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# The Element Six / Omega Pharma cases The Implications for Trustees

Deirdre Cummins

Irish Institute of Pensions Management

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**Financial Times 2012-2014**

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## Element Six - Brief Overview

*Greene & Ors v. Coady & Ors [2014] IEHC 38*

- Pensions dispute in relation to the manner in which a defined benefit pension scheme was wound up in deficit in 2011
- 128 plaintiffs, effectively a class action (806 pension scheme members in total)
- 6 individual trustees were the sole defendants
- Element Six Limited, the sponsoring employer of the Scheme, was not sued
- Judgment of Mr Justice Charleton, 4 February 2014
- No appeal

## Recent history of the Scheme

- By 2011 Scheme in deficit for over a decade
- Various actions undertaken to manage the deficit
  - 1 April 2000 closed to new members
  - 1 April 2004 guaranteed increases removed
  - 1 February 2009 closed to future accrual
- Funding Proposal 2009
  - €10,725 million per annum
  - 11 years (1 April 2009 to July 2020)
- Statutory Funding Standard (MFS) deficit at 1 January 2011 - €104 million (with pension increases)
- June 2011 Funding Proposal likely to go off track
- Employer ultimatum – termination notice – 24 October 2011 – wind-up Scheme
- Compromise Agreement 13 December 2011

## Employer's Offer

- **€37.1 million**
- **€23.1 million** to be paid into the Scheme
  - Meets MFS under the Pensions Act 1990 (without pension increases)
  - Will not provide the benefits promised in the Scheme
- **€14 million** to be paid outside the Scheme
  - to enhance benefits of certain categories of members (low paid pensioners, current employees)
- Take it or leave it

## Possible quantum of claim

- Possible liability of trustees:
  - MFS (with increases) (€129 million)
  - Buyout cost (c. €200 million)
  - Balance on funding proposal (c. €100 million)

## Offer Accepted

- Trustees voted
- Split 3/3
- Casting vote of Chairman

## Central themes in case

- Obligation to make contribution demand?
- Conflicts of interest
- Trustees must act honestly and in good faith
- Trustee procedures

## Contribution demands

- Always ?                    -            No
- Discretion ?               -            Yes
- Once final settlement offer made by employer:  
*“the trustees had an option to serve a contribution demand but had no option but to make a decision”*  
Charleton J (para 3.1)

## Conflicts of interest

- Exemption from conflict rule may be provided by the trust
- Clause 9
  - *“No decision or the exercise of power by the Trustees shall be invalidated or questioned on the ground that the Trustees or, in the case of the Trustees or any of them being a body corporate, any Director of such body corporate, or any individual trustee or trustees had a direct or personal interest in the result of any such decision or in the exercise of any such power.*
  - *Any of the Trustees or any director of a corporate trustee who is a Member may retain any benefits payable to him from the Plan for his own benefit absolutely and may participate in any discussion in respect of and vote on any resolution which affects or may affect any benefits payable to him from the Plan in any way whatsoever.”*

## Conflicts of interest

- Fundamental obligation of a trustee is to pursue the aims of the trust honestly and in good faith
- Court recognised that conflicts are inherent in the design of Irish occupational pension trusts
- *“To allege that a trustee was, notwithstanding exemption clause, unable to or did not function objectively and for the benefit of the trust is to take on burden of proving that as fact.”*

## Trustee procedures

- Obtain appropriate advice (note: advisers advise, trustees decide)
- Hold meetings – record decisions (attach advices to minutes)
- Correspond with employer
- Communicate with members

## Test for trustee decisions

- Not for Court to be better informed / make better judgment than trustees
- Act honestly and in good faith in the best interests of beneficiaries
- Take account of relevant considerations:
  - Trustee powers
  - Enforceability of demand / Funding Proposal
  - Threat of company to wind-up
  - Preferential nature of claim
  - Loss of jobs
  - Payment of €14m outside Scheme
- Exclude irrelevant considerations
- Once consideration relevant – weight is matter for trustees
- No reasonable body of trustees would have made same decision (ie, perverse)

## Implications for trustees

- High standard of review
  - No reasonable body of trustees would have made same decision
  - Difficult for members / employers to challenge a trustee decision **provided**
    - Trustees can demonstrate they
      - considered all relevant factors
      - acted honestly and in good faith
      - acted reasonably

## Omega Pharma - Brief Overview

*Holloway & Ors v. Damianus & Ors 2013/6239P*

- Pensions dispute in relation to the validity / enforceability of a contribution demand
- Trustees brought proceedings against the sponsoring employer of a defined benefit pension scheme
- Judgment of Mr Justice Moriarty – 25 July 2014
- Appealed in November 2014 – Court of Appeal upheld Judgment – written judgment awaited

## Background

- September 2012 – Principal Employer announced redundancies and intention to wind up scheme
- October 2012 – 3 months' notice given of intention to terminate
- Scheme was fully funded by reference to statutory funding standard

## Background

- Trustees took legal and actuarial advice
  - Contribution obligation: Employers were required to pay to the trustees *“the moneys which the Trustees determined, after consulting the Actuary and the Principal Employer, to be necessary to support and maintain the Fund in order to provide the benefits under the Scheme.”*
- Advised the employers of the sum required to secure the benefits on buy-out basis and formally requested that the Principal Employer enter into consultation process
- No response to this letter issued and further attempts to engage were stonewalled

## Background

- December 2012 - contribution demand for €3.01 million issued (later revised to €2.23 million)
- January 2013 - trustees requested urgent meeting and referred to possibility of legal action
- April 2013 – informed that Principal Employer would not engage
- May 2013 - Trustees issued proceedings in High Court to enforce contribution demand
- July 2013 – transferred to commercial court list

## Issues considered

- Number of issues considered in this case including:
  - construction of the trust documents
  - effect of termination notice
  - entitlement of the Trustees to issue contribution demand
  - validity and enforcement of contribution demand
  - appropriate method for computation of members' benefits

## Judgment of Justice Moriarty

- Court conducted a detailed analysis of the relevant provisions of Trust Deed and Rules and in particular:
  - contribution rule
  - termination provisions – reference to 3 months’ notice
  - wind up provisions – scheme shall be wound up on the Principal Employer “*giving or being deemed....to have given notice*”
  - references to opportunity to consult
- Court held that the demand was valid
- Court found that decision of the Trustees to issue the contribution demand did not appear to be one which no reasonable body of trustees would have made

## Judgment

- Amount of the demand - three methods of computation in issue
  - Defendants argued that statutory funding standard acts as benchmark that parties should be slow to depart from
  - Buy-out basis was felt to be “excessive” – hybrid basis used
  - Court was highly critical of the lack of engagement by the employer with the trustees
  - Court held that the trustees, in determining the amount, had been acting in good faith, in the best interests of members and in accordance with their fiduciary responsibilities
- Held that the trustees were entitled to succeed in their claim

## Analysis

- Upheld by Court of Appeal in November 2014 (Justice Kelly presiding with Justice Hogan and Justice Mahon)
- Key points from judgment:
  - balance of powers under trust documents is of central importance
  - courts are slow to interfere with a decision made by trustees – high standard of review
  - statutory funding standard *may not* of itself be determinative of the contribution obligations of an employer
  - lesson for employers with respect to the importance of engagement with trustees, particularly in a wind-up situation

Deirdre Cummins

Matheson

70 Sir John Rogerson's Quay

Dublin 2

T: +353 1 232 2584

F: +353 1 232 3333

E: [deirdre.cummins@matheson.com](mailto:deirdre.cummins@matheson.com)

W: [www.matheson.com](http://www.matheson.com)