

# Contribution notice trimmed

February 2011

Importance ★★☆☆☆

Eyebrows rose at the decision to issue a contribution notice (CN) for £5 million against the parent of the Bonas company. Now the UK's most experienced pensions judge has said the legal basis for what would be the first ever CN is "unsustainable".

Mr Justice Warren's interim conclusions in the parent's appeal will give the Pensions Regulator (TPR) pause for thought over the strength of its powers.

## Can withdrawing voluntary support from a scheme be the basis for a CN?

The parent argued it had supported the Bonas scheme voluntarily. The judge agreed it was "highly questionable" that withdrawing voluntary support met the test for a CN of "preventing the recovery" of a s.75 employer debt.

*Comment: in addition to the legal arguments, there are clearly policy advantages in not deterring groups from arranging voluntary support for their pension schemes.*

## If a pre-pack insolvency leads to the business being sold back to its original owners for less than its full value (say £100,000), does that justify a CN of £5 million?

The judge said the question was how much less was available to the scheme as a result of the parent's actions. If the sale price was less than full, it would be difficult to justify a CN for more than the undervalue.

At this stage, evidence whether or not there was an undervalue sale has yet to be investigated.

*Comment: proportionality between the detriment and the penalty would make practical sense. It would allow companies and schemes to plan with greater certainty.*

## Can a decision not to apply for "moral hazard" clearance justify a CN?

The judge thought not. Although negotiations for clearance might have led to an agreed amount being paid into the scheme, a failure to apply for clearance did not "prevent the recovery" of a s.75 debt.

*Comment: clearance is a voluntary process giving certainty. There are strong legal and policy arguments that a decision not to apply should be free of any sanction.*

## Going forward

Although all the main legal issues will be re-argued at the full hearing, these preliminary views are likely to be influential and to mean that the eventual decision will clarify TPR's powers. This will help companies, trustees – and TPR.



For more information, please contact **Clive Pugh on 0117 307 6943** or at **[clive.pugh@burgess-salmon.com](mailto:clive.pugh@burgess-salmon.com)**

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Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX  
Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400  
Chancery Exchange, 10 Furnival Street, London EC4A 1AB  
Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7685 1266  
[www.burges-salmon.com](http://www.burges-salmon.com)



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