

SCHEDULE 2

The Dunfermline Third Party Compensation Scheme

PART 1

General provisions

Citation

1. This scheme may be cited as the Dunfermline Third Party Compensation Scheme.

Interpretation

2. In this Schedule—

“actual treatment” means the treatment pre-transfer creditors have received, are receiving or are likely to receive if no (or no further) compensation is paid;

“assessment notice” means a notice issued by the independent valuer in accordance with paragraph 4 or 10 of this Schedule;

“insolvency treatment” means the treatment which pre-transfer creditors would have received had Dunfermline entered insolvency⁽¹⁾ immediately before the relevant time;

“relevant time” means 8am on 30 March 2009, which is the time the Transfer Instrument came into force;

“remaining creditors” has the meaning given in paragraph 5(b);

“transferred creditors” has the meaning given in paragraph 5(a).

PART 2

Determination of amount of compensation: third parties affected by the application of section 38(6) of the Act

Third party compensation: persons affected by the application of section 38(6) of the Act

3.—(1) Subject to sub-paragraph (4), the amount of any compensation payable to persons whose default event provisions⁽²⁾ were affected by the application of section 38(6) of the Act (by virtue of paragraph 6 of the Transfer Instrument) must be determined by the independent valuer in accordance with this paragraph.

(2) The amount of any compensation payable to a person must be such compensation as may be fair and equitable in respect of the effect on that person’s property, rights or liabilities of the application of section 38(6) of the Act.

(3) In determining any compensation payable, the independent valuer must take into account—

- (a) any diminution in the value of the person’s property or rights; or
- (b) any increase in the burden of any liability on that person,

which is attributable to the application of section 38(6) of the Act.

(1) See section 60(3) of the Act.

(2) “Default event provision” is defined in section 38(1) of the Act.

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(4) Compensation is payable only if it is required to be paid to comply with the Convention rights (within the meaning of section 1 of the Human Rights Act 1998⁽³⁾).

Assessment notice

4.—(1) Where the independent valuer makes a determination in accordance with paragraph 3, the independent valuer must issue an assessment notice to—

- (a) the person affected by the application of section 38(6) of the Act, and
- (b) the Treasury.

(2) An assessment notice must contain the following information—

- (a) the date on which the assessment notice is issued,
- (b) the amount of any compensation payable, and
- (c) the reasons for the independent valuer’s decision.

PART 3

Determination of amount of compensation: pre-transfer creditors

Third party compensation: pre-transfer creditors of Dunfermline

5.—(1) The amount of any compensation payable to—

- (a) pre-transfer creditors whose rights were transferred by virtue of the Transfer Instrument (“transferred creditors”) shall be determined in accordance with paragraph 7;
- (b) pre-transfer creditors whose rights were not transferred by virtue of the Transfer Instrument (“remaining creditors”) shall be determined in accordance with paragraph 8.

(2) The independent valuer, in conducting his or her functions in accordance with this Part, may make determinations in respect of all pre-transfer creditors, a class of pre-transfer creditor or a particular pre-transfer creditor as the independent valuer considers appropriate.

(3) The independent valuer must have regard to any information provided by a pre-transfer creditor which is relevant to the conduct of his or her functions under this Part and in particular must have regard to any information which relates to the assessment of—

- (a) the insolvency treatment;
- (b) the actual treatment.

Assessment of insolvency treatment

6.—(1) The independent valuer must assess the insolvency treatment of the pre-transfer creditors of Dunfermline.

(2) In making the assessment of the insolvency treatment, the independent valuer must determine the insolvency process it is likely Dunfermline would have entered had the Transfer Instrument not been made.

(3) 1998 c.42.

Assessment of compensation: transferred creditors

7.—(1) The independent valuer must assess the actual treatment of transferred creditors (including any payment of compensation to be made in accordance with a determination of the independent valuer under paragraph 3).

(2) If the independent valuer considers that, in relation to any transferred creditor, the actual treatment is less favourable than the insolvency treatment, the independent valuer must determine the amount of compensation payable to the transferred creditor.

(3) The independent valuer must assess the compensation payable—

- (a) by reference to the difference between the insolvency treatment and the actual treatment; and
- (b) on the basis of the fair and equitable value of that difference in treatment.

Assessment of compensation: remaining creditors

8.—(1) The Treasury must notify the independent valuer as soon as is reasonably practicable after giving the notification under paragraph 6(1) of Schedule 1 that the notification has been made.

(2) As soon as is reasonably practicable following the receipt of the notification under subparagraph (1) the independent valuer must assess the actual treatment of remaining creditors, including by virtue of any payment to be made—

- (a) to Dunfermline from the Dunfermline Resolution Account; and
- (b) in accordance with a determination of the independent valuer under paragraph 3.

(3) If the independent valuer considers that, in relation to any remaining creditor, the actual treatment is less favourable than the insolvency treatment, the independent valuer must determine the amount of compensation payable to the remaining creditor.

(4) The independent valuer must assess the compensation payable—

- (a) by reference to the difference between the insolvency treatment and the actual treatment; and
- (b) on the basis of the fair and equitable value of that difference in treatment.

Valuation principles

9. In making the assessment of the insolvency treatment as required under paragraph 6(1), the independent valuer must determine the amount of compensation payable in accordance with the following valuation principles (in addition to the principle which applies by virtue of section 57(3) of the Act)—

- (a) that Dunfermline was failing, or was likely to fail, to satisfy its threshold conditions (within the meaning of section 41(1) of the Financial Services and Markets Act 2000⁽⁴⁾ (permission to carry on regulated activities));
- (b) that Dunfermline would have entered insolvency immediately before the relevant time;
- (c) the Transfer Instrument has not been made and that no other order or instrument under Part 1 of the Act would have been made in relation to or in connection with Dunfermline; and
- (d) that no financial assistance⁽⁵⁾ would have, after the relevant time, been provided to Dunfermline by the Bank of England or the Treasury.

(4) 2000 c.8.

(5) “Financial assistance” is defined in section 257 of the Act.

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Assessment notice

10.—(1) Where the independent valuer makes an assessment in accordance with paragraph 7 or 8, the independent valuer must issue an assessment notice to—

- (a) the pre-transfer creditor,
- (b) the building society special administrator of Dunfermline, and
- (c) the Treasury.

(2) An assessment notice must contain the following information—

- (a) the date on which the notice is issued,
- (b) the amount of any compensation payable, and
- (c) the reasons for the independent valuer’s decision.

Interim payments

11.—(1) The independent valuer may determine that the Treasury must make interim payments to pre-transfer creditors, a class of pre-transfer creditors or all pre-transfer creditors on account of compensation determined to be payable under this Schedule (“payments on account”).

(2) The independent valuer may make a determination under sub-paragraph (1) at any time before the assessment required by paragraph 7(1) or paragraph 8(2) has been made.

(3) Subject to sub-paragraph (4), the independent valuer may make such provision as to payments on account as he or she thinks fit (including a requirement that payments are to be made in instalments).

(4) Payments on account must be made subject to the following conditions—

- (a) that the acceptance of such a payment by the pre-transfer creditor reduces any obligation (whether in existence at the time of the payment or not) on the Treasury to pay compensation to the pre-transfer creditor by the amount of the payment on account;
- (b) that, where the independent valuer, in accordance with paragraph 12, determines that the pre-transfer creditor should make a balancing payment to the Treasury, the pre-transfer creditor is liable to pay that amount.

(5) In considering whether to require payments on account to be made in accordance with this paragraph, the independent valuer must have regard to the merits of ensuring that pre-transfer creditors receive compensation in a timely manner.

Balancing payments

12.—(1) Where the independent valuer has determined that the Treasury must make interim payments in accordance with paragraph 11, the independent valuer must determine what balancing payments, if any, are appropriate to ensure that each pre-transfer creditor receives the relevant amount of compensation, if any, determined to be payable in accordance with paragraph 7(1) or 8(2) (and no more than that amount).

(2) The independent valuer must make a determination under sub-paragraph (1) as soon as is reasonably practicable after the assessment required by paragraph 7(1) or 8(2) has been made.

(3) Where the independent valuer determines that it is necessary for—

- (a) the Treasury to make a balancing payment to a pre-transfer creditor, the independent valuer must notify in writing the Treasury of—
 - (i) the need to make that payment, and
 - (ii) the amount of the payment to be made;

- (b) the pre-transfer creditor to make a balancing payment to the Treasury, the independent valuer must notify in writing—
 - (i) the pre-transfer creditor of—
 - (aa) the need to make that payment, and
 - (bb) the amount of the payment to be made;
 - (ii) the Treasury of the entitlement to receive that payment.

PART 4

Payment of compensation

Payment of compensation

13.—(1) The Treasury must, as soon as is reasonably practicable following receipt of an assessment notice, pay to the person entitled the amount of any compensation set out in that assessment notice.

(2) But where an order under section 55(6) of the Act is in force and a person affected by the determination of the independent valuer—

- (a) requires the reconsideration of the determination;
- (b) appeals to a court or tribunal against a determination of the independent valuer;

the Treasury shall not be required to make payment of the compensation payable (if any) until the matter has been finally disposed of.