

# In the matter of the Bonas Group Pension Scheme [2011] UKUT (FS)

## **Decision of the Upper Tribunal (Tax and Chancery Chamber)**

### *Background*

The target of the first ever contribution notice issued by the Pensions Regulator, for £5m (the PPF deficit in the scheme), in May 2010 sought to have it struck out by the Upper Tribunal. At the same time the Regulator sought to increase the contribution notice to £20m and sought a contribution notice against a director of the insolvent company.

Whilst the Tribunal declined to strike-out the notice it did suggest that the amount specified in the notice was excessive. It also refused to allow a contribution notice against the director.

In delivering his judgment, Warren J gave considerable guidance on the powers and procedure of the Determinations Panel and the role of the Upper Tribunal in hearing appeals.

### *Procedural Guidance*

- Where there is an appeal to the Upper Tribunal in connection with a decision of the Determinations Panel the respondent is the Regulator.
- In order for an appeal to be successful there is no need to show that the Determinations Panel made a decision in error.
- It is for the Upper Tribunal to determine, in light of the evidence before it, the appropriate action for the Regulator to take.
- In reaching its decision, the Tribunal is entitled to take account of new evidence produced by both the Applicant and the Regulator.
- The Regulator is entitled to argue that the Tribunal should depart from the determination of the Panel so as to exercise the relevant regulatory function in the way in which it, the Regulator, considers appropriate at the time when the matter is dealt with by the Tribunal.

*Section 38 - “Deliberate Failure to Act”*

Section 38 authorises the issue of a contribution notice only if the conditions in subsection (3) are fulfilled. One of these conditions is that the Regulator is of the opinion that the target was a party to “*an act or deliberate failure to act*” the main purpose of which was to prevent the recovery of all or some of the debt which was or might become due from the employer in relation to the scheme under section 75.

The Applicant argued that a failure to act means that something must be left undone that ought to have been done. This was rejected by the Tribunal which held that the phrase means no more than that a person has perceived different possible steps and has decided not to take a step which he might, not necessarily ought, to have taken.

The Tribunal also concluded that it would be difficult for the Regulator to satisfy the test of reasonableness if it included an amount in the contribution notice greater than the amount it would have recovered if the act or failure under consideration had not occurred.

Whilst a final decision on the facts of the case will only be given after a full trial of the issues, the Tribunal has said that, unless the Regulator adduces further additional evidence, it will be difficult for the Tribunal to conclude that the final contribution notice should be for any amount in excess of £100,000 (the additional amount of the s75 debt that would have been recovered but for the sale of assets at an undervalue).

[Any queries?](#)

**Please contact:**

**Helena Berman**

Direct: +44 (0)20 7012 8617

Email: [helena.berman@mtgllp.com](mailto:helena.berman@mtgllp.com)

**Jenny McKeown**

Direct: +44 (0)20 7012 8618

Email: [jenny.mckeown@mtgllp.com](mailto:jenny.mckeown@mtgllp.com)