

Pensions ^{MANAGEMENT}

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The Pensions Regulator's decision to settle the Bonas case by issuing a contribution notice (CN) of £60,000 was described as "in particularly bad grace" by a leading lawyer.

Jennie Kreser, partner at Silverman Sherliker, commented: "[The settlement] makes clear the regulator does not feel bound to follow the approach taken by [judge Nick] Warren.

"I think you would ignore Nick Warren somewhat at your peril. If another CN were to be issued without taking that approach into account, I could see some judicial review proceedings being considered. While the regulator may have won this battle, I'm not so sure its won the war; it's a Pyrrhic victory at best."

Kreser's comments followed Warren's *obiter dicta* comments - a legal term for an aside during a hearing or proceedings.

In April 2010, the determinations panel [recommended the regulator should issue a CN](#) in an amount exceeding £5.08m against Michel Van de Wiele NV (VdW), the Belgian parent company of Bonas UK.

The Bonas scheme was effectively dumped into the Pension Protection Fund (PPF) after it was sold under a pre-pack administration, prompting the regulator to seek a CN from VdW.

Believing the £5.08m sought was too great an amount, VdW applied to the Upper Tribunal (the tax and chancery chamber) and [asked for the determination to be struck out](#).

The strike-out application was unsuccessful, but in giving judgment Warren suggested *obiter dicta* the amount specified in the proposed CN was excessive, adding the CN should simply compensate the scheme for the detriment suffered, rather than being based the amount on the PPF deficit.

The regulator's subsequent report said it believed the *obiter dicta* comments related solely to the Bonas case and should not be relied on in other cases. Chief executive Bill Galvin said the settlement was not indicative of any change in the regulator's approach to "avoidance activity".

"We will investigate vigorously attempts to avoid pension liabilities and, where appropriate, we will not hesitate to use our powers where we believe there may be an opportunity to improve the outcome," he continued. "This includes examining closely the circumstances of insolvency events to ensure that outcomes are fair for pension scheme members and the PPF."

Ken Tymms, corporate pensions manager at Grove Corporate Pensions said the decision had left him and others confused: "We are told to be reassured it has been vindicated in doing so in this case and are justified in acting similarly in the future. Meanwhile, pensions levy payers have to pick up the £5m cost of making good the deficit on entry to the PPF. I doubt that £60,000 will even cover the regulator's costs.

"It would be helpful to the industry if the regulator was to give further explanation about the comments that led to the change in compensation basis. All will want to assess whether this is, in effect, a precedent that will limit the regulator's ability to meet its statutory obligations in future."

Simon Kew, senior manager at Jackal Advisory, said in the regulator's defence, it has to ensure bad practice, as in this case where the trustees were not involved, and the parent company walked away from a scheme via a pre-pack, does not gain momentum.

"The regulator calls it "regulatory erosion" - let one get away with it and the floodgates open. But did it go about it the right way? Probably not - but hindsight is a wonderful thing," he added.

"As for Warren's aside - the regulator will have taken advice from legal counsel on the impact of the comments on future CNs, before issuing its statement and, indeed, the CN. I can't blame it for being bullish and would be quite concerned if it was not willing to challenge what is in effect an off-hand comment, and not a specific judgment."

A report on the Bonas case issued under section 89 of the Pensions Act 2004 can be viewed on the regulator's [website](#)