UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Reference numbers: FS/2012/0001-5

GRANADA RENTAL & RETAIL LIMITED
GRANADA MEDIA LIMITED
GRANADA GROUP LIMITED
GRANADA LIMITED
ITV plc **Applicants**

- and –

THE PENSIONS REGULATOR **Respondent**

- and –

BOX CLEVER TRUSTEES LIMITED **Interested Party**

REASONS FOR DIRECTION

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1. On 21 December 2011 the Determinations Panel ("the DP") of the respondent, the Pensions Regulator ("the PR"), sent to the applicants (hereafter "the Targets") a determination notice stating that, subject to reference to this tribunal, financial support directions made pursuant to s 43 of the Pensions Act 2004[1], would be issued, requiring the Targets to put in place financial support for the Box Clever Group Pension Scheme ("the Scheme"). The Scheme has, I was told, a deficit exceeding £60 million. The Scheme trustee is Box Clever Trustees Limited ("the Trustee").

2. A warning notice was issued by the PR on 30 September 2011, foreshadowing the determination notice. It was addressed to all of the Targets, in that capacity, and to the Trustee and the employers who participated in the scheme, all as "directly affected persons", a term which I shall explain below. The Targets and the Trustee were all represented before the DP, which met on 12 to 14 December 2011, but despite the Targets' objections the determination notice was issued.

3. The Targets referred the determination notice to the tribunal on 17 January 2012, making various challenges to it which are substantially the same as those advanced before the DP. The PR's statement of case was served on 12 March 2012; it adopted the DP's reasons for issuing the determination notice and addressed points made by the Targets in their reference notice. I am not, however, concerned at this stage with the merits of the reference.

4. In the meantime, on 6 February 2012, the Trustee served its own reference notice, by which it sought to be joined to the Targets' reference as an interested party. That application came before me on 27 March 2012, when it was supported by the PR and opposed by the Targets. I decided that the Trustee should be joined as it had requested, and so directed. These are my reasons for doing so.

5. An "interested party" is defined by rule 1(3)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008[2], as amended, as

> "in a financial services case, any person other than the applicant who could have referred the case to the Upper Tribunal and who has been added or substituted as an interested party under rule 9 (addition, substitution and removal of parties)".

6. This is a financial services case, as defined by the same rule. Rule 9, so far as relevant, is in these terms:

> "(1) The Upper Tribunal may give a direction adding, substituting or removing a party as an appellant, a respondent or an interested party.
>
> (2) If the Upper Tribunal gives a direction under paragraph (1) it may give such consequential directions as it considers appropriate.

1 All statutory references below are to provisions of this Act.

2 All references to rules below are to these Rules.

(3) A person who is not a party may apply to the Upper Tribunal to be added or substituted as a party.

(4) If a person who is entitled to be a party to proceedings by virtue of another enactment applies to be added as a party, and any conditions applicable to that entitlement have been satisfied, the Upper Tribunal must give a direction adding that person as a respondent or, if appropriate, as an appellant."

7. Although rule 9, taken alone, appears to give the tribunal an unfettered discretion to add an interested party, when it is read with the definition of interested party in rule 1 it becomes clear that there is a pre-condition: joinder of a party in that capacity is possible only when that party could itself have made a reference. I should add that the parties agreed that rule 9(4) is not engaged since it is clear that a trustee, if he is to be joined at all, must be joined as an interested party and not as a respondent (that position can be filled only by the PR), nor as an appellant (a role which finds no place in a financial services case): see rule 1.

8. The Trustee relies on the fact that it has been accepted, without dissent, in other references before this tribunal that the trustee of a scheme should be entitled to participate not only in the proceedings before the DP but also in a subsequent reference. I was referred to observations of Briggs J in *Nortel & Lehman Brothers v the Pensions Regulator* [2010] EWHC 3010 (Ch), a case dealing with the rights of creditors but with an analogy to the position here. The learned judge said:

"[183] … I consider it inconceivable that Parliament intended to confer upon every one of the potential army of creditors of an insolvent target a separate and distinct right to be served warning notices, to make representations, and to make references to the Tribunal. It was precisely to exclude armies of that kind from participation in those processes that section 100(2)(b) is limited to the interests of persons 'directly' affected by the exercise of the relevant regulatory function.

[184] While it is, from a strict insolvency perspective, probably correct to say that, once a company enters into an insolvency process, its interests are for the most part replaced by direct interests of its creditors, I consider it implicit in section 100 that a target in an insolvency process remains the person 'directly affected' by the proposed exercise of the FSD regulatory powers against it, but that precisely because it is in an insolvency process, that requires the Regulator to have regard to the interests of its creditors as a body. Generally speaking, those interests will be sufficiently represented by the office-holders, in any process of seeking and obtaining representations, and in any reference to the Tribunal."

9. In this case, for "creditors" one should read "members", and for "office-holders" one should read "trustee". That approach is consistent with s 100, which is entitled "Duty to have regard to the interests of members etc" and reads

"(1) The Regulator must have regard to the matters mentioned in subsection (2)—

(a) when determining whether to exercise a regulatory function—

(i) in a case where the requirements of the standard or special procedure apply, or

(ii) on a review under section 99, and

(b) when exercising the regulatory function in question.

(2) Those matters are—

(a) the interests of the generality of the members of the scheme to which the exercise of the function relates, and

(b) the interests of such persons as appear to the Regulator to be directly affected by the exercise."

10. The contrast (the Trustee says) is between the members, whose interests are indirect, and the trustee who, as the custodian of the fund, is charged with the duty not merely of administering it but also of conserving its value and who, in the context of a financial support direction, has a direct interest in ensuring that the financial support obtained is sufficient to enable the fund to meet its obligations to the members.

11. "Directly affected" and "directly affected person" are terms which find their origin in ss 93 and 96, sections which deal with the "standard procedure" to be followed when the PR is exercising its regulatory functions, of which the making of a financial support direction is one (see s 93(2(c) and Sch 2 para 33). Subsection 96(2)(a) requires the PR to give a warning notice to "such persons as it appears to the Regulator would be directly affected by the regulatory action under consideration". It was in accordance with that provision that the warning notice was sent to the Trustee, and as a recipient it was permitted by the DP to participate in the hearing before it, by making both written and oral representations. Section 96(2)(d) provides for "the giving of notice of the determination to such persons as appear to the Regulator to be directly affected by it", and the determination notice was sent to the Trustee accordingly.

12. The Act does not give any further guidance about who is, and who is not, "directly affected", and it is therefore left to the PR to identify those who fall within that class on a case by case basis. Its published statement of the DP's procedure (determined in accordance with s 93(3) and published as required by s 94(1)) merely adopts the statutory wording. It has, however, been the PR's practice to treat the trustee of any scheme as a "directly affected party" and, says the Trustee, its interest in maintaining the value of the fund and in ensuring the financial support is sufficient makes it clear that it is "directly affected" within the ordinary meaning of the phrase.

13. Section 96(2)(e) requires the PR to include in a determination notice "details of the right of referral to the Tribunal under subsection (3)", and that subsection in turn provides that

"Where the standard procedure applies, the determination which is the subject-matter of the determination notice may be referred to the Tribunal by—

(a) any person to whom the determination notice is given as required under subsection (2)(d), and

(b) any other person who appears to the Tribunal to be directly affected by the determination."

14. It follows that if the PR was right in its view that the Trustee was directly affected by the determination, it was obliged by s 96(2)(d) to serve the determination notice on it, and by virtue of s 96(2)(e) the Trustee became eligible to make a reference to the tribunal.

15. The Trustee and the PR both accept that rule 9 confers only a discretionary power and that, before joining the Trustee as an interested party, I must be satisfied not only that it is eligible, but also that it is in the interests of justice that it should be joined. They also accept that their interests are substantially the same, in that they will both endeavour to persuade the tribunal to uphold the determination but, they say, their interests and approach are not identical and, as time passes and the reference develops, they may diverge. Moreover, the Targets are advancing arguments that the passage of time made it unreasonable to issue financial support directions, and that the PR was guilty of procedural impropriety. These are not complaints which could be levelled at the Trustee, which therefore has a different perspective, and has its own arguments to advance.

16. Thus, they say, the tribunal should lean towards joinder of a trustee save where there is clearly no need or justification for joinder, and that is not this case. That has been the consistent approach of the courts as in, for example, *PNPF v Taylor* [2009] EWHC 1693 (Ch) in which, at [62], Proudman J said "I agree … that all the cases show a consistent and instinctive approach on the part of the judges that the remedy of a person dissatisfied with his representation is to be joined as a defendant in his own right."

17. Irrespective of whether the Trustee is "directly affected" in the sense intended by the Act, it does have its own interest in the sufficiency of the Scheme's fund, and it will necessarily be involved in putting in place the financial support to be provided by the Targets if their reference fails, or in the enforcement of a contribution notice should one be issued in the event that the financial support directions are not complied with.

18. It would, say the Trustee and the PR, be odd if the Trustee were allowed to participate fully in the proceedings leading to the DP's determination, but then was precluded from participation in the Targets' reference to the tribunal. It had access to relevant evidence about the background to and history of the Scheme; although that evidence could be made available to the PR it was more appropriate that it should present its own evidence, rather than rely on another party to do so.

19. In addition, there is authority of this tribunal, in *Michel van de Wiele v the Pensions Regulator (Bonas UK)* [2011] 023 PBLR that, had the DP decided not to issue financial support directions, the Trustee could have referred that determination to the tribunal. That was a case relating to a contribution notice, but the principles must be the same. At [66] the President of the Chamber, Warren J, said

> "… In the case of a contribution notice, it is, I think, correct to say that the trustees or managers of the scheme concerned who are entitled to receive payment are persons 'directly affected' and could themselves refer the matter to the Tribunal if they consider that the Panel has been too lenient or, indeed, to preserve the position against one person where another person had referred a determination to the Tribunal."

20. It would, say the trustee and the PR, be absurd if a trustee could refer a negative determination, or participate in the tribunal process in the case of a partially negative determination, but the tribunal was required to exclude it from participation, with a view to protecting the scheme fund, when a wholly positive determination had been referred by the targets identified in it.

21. Moreover, the task imposed on the tribunal is not to decide whether the DP's determination was reasonable, but to decide what is the appropriate action for the Regulator to take: see s 103(3) and (4). This point was dealt with in *Bonas UK* at [37] and [38], where the President emphasised that, while the tribunal would accord respect to the DP's determination, it had to make its own decision on the evidence before it, evidence which might well include material not before the DP, and on the arguments presented to it, which again might differ from those advanced before the panel. In that context too it would be absurd to exclude the Trustee.

22. The Targets' contrary argument is, first, that the PR's (or the DP's) opinion whether the Trustee is directly affected is not determinative: if the opinion is wrong, because the person concerned is not capable of being a directly affected party within the meaning of the legislation, it is a nullity and the fact that the determination notice was served on the Trustee does not bring it within s 96(2)(e) and the category of parties which may make a reference. A trustee has no financial interest of its own in the fund: it is a custodian which merely manages and administers it on behalf of the members. The members are not directly affected (as s 100 indicates), thus the trustee of the fund, standing in their shoes, also cannot be directly affected. Rather, the duty of looking after the members' interests is placed on the PR: that is the purpose of s 100. If the Trustee is directly affected at all it is only as administrator of the Scheme; yet here it is seeking to be joined, not in that capacity, but in order that it could represent the members.

23. The Trustee could not have referred this determination to the tribunal since there is nothing for it to refer: any relief it could have hoped for was granted. Thus even if the general principle explained by Warren J in *Bonas UK* is right, it is of no application to this case. Responsibility for upholding (as opposed to challenging) a determination rests with the PR, whose determination it is, even if made on its behalf by the DP. Only the PR may make a financial support direction; while a trustee might be allowed to participate in the process leading up to the issue of a direction, it has no role to play once the direction has been made.

24. If, nevertheless, I should be persuaded that the Trustee has the standing to be joined as an interested party, I should decline to exercise my discretion to join it because it is unnecessary, would require the Targets to deal simultaneously with two opponents, and would add to the Targets' costs. It is unnecessary because there is no reason why the PR cannot advance all of the arguments the Trustee might make; there is no impediment to their joining forces as a single party. Section 100 compels the PR to have regard to the members' interests and that compulsion would necessarily dictate its conduct of the reference; there is nothing the Trustee could add to it. That point is illustrated by the manner in which the PR and the Trustee presented their arguments to the DP, where one advanced arguments on a particular issue and the other simply adopted them. Duplication is

25. Even though the PR and the Trustee have similar if not identical interests their both being parties, separately represented as they have been hitherto, would lead to duplication: the Targets would be required to consider and respond to two sets of evidence, two statements of case and two skeleton arguments. The length of the eventual hearing is likely to be increased, and overall the cost burden to the Targets of dealing with the litigation would be substantially greater than if the Trustee were not joined. The Trustee itself would also incur costs, probably to be borne by the fund. The judicial time taken by the reference would also be increased by the need to read and consider three sets of arguments, and hear three parties. These additional burdens should be avoided unless there is compelling reason to join the Trustee, which there is not.

26. I accept that there is some merit in the Targets' arguments in respect of the exercise of discretion, and I do not discard them lightly, but I am satisfied that the trustee of a scheme is correctly described as a directly affected party, that it has the standing to make a reference, and that in this case the discretion should be exercised in favour of joinder as an interested party.

27. It is, perhaps, surprising that the draftsman of the 2004 Act did not make it clear that the trustee of a scheme is (or, if I had concluded that the Targets are right, is not) a directly affected person. It may be there are cases in which a trustee is not directly affected, but I do not need to speculate what they might be. In my judgment, when the matter in issue is financial support for a scheme in deficit, whether by way of a financial support direction or contribution notice, the trustee of that scheme is necessarily directly affected. His task is not confined, as the Targets' argument implies, to administering the scheme, but (as the Trustee correctly submitted) extends to husbanding the fund in order to ensure that it is sufficient to meet the members' current and future entitlements. A trustee who failed to take steps to preserve, if not maximise, the fund's resources would be failing in his duty. Against that background the only reasonable conclusion is that a trustee has an interest of his own, and not merely as a representative of the members, in the making of a financial support direction or contribution notice, and in its implementation and enforcement, and is thus "directly affected".

28. I can see the logic of the Targets' argument that, directly affected or not, the Trustee could not have referred this determination. Rule 1 defines an interested party in a financial services case as "any person … who could have referred *the* case to the Upper Tribunal" (emphasis added); thus there does at first sight appear to be an impediment to the adding of the Trustee in this case. However, I think that interpretation of the rule is too narrow, and if it were right it would leave a trustee faced with what he perceives as an inadequate determination with no remedy. Moreover, purposeless though it might have been, I see no statutory bar to a trustee's making a reference. Indeed, s 96(3) confers an unfettered right to refer. Even if I am wrong about the literal interpretation of the definition, purposive construction can lead only to the conclusion that the Trustee in this case is eligible to be joined.

29. I am not persuaded that the added cost, in time and money, to which it will lead militates against joinder. I recognise that there will be some but, as the Targets themselves accept, the PR and the Trustee minimised the duplication, by the one adopting the arguments of the other, in the proceedings before the DP and I see no reason why that approach should not be maintained in the course of this reference, and if necessary enforced by judicial case management.

30. On the other hand, it is difficult to see why a person who meets the eligibility requirement and has an identifiable interest in the outcome of a reference should be excluded from participation: in my view there is a presumption that a person in that position should be joined if he so desires. It is true that, in this case, there appears to be no significant difference between the PR and the Trustee in their approach (I am not persuaded that the criticism of the PR to which I have referred affects that conclusion), but the position may change—and if it did, and late joinder of the Trustee became necessary, the additional cost and delay might well be substantial. Moreover, and although this is not a case in which the observation of Proudman J to which I have referred above is directly in point, it nevertheless seems to me that a court or tribunal should respect the desire of a person, with a proper claim to be joined, to be separately represented, unless there is good reason to the contrary. I do not detect such a reason here.

Colin Bishopp
Upper Tribunal Judge

Release date: 10 April 2012