Reference No: FS/2010/0010
FS/2010/0011

PENSIONS REGULATOR – Contribution notice – Authority of the Tribunal – Appropriate action – Reference by Scheme Trustees as party affected – Whether any determination to take regulatory action against individual shareholder in employer company – Whether Tribunal's direction to Regulator to issue a contribution notice after expiration of six year limitation period is "appropriate action for the Regulator to take" – Pensions (Northern Ireland) Order 2005 Articles 91(2)(d) and (e) and (3) and 97(4)
PENSIONS REGULATOR – Applications to strike out – Allegations not made in determination of Panel – Allegations rejected by Panel – Allegations never put to Panel – Application to bar Regulator from relying on series of acts – Pensions (NI) Order 2005 Art 34 – Trib Procedure (UT) Rules 2008 Sch 3 p4

THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

(1) MR DENIS DESMOND
(2) MR DONAL GORDON
(3) MRS ANNICK DESMOND
(4) DR STEPHANIE DESMOND **Applicants**

- and -

THE PENSIONS REGULATOR **The Regulator**

- and –

GARVIN TRUSTEES LTD AS TRUSTEES OF THE DESMOND & SONS 1975 PENSIONS AND LIFE ASSURANCE SCHEME **The Trustees**

Tribunal: SIR STEPHEN OLIVER QC

Sitting in private in London on 7-9 February 2011

Sarah Asplin QC and Javan Herberg QC, instructed by Clifford Chance LLP, for the Applicants

Raquel Agnello QC and Thomas Robinson, counsel, instructed by the Pensions Regulator, for the Regulator

Richard Hitchcock and Farhaz Khan, counsel, instructed by Burges Salmon LLP, for Garvin Trustees Ltd

DECISION

Background to the Applications

1. Desmond & Sons Ltd ("the Company") was sole participating employer in relation to the Desmond & Sons Ltd Pensions & Life Assurance Scheme ("the Scheme"). On 3 June 2004 the Company was placed in members' voluntary liquidation ("MVL").

2. The Regulator, through the Determinations Panel ("the Panel") issued a Determination Notice on 17 May 2010. This had been preceded, on 27 April 2010, by an Order of the Panel to issue a contribution notice. The Panel had held an oral hearing on 22 and 23 April 2010.

3. The Determination Notice (sent to the four Applicants under cover of a letter of 17 May 2010) had been issued to two of the Applicants, namely Mr Denis Desmond and Mr Donal Gordon. This determined that Messrs Desmond and Gordon were liable, pursuant to Article 34 of the Pensions (Northern Ireland) Order 2005 ("the 2005 Order"), to pay to the Trustees of the Scheme £900,000 and £100,000 respectively. Messrs Desmond and Gordon referred the matter to the Tribunal (on 15 June 2010) contending that the Panel should not have decided that a contribution notice be issued against either of them or that, if issued, the amounts specified should have been zero.

4. When considering whether to impose contribution notices on Messrs Desmond and Gordon, the Panel considered whether to impose contribution notices on two other ex-shareholders in the Company (Mrs Annick Desmond and Dr Stephanie Desmond). The Panel stated (in paragraph 70 of the Decision Notice) that it would not be reasonable to impose any liability on either Mrs Desmond or Dr Desmond.

5. The Trustees of the Scheme, as persons directly affected by the Panel's determination, referred the matter to the Tribunal on 15 June 2010 ("the Trustees' Reference").

6. The four Applicants made four Applications on 3 August 2010 pursuant to the Tribunal Procedure (Upper Tribunal) Rules 2008, Rule 8(2)(a) and (3)(c) (which give the Tribunal power to strike out) and/or Rule 5(3)(c) (case management powers to require amendment of documents).

7. The first application made by Dr Stephanie Desmond is no longer being pursued; the Regulator has stated in a letter of 25 January 2011 that it will no longer be proceeding against her. The Trustees have confirmed their reference against Mr Desmond, Mr Gordon and Mrs Desmond only. I direct therefore that, to the extent that the subject matter of the Trustees' reference relates to Dr Stephanie Desmond, the reference is to be treated as withdrawn and the Application (so far as Dr Stephanie Desmond is concerned) is allowed.

8. The Trustees' Reference now contends that:

(a) The total sum in respect of which Contribution Notices should have been issued should have been the entirety of the alleged shortfall in the Scheme's funding position calculated on a buyout basis, of an as yet unspecified and uncalculated sum between £10.9m and £17m, or alternatively a far greater proportion of that sum than £1m;

(b) A Contribution Notice should have been issued against Mrs Desmond as well as Mr Desmond and Mr Gordon; and

(c) A finding of liability should have been made under Article 34(5)(a)(ii) of the 2005 Order to the effect that Mr Desmond, Mr Gordon and Mrs Desmond acted otherwise than in good faith.

9. Two Statements of Case in identical terms have been filed by the Regulator in respect of the two References: these are referred to collectively as "the Statement of Case". In the Statement of Case the Regulator now seeks to contend that:

(a) The total sum in respect of which Contribution Notices should have been issued should have been the entirety of the alleged shortfall in the Scheme's funding position as at 3 June 2004, as contended by the Trustees;

(b) A finding of liability should have been made pursuant to Article 34(5)(a)(ii) of the 2005 Order to the effect that Mr Desmond, Mr Gordon and Mrs Desmond ("the Targets") acted otherwise than in good faith, as contended by the Trustees; and

(c) A Contribution Notice should have been issued jointly and severally against all Applicants (other than Dr Desmond).

Introduction to the strike out applications

10. In the remaining three Applications the Applicants contend that the Trustees' Reference and the Regulator's Statement of Case include matters and allegations which do not and cannot form the basis of any lawful or proper reference to the Tribunal (as a consequence of which the Tribunal does not have jurisdiction in relation to them) and as such that there is no reasonable prospect of their succeeding. On that basis the Applicants have asked the Tribunal to strike out the relevant parts of the Trustees' Reference and the Regulator's Statement of Case. The strike out power in Rule 8(3)(c) is applied to the Regulator by virtue of Rule 8(7). As a result, in the case of the Regulator, references to the striking out of proceedings are to be read as references to the barring of the Regulator from taking further part in the proceedings. Where such a bar is imposed, Rule 8(8) provides that the Tribunal need not consider any response or other submissions made by the Respondent (the Regulator) and may summarily determine such issues: see the decision "In the matter of the *Bonas Group*

Pension Scheme" ("*Bonas*") (Reference FS/2010/0007) of Sir Nicholas Warren (Warren J), sitting as the Chamber President at paragraphs 33-35.

Brief summary of the three Applications

11. The first application with which this Decision is now concerned is by Mrs Desmond. The effect of this is that the Trustees' Reference improperly and without regard to legal basis purports to refer a "determination" against her to the Tribunal; and the Statement of Case unlawfully advances or supports the case against Mrs Desmond on the basis that there was such a determination. The basis of the application is that there was, in fact, no "determination" against Mrs Desmond and accordingly the Tribunal has no power to entertain or determine a reference in respect of her; in any event, the application contends, the Regulator's statutory power to issue a contribution notice in respect of Mrs Desmond has elapsed by effluxion of time. Therefore, even if the Tribunal were to take the view that a "determination" against Mrs Desmond has been (or should now be) made, the Regulator no longer has power to issue a contribution notice because any such Notice would be out of time in respect of any act or failure to act between 27 April 2004 and 3 June 2004. Any direction to that effect by the Tribunal would therefore be inappropriate. For the reasons given in paragraphs 34 to 38 I have decided that the Application should be upheld.

12. The second of the three surviving applications (by Mr Desmond, Mr Gordon and Mrs Desmond) is to the effect that the Regulator improperly makes allegations in the Statement of Case that (a) were not made in the determination of the Panel, (b) were in terms rejected by the Panel, or (c) were never put to the Panel at all. For the reasons given in paragraphs 47 to 67 I have decided that the Application is to be dismissed.

13. The remaining Application (by Mr Desmond, Mr Gordon and Mrs Desmond) claims that, contrary to the 2005 Order in its June 2004 form (the date of the MVL) the Regulator purportedly seeks to rely upon what is in effect a series of acts and failures to act rather than a single act or failure to act. Further, it is contended the Regulator improperly makes allegations regarding acts and failures to act that cannot be relied upon as founding a Contribution Notice because they took place more than six years prior to any determination by the Regulator to issue the contribution notice in question. The relevant allegations should therefore be struck out. I have decided that this Application is to be dismissed: (see paragraphs 68 to 81).

The Facts

14. The Company was a long established family company involved in textiles manufacturing. Its sole customer was Marks & Spencer. Each of the four Applicants was either a director or alternatively a shareholder of the Company. Marks & Spencer informed the Company on 3 February 2004 that that relationship was to be severed. In the events, the Company was placed into MVL on 3 June 2004.

15. The MVL constituted a "trigger event" for the purposes of Article 75 of the 1994 Order in relation to the Scheme of which the Company was the sole participating employer, and the measure of funding prescribed by the legislation for determining an Article 75 debt in such circumstances which became applicable at that date, was by reference to the "Minimum Funding Requirement". There had apparently been no deficit in the Scheme by reference to the Minimum Funding Requirement; furthermore, it was pointed out for the Applicants, the Company had injected £4m of cash into the Scheme in May 2004 and that had been in excess of the Minimum Funding Requirement. However, the funding shortfall by reference to the cost of securing benefits by annuities (buyout basis), was estimated to have been £10.9m.

Matters relied upon by the Regulator

16. The Regulator's case as set out in the Statement of Case is that between 27 April and 3 June 2004 Messrs Desmond and Gordon and Mrs Desmond (referred to as "the Targets") had been parties to deliberate acts and failures to act that had caused the Company, as solvent employer of the Scheme, to cease trading and enter MVL as a matter of urgency on 3 June 2004. Each of those three individuals had knowingly assisted in the relevant acts or failures, or had been parties to those acts or failures or had been involved in both roles. The acts and failures relied upon by the Regulator are:

(i) repeatedly seeking and receiving professional advice with the aim of limiting the Company's liability to the Scheme under Article 75;

(ii) failures on the part of the Targets to inform the Trustees of events material to the Scheme and its future and, or in the alternative, acting in such a way so as to avoid the Trustees being alerted to the decision to cease the Company's trade and enter MVL (with Messrs Desmond and Gordon having been warned of the Company's statutory obligation to do so) in order to avoid the Trustees taking steps to increase the Company's liability to the Scheme;

(iii) the decision to enter MVL at short notice on 3 June 2004 without alerting the Trustees to that action, and

(iv) the resolution to enter MVL on 3 June 2004 by special resolution at short notice (requiring 95% shareholder approval).

The decision to place the Company into MVL on 3 June 2004 triggered the calculation of sums due to the Scheme from the Company under Article 75.

17. The Statement of Case points out that the decision to place the company into MVL had followed after Marks & Spencer had communicated its wish to disengage from trading directly with the Company over a period of up to 24 months and to trade with the Company's joint venture and manufacturing interests overseas. The reaction to that had been that, instead of allowing the Company to continue in existence in the

business of these joint venture and manufacturing interests, a new company had been incorporated to take over those interests. The Targets had approved a strategy under which the new venture and manufacturing interests had been transferred to a new company and services that had been provided by the Company to Marks & Spencer had been provided by a new company for a transitional period. This had allowed the Company to be placed into MVL on 3 June 2004 as a matter of urgency. That decision, the Statement of Case observes, had "been part of a clearly well thought out and meticulously planned scheme to enhance shareholder value and to do so to the detriment of the Scheme". The planning of the MVL and the attempts to enhance shareholder value had, the Statement of Case asserts, been prevalent throughout this period once advice had been received from pensions counsel in February 2004 relating to the ways which could be employed to achieve this by obtaining the Minimum Funding Requirement rather than buyout.

18. The acts and failures set out above had (so the Statement of Case alleges) allowed the Company to exploit what professional advisers to the Targets called the "MVL loophole": by reason of its entering MVL, the Company was treated as an insolvent employer company for the purposes of calculating the Article 75 debt, rather than as the fully solvent employer that it was. This resulted in the Minimum Funding Requirements calculation basis being applied to calculate the Scheme's liabilities, which in turn resulted in no Article 75 debt arising. As a result the Targets, who are the controlling shareholders of the Company, had received moneys from the Company totalling £17.2m while the Scheme suffered a funding shortfall of some £10.9m and has been forced to enter the Financial Assistance Scheme.

19. The acts and failures relied upon took place during the passage of the Pensions Bill through Parliament in early 2004. This Bill had introduced the power to issue a Contribution Notice with retrospective effect to 27 April 2004. The Targets, so the Statement of Case alleges, had been informed of the introduction of this power. The Regulator's case, as asserted in the Statement of Case, is that the Targets had rushed to place the Company into MVL out of a concern that the MVL loophole be closed by the Pensions Bill becoming law, and that they acted with a main purpose of ensuring the Article 75 debt due from the Company would be calculated as though it were insolvent. In order to achieve this purpose, it is asserted, the Targets had failed to inform the Trustees of the following matters despite their position as directors of the company (save Mrs Desmond) and despite the obligations imposed on the Company by the Occupational Pension Schemes (Scheme Administration) Regulations (Northern Ireland) 1997 to inform the Scheme Trustees of material events:

(i) the decision by Marks & Spencer to disengage;
(ii) the Targets' approval of the strategy that the Company should cease to trade;
(iii) the Targets' approval of a strategy that the Company should enter MVL and
(iv) the decision to enter MVL at short notice.

20. The Statement of Case goes on (in paragraph 26) to state that in addition to the failure to inform the Trustees of the above matters, the Targets as part of a strategy authorised on 2 March 2004 by shareholders (including Mrs Desmond) had deliberately given the impression that the Company and the Scheme would continue for the foreseeable future. The directors of the Company had approved payment to the Trustees in May 2004 of the amount required to remove a deficit in the Scheme calculated on the ongoing basis, rather than that applicable if the Scheme were to wind up. At a Trustees' meeting on 6 May 2004 Mr Gordon had represented the Company and had stated that he would be receptive to a request from the Trustees for an increased employer contribution in the future, and that in three years' time the Scheme would have 50-70 active members. Advice on many of the aspects of the proposals, including a request for a demonstration "how shareholder value could be maximised" had been obtained during the weeks running up to the MVL.

Relevant regulatory framework

21. Key provisions of the 2005 Order are set out in the Appendix to this Decision. These were examined by Warren J in *Bonas*. The decision in *Bonas* was published shortly before the start of the present hearing. *Bonas* had been concerned with the corresponding provisions of the Pensions Act 2004 (the code applicable to Great Britain). The section numbers of the provisions of the Pensions Act are different from those in the 2005 Order but the wording of the relevant provision is, for all material purposes, identical.

22. Article 34 is headed: "Contribution notices where avoidance of employer debt". It gives the Regulator authority to issue a contribution notice and consequently it is the statutory source of the liability imposed on the person to whom the notice is issued, i.e. the Targets in the present case. Paragraph (2) provides that the Regulator "may issue a notice stating that the person is under a liability to pay the sum specified … to the Trustees or managers of the Scheme". Paragraph (3) of Article 34 specifies three conditions that must be satisfied for the Regulator's authority to exist and consequently for the contribution notice to impose an obligation on the person to whom it is issued. "Only if" they are satisfied on these particular counts may a contribution notice be issued. These counts cover the culpability of the person in question (paragraph (3)(a)), the status of the person in the relevant period (paragraph (3)(b) and (c)) and the reasonableness of the decision to impose liability on that person (paragraph (3)(d)).

23. Regarding culpability the person in question must, in the opinion of the Regulator, have been a party to an act or deliberate failure to act (paragraph (3)(c)). The purpose or the main purpose of the relevant act or failure to act must have been, among other things, to prevent recovery of debt in respect of deficiencies in the scheme assets or to prevent such a debt becoming due. The act or failure to act must have occurred on or after 27 April 2004. Where it was an act, it must have occurred within a six year period ending with the Regulator's determination to issue the contribution notice in question. Where it was a failure, it must have "first occurred

during, or continued for the whole or part of, that period". See paragraphs (3)(a) and (5)(c)(ii).

24. Regarding status, the person in question must (at some time in the relevant period starting with the act or failure to act and ending with the contribution notice) have been either the employer or an associate of the employer: paragraph (3)(b). (There is no issue that each of Mr Desmond, Mr Gordon and Mrs Desmond had been associates of the Company from 27 April 2004 until 3 June 2004.)

25. Regarding the reasonableness condition, it must be shown that the Regulator was "of the opinion that it [was] reasonable to impose liability on the persons to pay the sum specified": see paragraph (3)(d). There is no issue about this in the proceedings before me.

26. The Regulator's procedural obligations, leading to the issue of a contribution notice are contained in Articles 90-96 of the 2005 Order. In this case the "standard procedure" contained in Article 91 applied because the issue of a contribution notice is a "regulatory function" (Schedule 2 Part IV) and the circumstances in which the "special procedure" might have applied did not arise.

27. Where the standard procedure is, as here, applicable, four prescribed steps relevant to the present matters are required by Article 91(2). Step (a) requires a "warning notice" to be given to such persons as it appears to the Regulator "would be directly affected by the regulatory action under consideration". A warning notice therefore marks the formal opening of the procedure as regards the particular person notified. Until the procedure is closed by a further step in the prescribed standard procedure or by effluxion of time, the person notified remains under a contingent liability to pay to the Scheme Trustees such sum as may be specified in the Contribution Notice. Step (b) requires the Regulator to give the person notified the opportunity to make representations. Step (c) provides for consideration of any such representations and the determination whether to take the regulatory action under consideration. Step (d) is the giving of the determination notice "to such persons as appeared to the Regulator to be directly affected by it."

28. Article 91(3) gives the right to refer "the determination which is the subject matter of the determination notice" to the Tribunal. The right is given to "any person to whom the determination notice is given" and "any other person who appears to the Tribunal to be directly affected by the determination". The Regulator's right to exercise a regulatory function is held in suspense until the Tribunal reference procedure is concluded "when the subject matter of the determination notice is a determination to exercise a regulatory function".

29. References to the Tribunal are dealt with in Article 97 of the 2005 Order and in Schedule 3 paragraph 2 of the Procedure Rules. Schedule 3 paragraph 2 provides, so far as relevant,

"…

(2) A reference notice must be received by the Upper Tribunal no later than 28 days after notice was given of the decision in respect of which the reference is made … ."

Article 97 so far as relevant provides:

"(3) On a reference, the Tribunal 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)-(8) …

(9) An order of the Tribunal may be enforced as if it were an order of a County Court."

30. At this point I observe that the Tribunal's power is limited to determining what (if any) is the appropriate action for the Regulator to take "in relation to the matter referred" to the Tribunal. The "matter referred" (described in Article 97(3) as "the subject matter of the reference") is "the determination which directly affects the person making the reference": see *Bonas* per Warren J at paragraph 61.

The Application concerning Mrs Desmond

31. The question here is whether the Tribunal should exercise its powers in Rules 8(2)(a) and (3)(c) and strike out claims against Mrs Desmond or require the amendment of the Trustees' Reference and the Statement of Case to the extent that these purport to refer, plead or support the case in respect of her.

32. There are two linked aspects to this preliminary enquiry. First, did the Trustees (as this Application alleges) improperly and without legal basis purport to refer a determination against Mrs Desmond to the Tribunal where there has been no such determination within the meaning of the 2005 Order? Second, is the Application correct in claiming that the Regulator's Statement of Case unlawfully advances or supports the case against Mrs Desmond on the basis that there has been a determination against her?

33. A consequential question that would arise if the Tribunal were to rule against the Applicant (Mrs Desmond) on that point is whether the Tribunal can make a determination of "the appropriate action for the Regulator to take" (under Article 97(4)) by requiring the Regulator now to issue a contribution notice to Mrs Desmond. The relevance of this is that such a contribution notice would now be out of time in respect of any act or failure to act between 27 April 2004 and 3 June 2004. The

answer to this consequential question, if given in favour of the Applicant (Mrs Desmond), will determine the matter. I shall therefore address it first.

34. I have already observed that Article 34(3) provides that the Regulator may only issue a contribution notice if (among other things) there has been a relevant act or failure to act within paragraph (5) of that Article. Article 34(5) provides that an act or failure to act only falls within the paragraph if, among other things, the conditions of subparagraph (c) are met; in essence, that act must have 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". Even if I were to adopt the interpretation of "determination" throughout Article 91 as covering a determination whether or not to exercise a regulatory function, the six year limitation period in Article 34 is applicable. Article 34 prescribes and ties in that limitation period to the exercise of the power to issue the contribution notice. The limitation period has no reference to a determination not to issue a notice. I mention in this connection that there is nothing in the *Bonas* decision that suggests the contrary: see the analysis of section 38 (the equivalent of Article 34) at paragraph 85-102 of the *Bonas* decision.

35. In the present circumstances there has, as noted, been no determination by the Regulator to issue a contribution notice against Mrs Desmond. The reverse is the case. Even assuming that this Tribunal has jurisdiction to address the question of whether or not a determination should have been issued in respect of Mrs Desmond, the Regulator will now be out of time to issue a notice. This is because the last act or failure to act identified by the Regulator was the MVL that took place on 3 June 2004. The Regulator's statutory powers to issue a Contribution Notice will have ceased by effluxion of time on 2 June 2010. It is not therefore open to the Trustees to seek to resurrect the Regulator's statutory powers by seeking to make a reference in respect of such a person, in this case, Mrs Desmond.

36. The Tribunal's role on references is, as noted, limited to determining what (if any) is the appropriate action for the Regulator to take in relation to the matter referred (see Article 97(4)). The Regulator is a creature of statute and its powers are limited to those contained in the statute. In determining and directing "the appropriate action for the Regulator to take in relation to the matter referred", the Tribunal cannot enlarge the Regulator's authority. Consequently the Tribunal cannot therefore direct as the appropriate action something that is outside the Regulator's statutory authority. It could not, I think, be appropriate for the Tribunal to direct the Regulator to issue a contribution notice that sought to grant rights and to impose obligations in circumstances where the makers of the 2005 Order had not conferred such a power on the Regulator; the Tribunal cannot make itself the source of such rights and obligations. For that reason I am satisfied that there is no reasonable prospect of the Trustees' application succeeding.

37. On that basis I have decided to strike out the claims against Mrs Desmond.

38. To the extent necessary I also direct the amendment of (a) the Trustees' Reference and (b) the Statements of Case so far as they purport to refer, plead or support a case in respect of Mrs Desmond.

39. I refer now to the primary enquiry which is essentially whether there has been a determination against Mrs Desmond. Here the Application seeks to strike out a part of the Trustees' Reference on the grounds that there has been no "determination which is the subject matter of [a] determination notice" which is capable of referral to the Tribunal within Article 91(3) of the 2005 Order. The same applies as regard to the Regulator's Statement of Case. The contentions in the Application run counter to the reasoning of Warren J in considering the corresponding provisions of the Pensions Act 2004 in respect of the scheme and the consideration in *Bonas*; see in particular paragraphs 20 and 55-57 of that decision.

40. The Panel in the present case concluded that a Contribution Notice should not be issued against Mrs Desmond. On that basis the main question in the primary enquiry is whether, in respect of Mrs Desmond, there has been a "determination which is the subject matter of [a] Determination Notice" which is capable of being referred to the Tribunal within Article 91(3) of the 2005 Order. The Trustees and the Regulator contend, on the strength of the reasoning of Warren J in the *Bonas* decision, that a referable determination was duly made against Mrs Desmond notwithstanding the fact that the Panel found, following its enquiry, that a contribution notice should not be issued against her. Warren J had observed that the determination referred to in the equivalent to Article 91(2)(c) was "clearly the decision whether or not to exercise the regulatory functions concerned" (see paragraph 20 of the *Bonas* decision). That step in Warren J's reasoning was challenged, for Mrs Desmond, in the Application. I do not need to reach a conclusion on the matter because I have already decided that this Tribunal has no power to require the Regulator to issue a contribution notice. But I shall, for the record, summarise the contentions presented in the Application.

41. In this respect the case in support of the Application emphasises that Article 34 both empowers the Regulator to issue a Contribution Notice which imposes the obligation on the person in question to pay the specified sum; it also provides that the Regulator may only issue the Contribution Notice if it relates to 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". On that basis, it is pointed out, the power to issue the Contribution Notice is regulated by reference to the time bar that ends with the "determination to exercise the power". The "determination" which can be the subject to of a referral is thus expressly defined by reference to its issuance; on this basis, so the Application runs, it is a determination to exercise the power, not a determination not to exercise it. The point is further made that where Article 34 does address the Regulator's discretion as to "whether or not" to make a Contribution Notice (as it does in Article 34(7)), it does not use the language of making a determination, but rather refers to "the Regulator, when deciding … whether it is reasonable to impose liability on a particular person …". The same meaning must, it is contended in support of the Application, be accorded to the same words in Article 91. For the purposes of the standard procedure a "determination" is a

"determination to issue", and cannot include a determination not to issue a Contribution Notice. On that basis therefore, the reference in Article 91(2)(d) to the giving of notice of "the determination" to such persons as appear to be directly affected (defined as a "determination notice"), is to be read as referring to a "determination" as defined by the article which confers the jurisdiction, namely Article 34. From that it must follow (so the argument in support of the Application runs) that there will only be a determination notice where the Regulator has decided to impose some liability. Moreover, the "determination" in Article 91(3) which may be the subject of a reference, must be a determination to issue a contribution notice.

42. Put that way, the argument in support of the Application creates finality for the potential target. Where a regulatory function is exercised against him and a contribution notice is issued to him within the six year period, he has a right to make a reference in respect of such an exercise. Where that regulatory function is not exercised within that period or, if it is commenced with a warning notice but does not lead to the issue of a contribution notice, the Regulator's power lapses and the matter is at an end.

43. Warren J in *Bonas* did not adopt the above approach of reading the equivalent of Articles 91(2)(d) and 91(3) in conformity with Article 34. It does not appear from the judgment that this submission had been made to him. The reasoning in *Bonas* relied (in finding that a "determination" in Articles 91(2)(d) and 91(3) included a determination whether or not to take regulatory action) on Article 91(2)(c). The latter provision does indeed refer to a determination "whether to take" regulatory action.

44. The case in support of the Application on Mrs Desmond's behalf is that Article 91(2)(c) has a different function from Article 91(2)(d). The former provision is merely dealing with the warning notice stage; with the consideration of the representations made by the target on the warning notice and, following such consideration, with the decision to be made by the Regulator as to whether or not to proceed through a determination notice. It is only if the Regulator has decided to issue a determination notice (referred to in Article 91(2)(d) as "the giving of notice of determination") that such notice needs to be served. It is that "notice of the determination" referred to in Article 91(2)(d) which is the "determination notice" in Article 91(2)(e) which must contain details of the right of referral. Hence Article 91(2)(d) (and Article 91(3)) are, like Article 34, inextricably linked to a decision to take (not whether to take) regulatory action, and Article 91(2)(c), relied upon in *Bonas,* does not provide any support to the contrary.

45. Here, as already noted, the Panel formally decided as regards Mrs Desmond that no liability should be imposed on her and that no determination or determination notice should be issued to her. On that basis, so the Application goes, there is nothing capable of reference to the Tribunal under Article 91(3) with regard to her. That concludes the summary of the argument in favour of the Application.

Application for strike out of allegations in Statement of Case

46. The Applicants, Mr Desmond, Mr Gordon and Mrs Desmond seek a striking out direction of certain allegations made by the Regulator. The basis of their application is that the Regulator has improperly made allegations that either had not been made in the determination of the Panel or had been in terms rejected by the Panel or had never been put to the Panel at all (by way of the Warning Notice or otherwise). It is further submitted that the Regulator has no power to advance a case in this way, which calls into question the Determination Notice or notices of the Panel on the basis that they were too lenient.

47. The first target of this Application is paragraph 19 of the Statement of Case. Paragraph 19 summarises the Regulator's case and it should, so the Applicants contend, be struck out on grounds that it introduces acts put to the Panel by the Regulator but not adopted by it.

48. The Panel's decision in paragraph 20 of the Determination Notice of 17 May 2010 had been based solely on the decision to put the Company into a MVL as swiftly as possible. That, it was accepted by the Applicants, correctly reflected the statutory meaning of Article 34(5) of the 2005 Order which was that a contribution notice could only be issued in respect of a single act or single failure to act. However, paragraph 19 of the Statement of Case purported to re-introduce a number of acts put to the Panel that had not been expressly adopted by the Panel. Paragraph 19 reads as follows:

> "Between 27 April and 3 June 2004 the Targets were party to deliberate acts and failures to act that caused the solvent employer of the Scheme to cease trading and enter MVL as a matter of urgency on 3 June 2004. Under Article 34(6) the parties to an act include those who knowingly assist in it. As set out below, the Targets knowingly assisted and/or were parties to the acts and failures to act relied upon."

49. The inwardness in this contention lies in the fact that Article 34(3) and (5) do indeed refer to "an act or deliberate failure to act" in prescribing the conditions required to be satisfied to give the Regulator authority to issue a contribution notice. The events from 27 April leading to the MVL, being a series of acts rather than a single act did not, it was said for the Applicants, count as the relevant act for purposes of Article 34(3) and (5). I do not, however, accept that the things that happened between 27 April and 3 June 2004 were separate acts. An act is not necessarily a single happening. An act may just as well be some part of the series of events leading to a prescribed result. It is for the Upper Tribunal to determine as a matter of fact whether the events or failures to act between 27 April and 3 June 2004 were collectively an act for those purposes. For that reason it is, I think, proper for the Statement of Case to identify them as part of the act culminating in the MVL.

50. Article 34(3) and (5), as mentioned, do refer to "an act or deliberate failure to act". There is, however, nothing in the context of Article 34 that displaces section 6

of the Interpretation Act 1978 which provides that words in the single are to include the plural. Thus, taken together, they can properly be regarded as an act.

51. It will be noted that Schedule 8 paragraph 8 of the Pensions (No.2) Act (Northern Ireland) 2008 states that series of acts are to be equated with acts for the purposes of section 38 (the GB equivalent to Article 34). I cannot see that the new statutory provisions alter the meaning of the originals. They simply clarify the position.

52. Seen in the wider context of the Tribunal's function when engaged by a reference, the position is the same. The Tribunal's authority comes from Article 97(4) and (5). This is to determine the appropriate action for the Regulator to take in relation to the matter referred and to remit the matter with directions as appropriate. The Tribunal is authorised to make its determination in the light of evidence that was not before the Panel (see Article 97(3)). The Upper Tribunal Rules enable the Tribunal to require disclosure of material, including material that the Regulator has obtained after the giving of the Determination Notice: see paragraphs 1(b), 3(b) and 6(1) of Schedule 3. Strong inference from those factors is that the Regulator is not to be constrained by the rules in paragraph 4(2) and (3) of Schedule 3. The Act requires the Tribunal to take a full, all round and up to date view of the circumstances. The rules do not, as Warren J recognised in paragraph 71 in *Bonas*, determine the statutory authority of the Tribunal. They cannot therefore be read as cutting down the effect of the primary legislation. Properly interpreted, I think the expression "support the referred action" and "support of the referred action" cover all facts, matters and documents brought into the reckoning in determining the referred action, whether those facts, matters and documents were explicitly relied upon by the Panel or not. They "support" the determination in the sense of being underlying evidence and considerations. However, there may and frequently will be matters that have no place in the regulatory action commenced by the issue of the Warning Notice. Those will not have been taken account of by the Panel in reaching its decision. I share Warren J's view in paragraph 70 of *Bonas* where he recognises as potentially impermissible the reliance by the Regulator of an argument that raises "a completely new case which is entirely outside the scope of the Warning Notice".

53. For those reasons I am against the Applicants' application to strike out paragraph 19 of the Statement of Case.

54. As the second target of their strike out application, the Applicants seek to have two sentences in paragraph 22 of the Statement of Case struck out. These sentences read as follows:

> "The decision to place the company into MVL was part of a clearly well thought out, meticulously planned scheme to enhance shareholder value and to do so to the detriment of the Scheme. The planning of the MVL and attempts to enhance shareholder value were prevalent throughout this period once advice was received from pensions counsel in February 2004 relating to the ways which could be employed to

> achieve this by obtaining MFR [Minimum Funding Requirement] rather than buyout."

These, it is said in favour of the Application, are the Regulator's attempts to reintroduce allegations that it had previously put to the Panel as part of its case and had been rejected.

55. Bearing in mind that the function of the Tribunal is to reach its own decision and that it may, in doing so, depart from the view taken by the Panel (a feature recognised in paragraph 38 of *Bonas*), it is in my view self-evident that the Regulator, like parties who have themselves made references, should be able to argue for a different determination from that reached by the Panel. I see no reason for departing from the decision of the Financial Services and Markets Tribunal in *Jabre v FSA* ("Decision on Jurisdiction" of 10 July 2006) which emphasised that there, as here, the Tribunal obtained its authority from the primary legislation and not through the Rules (paragraph 35) and therefore its functions were not limited to matters that supported the "referred action". Its function was to determine the appropriate action for the FSA, as regulator, to take. In *Jabre* this meant that the Regulator's Statement of Case could state what action it saw as appropriate including arguing that the decision making body (the Regulatory Decision Committee) had been too lenient (paragraphs 27 and 37).

56. The Applicant's application to strike out the passages in paragraph 22 of the Statement of Case is therefore dismissed.

57. The third target of the Applicants' strike out application is a group of nine occasions where the Statement of Case has referred to "acts and failures to act". Paragraph 12 sets the scene as follows:

> "As particularised below, the Targets were party to acts and failures to act whose purpose was to prevent the Company becoming liable to use its assets to provide that 100% level of benefits to Scheme members."

The strike out application points out that the Panel had decided that only one act had been relevant, namely the placing of the Company in MVL as swiftly as possible; and in any event it is said for the Applicants, the contribution notice could only be issued in respect of a single act or failure to act. The Regulator's assertion in the Statement of Case, it was said, was an "attempt to dis-inter allegations … which the Panel rejected".

58. The passages which the Applicants seek to have struck out are paragraphs 12, quoted above, 19, 24-28, 91, 92.2, 92.3 and 93-97 of the Statement of Case. Those "acts" are, as I read the Statement of Case, ones that took place between 27 April and 3 June 2004. I have already stated that those were events that collectively comprise an act culminating with the MVL. They are part of the circumstances from which the Tribunal will have to determine the main purpose of the act when addressing the question of whether the conditions in Article 34(5)(a) have been satisfied. Thus,

those events will be relevant to the Tribunal's function of determining what is the appropriate act for the Regulator to take in relation to the matter referred. They should not therefore be struck out.

59. The fourth target of the strike out Application is paragraph 46 of the Statement of Case. This alleges that:

> "It is clear from these communications that the main purpose of the Advisory Committee from its earliest meetings included extracting the maximum amount of money possible from the Company by limiting the claim of the Scheme. MVL had already been identified as the desirable outcome, unsurprisingly given the Scheme Actuary's information to Mr Gordon and Mr Desmond on 10 February 2004 that the MFR base is applied to solvent liquidations. The advisers used included KPMG, Deloitte, Hammonds and pensions counsel; all were asked to focus on reducing the Company's liability to the Scheme."

The Applicants say that this is an attempt by the Regulator to restore allegations that it had previously put to the Panel as part of its case with which the Panel had rejected. I do not see it that way. The Panel decided (in paragraph 55 of the Determination Notice of 17 May 2010) "that the main or one of the main purposes of the MVL was to avoid the buyout costs". But surely if the main purpose of the MVL had been to avoid the buyout costs, the purpose (or a main purpose) must also have been to reduce the amount of money to be paid to the Scheme. I do not therefore share the Applicants' view that the Panel had rejected the Regulator's case in this respect. In any event I think the input of the Advisory Committee is directly relevant to the Trustees' function and, whether rejected or accepted, references to it should not be struck out.

60. Fifthly, the Applicants seek to have struck out paragraph 68 of the Statement of Case. This claims that no work had been "conducted on the possible future existence of the Company". This I understand to be a matter which the Applicants contend should be struck out because it had not been before the Panel. The sentences that precede those that are referred to by the Applicants record the action points for each of the seven Advisory Committee meetings held by 28 April 2004; these do not reveal work being conducted on the possible future existence of the Company. I note that the skeleton argument presented by the Regulator to the Panel states in paragraph 31 that – "the documents produced by the Targets make clear that the decision to cease trade and to place the Company into MVL had been taken as early as 1 March 2004". Paragraph 21 alleges "consideration of the Project Advisory Board minutes and the material produced by Deloitte on future business models makes clear that the decision to place the Company into MVL was taken earlier." Those references are enough to satisfy me that the material behind the Regulator's allegation that no work had been conducted on the possible future existence of the Company had been before the Panel. For that reason I do not accept that paragraph 68 of the Statement of Case should be struck out. Moreover, and even if I were wrong on that, I would regard the allegation has so closely relating to facts surrounding or accompanying the transaction

with which the series culminates, i.e. the MVL, as to qualify it as new evidence that the Tribunal could receive in exercising its statutory function. I therefore dismiss the Application to strike out section 68.

61. The sixth part of the strike out application targets the references to "otherwise than in good faith" References in paragraph 53 (including the onward reference to paragraphs 71-72), paragraphs 91, 96, 97, 100 and 101 and Section H of the Statements of Case contend that the "acts and failures" identified were carried out with a purpose that was otherwise done in good faith. This line of argument, it was said for the Applicants, was expressly not adopted by the Panel despite being put to it.

62. The phrase "otherwise than in good faith" is part of the requirement in Article 34(5)(a)(ii) that the Regulator should be of the opinion that a main purpose of the act was "otherwise than in good faith to prevent … a debt [due to the Scheme] becoming due". That subparagraph follows subparagraph (a)(i) which states, as an alternative condition, that the Regulator be satisfied that a main purpose be to prevent recovery of a debt due to the Scheme. The Regulator, I was informed, presented its case before the Panel on both limbs of Article 34(5)(a). The Panel based its determination on the first and did not consequently address the latter. The fact that the Panel did not comment on the latter is no indication that it and the relevant evidential material has or has not been adopted, still less that it has been rejected. For that reason I reject the application to strike out paragraph 53 and the other passages referred to above.

63. The seventh target of the Applicant's application is paragraph 82 of the Statement of Case. This refers to the resolution to place the Company into MVL immediately. It reads as follows:

> "The Trustees were not informed of this resolution until it was passed, notwithstanding that one Trustee, Mr J O'Dwyer, was a shareholder in the Company. There was no reason not to inform the Trustees of it, save to avoid them taking action to increase the sums due from the Company to the Scheme. Mr O'Dwyer learned that the Company had entered MVL when he heard it on the radio."

The Applicants accept that, at the hearing before the Panel, the point had been raised by the Regulator. In my view the matter raised here relates to disputed evidence, It is eminently one for the Tribunal to address as part of its statutory function.

64. The eighth target of the Applicants' strike out Application is that part of the Statement of Case where the Regulator argues for an increased amount in the contribution notices. The Applicants say that the Regulator should be supporting the Panel's decision; they go on to challenge the Regulator's action as a matter of fact.

65. The Applicants observe that the Regulator contends that the Panel's decision to determine the quantum of the contribution notice should have been for the whole of the shortfall sum, being the "deficit in the Scheme as at 3 June 2004". This had been put to the Panel and had been expressly rejected by the Panel which had concluded

that a substantially lesser sum was appropriate. For the Applicants it is argued that the Regulator has no power to advance a case in this respect; it is required, they say, under the Tribunal Rules to support the Panel's decision. In that connection I note that the *Bonas* decision confirms that the Tribunal has jurisdiction to increase the quantum of a Contribution Notice. The Tribunal had there concluded that its role was to determine the "appropriate action" for the Regulator to take and in this respect it was not constrained (as an appellate court might be) and that it could increase the amount of a contribution notice ordered by the Panel. I refer to paragraph 37 and 69-70. It is relevant to mention that the Upper Tribunal in *Scerri v FSA* [21 May 2010] had increased the penalty ordered by the Regulatory Decisions Committee on the basis of information received from the FSA after the meeting of the RDC. In my view an equivalent power exists in the present context.

66. The Applicants challenge the Regulator's increases in the quantum of the Contribution Notices. They point to a letter by the Regulator to the Trustees of the Scheme dated 26 April 2007. The letter reads as follows:

> "We can confirm that at this time, based upon all the information held, the Regulator is of the opinion that it would not be reasonable to serve a Contribution Notice on the potential targets because it is a precondition to the issue of a contribution notice that an act to avoid should "… prevent a section 75 debt becoming due … or reduce the amount of such a debt which would otherwise become due" … . The entering into a MVL between 27 April 2004 and 14 February 2005 did neither. It simply caused the debt to be calculated on a particular basis."

The Applicants point to paragraph 116 of the Statement of Case that asserts that the Regulator "reserves the right to reconsider" the position and "has now done so", but fails to support this by explaining what if any "further information" has come to its attention which "materially alters the facts relied upon, which are the requirements for altering its position set out by the Regulator in his letter of 26 April 2007". The Regulator points out, in connection with the argument based on the letter of 26 April 2007, that the jurisdiction or arguments and the request in the Reference of the Trustees for an increased contribution notice sum mean that the issue of the appropriate contribution notice sum will be put before the Upper Tribunal at the final hearing. For reasons that I have explained, there is no merit in the current application to bar the Regulator from seeking an increased sum on jurisdiction or grounds. Nor can the Applicants contend in law that the findings or reasoning of the Panel bind the Regulator before the Upper Tribunal. Any argument that the Regulator has not satisfied requirements set out in its letter of 26 April 2007 and cannot therefore now argue for an increased contribution notice sum are matters for the final hearing of the Reference.

67. I should add two points, relied upon by the Regulator and with which I agree, which reinforce my view that it is not necessary to the appropriate action that the quantum of the contribution notices should be limited to a total of £1m. The first of

these is that the letter of April 2007 was sent to representatives of the Trustees and not to the Applicants. There has been no allegation by the Applicants that they had a legitimate expectation as a result of the letter. Secondly, the letter concludes that the Regulator has reserved the right to reconsider the use of its powers if further information comes to its attention that materially alter the facts relied upon by it in making its decision. The letter had expressed consideration of only one "act" for the purposes of Article 34(4), namely the act of entering into MVL between 27 April 2004 and 14 February 2005. Following further information and disclosure, the acts now relied on have, as I see it, turned out to be significantly different. It was therefore appropriate for the Regulator to reconsider its earlier view, to investigate further and to decide to issue the Warning Notice.

The application that the Regulator is debarred from relying upon allegations as an "act" or "failure"

68. The application as explained in the Applicants' written argument as follows:

> "The Applicants contend that the Regulator (a) when looking at events between 27 April 2004 and June 2004, is not entitled to rely upon a series of acts or failures to act for the purposes of Article 34 but is restricted to reliance upon a single act or failure to act : and (b) is not entitled to rely upon an act or failure to act as founding a Contribution Notice where such alleged act or failure took place more than six years prior to the determination by the Regulator to exercise the power to issue the Contribution Notice in question. The contention goes on with the submission that the Regulator is debarred from reliance upon and/or from making submissions on the basis that any event or matter, other than "the entry of Desmonds into an MVL" (paragraph 20 of the Determination Notice) on 3 June 2004 constitute an "act" or "failure to act" for the purpose grounding jurisdiction to issue a Contribution Notice pursuant to Article 34. It is submitted that the Tribunal should summarily determine that such matters and each of them cannot constitute such an "act" or "failure to act" for the purposes of Article 34 and that the Statement of Case be amended accordingly."

69. The Application relies on the original wording of Article 34, noting that before 26 November 2008 (when the legislation was amended by paragraph 8 of Schedule 8 to the Pensions (No.2) Act (Northern Ireland) 2008 with effect from that date) each exercise of the power to issue a contribution notice had to be based on a single act or failure to act. After that date reliance could be placed on a "series of acts" where at least one of the acts occurred after 26 November 2008.

70. The reasoning behind the Application goes on to claim that the Regulator is not entitled to rely upon an act as founding its jurisdiction to issue the contribution notice in question where the act occurred more than six years prior to the determination to exercise the power to issue a contribution notice: reference is made to Article 34(5)(c) of the 2005 Order. Here, it is observed for the Applicants, the

Panel determined to exercise its power in relation to the MVL only. Thus any attempt now to determine to exercise the power in respect of any other act would be out of time. The power to make such a determination in respect of any other act has by now expired and the jurisdiction no longer exists.

71. The reasoning behind this is that a separate determination must be made in respect of each exercise of the regulatory power. In 2004 (the Applicants claim) only a single act could be relied upon as the basis of a determination to exercise the regulatory function to issue the contribution notice in question. The Regulator could, the Applicants observe, have determined to exercise the regulatory power to issue a contribution notice in relation to each post 27 April 2004 Act as identified in the Warning Notice. (The relevance of 27 April 2004 lies in the condition in Article 24(5)(b), namely that the act in question should have occurred on or after that date.) Here, however, the Regulator through the Panel only determined to exercise its powers based upon the MVL. On this basis, so the argument runs, it is no longer possible to determine to exercise the regulatory function to issue a contribution notice in relation to any other act, the time limit in Article 34(5)(c) having expired. The conclusion sought from the Application is that the Trustees' reference of the Determination cannot have the effect of overriding the express limitation period in respect of acts which can form the basis of the jurisdiction.

72. I do not accept the basis on which the Applicants' contention is founded. As already explained the word "act" does not connote a single step in a series leading to a planned or expected conclusion. Just as a tune is different from its notes, so in the context of a provision such as Article 34(5)(a), which requires the act to have a purpose, an act may be different from the steps taken to achieve that purpose. So here, I think the Regulator is entitled to rely on the act as comprising the MVL coupled with the steps taken to achieve it. In saying that, I accept that a question for the Tribunal will be to determine, when the full hearing takes place, when the series of steps started. It may be that until 27 April 2004 those directing the Company had not firmed up on the preferred course; that may have occurred earlier. As I read paragraphs 19 and 66-87 of the Regulator's Statement of Case, reliance is placed on the events from 27 April onwards as the series comprising the relevant act. I do not read the Decision Notice of 17 May 2010 as saying anything significantly different. The MVL had to take place to achieve the purpose of avoiding the buyout cost that might otherwise have been payable; but the MVL was merely the culmination of the plan that had been "firmed up" on or even before 27 April.

73. My conclusion on that point is reinforced when the Interpretation Act is invoked to read "act" as "acts".

74. For those reasons I think the Statement of Case can legitimately rely on events before the MVL. These will either be part of the act or, if those events took place before the act was planned and acted out, they will be relevant as evidence of the main purpose of that act.

75. The remaining question is whether, on the strength of the Order of 27 April 2010, the six year time limit in Article 34(5)(c) in respect of an act that can be relied upon to found jurisdiction to issue a contribution notice runs from the date of the Order or from the date of the Decision Notice of 17 May 2010. (Article 34(5)(c), it will be recalled, provides that the act relied upon by the Regulator be one that 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".)

76. I do not see this as a relevant issue. The "act" in the sense of the series of events culminating with the MVL of 3 June 2004 did occur within the six year period. However, in case the matter should be relevant, I mention the argument for the Appellants to the effect that the Order, described as an "Order to issue a Contribution Notice under Article 34", stated that Mr Desmond and Mr Gordon "are liable pursuant to Article 34 to pay the sum specified in this Contribution Notice …". But the Regulator was not in fact empowered to issue a contribution notice because Article 91(5) of the 2005 Order precludes the Regulator from exercising a regulatory function (in this case, the issue of contribution notice) during the period in which the determination may be referred to the Tribunal, and if so referred, until the reference and any appeal against the Tribunal's determination has been finally disposed of. Thus the Regulator's attempts to issue a contribution notice were premature and the contribution notice was invalid.

77. The conclusion must either be that although "the Order" of 27 April 2010 purported to be a contribution notice, it is an invalid contribution notice and so wholly ineffective. Can it be taken as some other document or instrument within the procedure specified by Article 91, i.e. a determination notice?

78. I do not think it can be construed as a determination notice. A determination notice is significantly different from a contribution notice. It has different functions. A contribution notice creates an immediate liability on the recipients to pay a specified sum; that sum is treated as a debt due to the Trustees of the Scheme by Article 36(3) and the Regulator is given powers to recover that debt by Article 36(4). A contribution notice once issued also gives the Regulator certain powers to direct the Trustee not to take steps to recover a section 75 debt and once a direction is issued Trustees can be subject to civil penalties if they do not comply. A determination notice, by contrast, forms one step in the statutory process which may or may not lead to liability being imposed. It starts the time running for the purposes of referral and defines what could be referred. Moreover, bearing in mind that the Regulator is a body whose powers are wholly statutory, it is not, I think, entitled retrospectively to invite this Tribunal to treat what was issued as a contribution notice as fulfilling the obligations of a different notice under the statutory scheme.

79. I note in this connection that the Regulator accepted that the purported contribution notice of 27 April was ineffective and that any impact it had was to be ignored in favour of the 17 May document. I refer to a letter from the Regulator of 21 May 2010 where the Order of 27 April is described as having been "superseded" by "the Determination Notice of 17 May 2010". I refer also to the Determination Notice

of 17 May itself which states at paragraph 86 that – "This document constitutes a determination notice to exercise the power to issue a contribution notice. Accordingly, time for the purposes of any appeal to the Tribunal begins to run from the date of this determination notice". (I should mention that by a letter of 9 June 2010 the Regulator sought, contrary to its letter of 21 May 2010, to re-characterise the Order of 27 April as "a notice of the determination".)

80. Finally in this connection I should mention that the Order of 27 April 2010 cannot in any event be regarded as a determination notice as against Mrs Desmond. It is entirely silent in regard to her.

81. It follows in my view that the 17 May 2010 instrument should be treated as that which it purported to be, namely a determination notice issued under Article 91(2)(d) of the 2005 Order to exercise a regulatory function in respect of Mr Desmond and Mr Gordon.

Publication of this Decision

82. This Decision will not be published until directed to do so by the Tribunal. When published it will be anonymised. The parties are at liberty to make written proposals for the anonymisation by 7 June 2011.

SIR STEPHEN OLIVER QC

RELEASE DATE: 11 MAY 2011

APPENDIX

34–(1) This Article 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 has assumed responsibility for the scheme in accordance with Chapter 3 of Part III (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 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,

…

(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.

…

(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) 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 27 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 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 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 determination by the Regulator to exercise the power to issue the contribution notice in question.

(7) The Regulator, when deciding for the purposes of paragraph (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 paragraph (5),

(b)-(g) …"

Article 91 provides, so far as relevant:-

"(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.

(4) Paragraph (3) does not apply where the determination which is the subject-matter of the determination notice is a determination to issue a clearance statement under Article 38 to 42.

(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 (see Article 97(1), and

(b) if the determination is so referred, until the reference, and any appeal against the Tribunal's determination, has been finally disposed of".