

What do Trustees do now?

Lessons from *Omega Pharma* and *Element Six*

Brian Buggy, Matheson

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Omega Pharma - Background

- Employer gave 3 months' notice to the Trustees of its intention to terminate the Scheme
- Scheme was fully funded by reference to statutory funding standard
- 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”*

Omega Pharma - Background

- Trustees took advice of actuary and advised the employers of the sum required to secure the benefits
- Principal employer refused to enter into consultation with the Trustees
- Trustees issued a contribution demand of €2.3 million and requested an urgent meeting with the employers
- When the employers continued to refuse to engage, Trustees issued legal proceeding to enforce contribution demand

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Omega Pharma – Judgment

- Court found that the demand was valid
- The 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

Omega Pharma

- Key points from judgment:
 - Statutory funding standard may not of itself be determinative of the contribution obligations of an employer
 - Valuable lesson for employers with respect to the importance of engagement with trustees, particularly in a wind-up situation



Note: Judgment is under appeal

Element Six - Introduction

Brief history

- Proceedings issued July 2012
- 128 plaintiffs, effectively a class action
- Trustees sole defendants; Employer was not sued
- Judgment of Mr Justice Peter Charleton, 4 February 2014
- Appeal period expired 12 March 2014

Element Six – brief details of Scheme

- Employer – Element Six Limited
- Trustees – 3 employer nominated, 3 member nominated – Standard Arrangement under MNT Regulations
- Benefit structure:
 - N/45 Pensionable Salary
 - NRD 60
 - Mandatory pension increases (3%)

Element Six – brief details of Scheme

- Membership – December 2011
 - 173 actives
 - 375 deferreds
 - 258 pensioners

Element Six – recent history

- June 2011 funding problems
- MFS deficit at 1 January 2011 - €104 million
- Employer ultimatum – termination notice
24 October 2011
- Compromise Agreement 13 December 2011

Element Six – possible quantum of claim

- Compromise accepted by the trustees – MFS (without pension increases) €23.1 million + €14 million outside Scheme
- Possible liability of trustees:
 - MFS (with increases) (€129 million)
 - Buyout cost (c.€200 million)
 - Balance on Funding Proposal (c.€100 million)

Element Six – Claims of Plaintiffs

- Damages for - Breach of trust, Breach of duty, Breach of fiduciary duty, Negligence, Wilful default in failing to:
 - make contribution demand
 - enforce Funding Proposal
 - obtain all necessary information
 - have adequate regard to advice

Element Six – Claims of Plaintiffs (continued)

- negotiate adequately with sponsor
- make properly informed decisions / act in good faith
- properly exercise discretion in best interests of beneficiaries
- disregard irrelevant considerations / regard relevant considerations

Element Six – Conflicts of Interest

- Exemption from conflict rule may be provided by the trust
- Clause 9

“No decision of 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”

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Element Six – Conflicts of Interest (continued)

- Clause 9 (continued)

“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”

Element Six – Conflicts of Interest (continued)

- 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”*

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Element Six - 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

Element Six – test for trustee decisions (continued)

- Preferential nature of claim
- Loss of jobs
- Payment of €14 million 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)

Brian Buggy
Matheson
70 Sir John Rogerson's Quay
Dublin 2

T: +353 1 232 2239

F: +353 1 232 3333

E: brian.buggy@matheson.com

W: www.matheson.com

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