

# Impact of the Element Six Judgement



# The Element Six Case

(Greene & Ors v Coady & Ors 2012/7254P)



**Alan Broxson**

***20 February 2014***



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# 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



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# 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%)
- Membership – December 2011
  - 173 actives
  - 375 deferreds
  - 258 pensioners



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# Recent history of Scheme

- 1 April 2000 closed to new members
- April 2004 guaranteed increases removed
- 1 February 2009 closed to future accrual
- February 2009 Funding Proposal:
  - €10.725m per annum
  - 11 years (1 April 2009 - 1 July 2020)
- June 2011 funding problems
- MFS deficit at 1 January 2011 - €104m
- Employer ultimatum – termination notice 24 October 2011
- Compromise Agreement 13 December 2011 – on casting vote of Chairman



# Employer Ultimatum

- Liquidation of Irish Employer if offer not accepted
- Net value on liquidation allegedly less than MFS



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# Compromise Agreement

- Compromise accepted by the trustees – MFS (without pension increases) €23.1m + €14m outside Scheme
- €14m - part to enhance low pensions and balance to enhance contributions for active members under DC Plan



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# Possible quantum of claim

- Possible liability of trustees:
  - MFS (with increases) (€129m)
  - Buyout cost (c.€200m)
  - Balance on Funding Proposal (c.€100m)



# The Element Six Judgment Legal Aspects



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## Why is Greene V Coady (The Element Six Case) significant?

- An Irish ruling directly on the conduct of the employer / trustee relationship
- An Irish ruling on the making of a discretionary decision by pension trustees
- An Irish ruling on the standard by which Irish pension trustees will be judged when making such a decision
- Clarifies or comments on several other key areas of scheme governance



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## Relevant background to claim

- Trustees were trustees of the Element Six Pension Scheme
- Defined benefit scheme with a FS deficit of €129.2 million
- Existing funding proposal in place (off-track)
- Employer terminated contributions on one month's notice
- Offered €35.4 million in final settlement
- Later increased to €37.1 million
- Trustees accepted this offer



## Basis of Claim

- Claim by beneficiaries against trustees for damages for breach of trust
- Two grounds:
  - Failure to make a contribution demand for €129.2 million against the sponsoring employer was a wilful default
  - Decision to accept offer of €37.1 million “vitiating” by a conflict of interest, took into account irrelevant factors and ignored relevant matters and was a decision no reasonable body of trustees could have made



## Relevant Provisions of Element Six Pension Deed

- Trustee decisions protected where trustee has a direct or personal interest in the decision
- Principal employer can terminate contributions on one month's notice
- Trustees exonerated from liability for their actions except for wilful default by a trustee
- Employer to make contributions as determined by the actuary to be required to provide the benefits
- Employer contributions to be calculated on the basis agreed between the trustees and the principal employer



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## Key Issues Addressed by Court

- Basis for review of a trustee decision
- Issue of relevance versus weight
- Wilful default
- Conflict of interest and duty
- Whether factors outside DB scheme are relevant



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## Basis for review of a trustee decision

- No higher standard should apply to pension trusts
- Trustees must have
  - acted honestly and in good faith
  - have taken into account all relevant considerations and excluded all irrelevant considerations
- If so, only a decision which no reasonable body of trustees could have made will be condemned



- Court declined to second guess or disagree with the weight which trustees chose to give a particular factor, so long as it was a relevant factor
- Confirms English authorities such as *Edge v Pensions Ombudsman*
- Unless the weight attached to a relevant factor is outside the range of what any reasonable body of trustees would give to it, the Court will not intervene





# Wilful Default

- Plaintiffs' claim based on wilful default (of necessity) - sought to apply a wide meaning to these words
- Meaning of wilful default is a vexed question
- The Court advanced two definitions:
  - A failure to do something (make a contribution demand) which is a conscious or reckless breach of duty by the trustees
  - or if that's wrong, a default where the core of the trustee duties of good faith and honesty are breached, or a default which no body of trustees with the relevant knowledge at the time could have made
- As defendants satisfied basic test for reviewing trustee decisions outlined earlier in the judgment, this definition not tested in practice



## Conflict of interest and duty

- Of the six defendant trustees, the three company nominees had voted in favour of the employer offer, and the three worker nominees voted against
- The company nominated chairman exercised his casting vote in favour
- The Court confirmed that a trustee cannot put himself in a position where he has a conflict of interest, even if he does not actually act improperly
- The court accepted three exceptions to this:
  - Informed consent
  - A conflict inherent in the operation of the scheme itself, which cannot be avoided
  - An express exemption under the trust deed
- Plaintiffs argued that the trust deed exemption did not cover major conflicts, and did not cover a conflict of duty, as it only specified direct or personal interests



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## Conflict of interest and duty

- Example of conflict of interest – personal financial interest in the decision
- Example of conflict of duty – competing duty owed to the employer
- The Court ruled as follows:
  - A clause properly exempting conflicts of interests will also exempt conflicts of duty
  - Such a clause covers conflicts of interests generally
  - However, the trustees must not be actually overborne by those conflicts in making their decision



## Matters to be taken into account

- The plaintiffs argued that the trustees should not have taken into account, in making their decision
  - the element of the employer offer (€14 million) which was to be paid into a defined contribution scheme for the benefit of certain members of the DB scheme
  - the fact that a contribution demand was liable to put the company into liquidation, and this had been threatened by the employer
- The Court confirmed that the trustees were entitled to take account of issues beyond the scheme, where they were in the beneficiaries' wider interests



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## Other issues addressed by the Court

- Binding nature of funding proposal
- Interpretation of pension deeds
- Jurisdiction of court to rule on trustee decision
- Relevance of Robins



## Nature of Funding Proposal

This part of the decision was not necessary to the ruling, and so is not binding in a future High Court case

- A pre-existing contribution demand had been replaced by a funding proposal made by the employer and accepted by the trustees
- The court's "best view" was that the employer was, on contractual principles, obliged to pay the sums due under the proposal, and where it refused to do so, the trustees could sue for the value of the remaining contributions under the proposal
- No reference to language of funding proposal



## A word about evidence

Evidence = procedure; advice; and record keeping

- Courts focused on advice obtained by trustees
- Financial and legal advice hugely relevant
- Also evidence of trustees / employer interaction

*“not cast in milk and water language”*

Influential to Court’s final ruling



## What did Court rule?

That it could not take issue with trustee decisions not to serve demand and to accept €37.1 million offer

1. Trustees were not influenced by conflict of duty or interest
2. Made a fair appraisal of situation as they saw it after making all reasonable inquiries
3. Acted honestly and in good faith
4. Later knowledge of court is irrelevant
5. Obtained best possible advice from expert sources
6. Did not take any irrelevant factor into account, and did not ignore any relevant factor
7. Weighting they gave to factors was not unreasonable



# The Element Six Case

## Some thoughts on the impact



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# Funding Proposals

- Are they enforceable contracts?
- Charleton J strong on this point
- However, that part of judgment obiter, finding not necessary to the decision
- Point was pleaded but not argued:
  - (allegation in Statement of Claim of failure to take adequate steps to enforce Funding Proposal)



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# Issues for Trustees

- Does your Funding Proposal have a clause recognising supremacy of Deed clause allowing Employer to terminate?
- Is it sufficiently worded?
- If no such clause in existing funding proposal - must Trustees try to enforce if Employer can afford?



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# Issues for Trustees

- Whereas Trustees must consider all relevant issues they alone determine what weight ( if any ) should be given to each



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# Issues for Trustees

- “ Trustees must be careful not to impose burdens which imperil the continuity and proper development of the employers business or the employment of the members who work in the business. The main purpose of the scheme is not served by putting the employer out of business”



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# Unresolved Trustee Dilemma

- If Trustee agree a Contribution Demand is merited, do they demand:

Balance of MFS?

Balance of agreed Funding Proposal?

Guaranteed Buyout Cost?

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