Reference number: FS/2010/0029-31

PENSIONS REGULATOR – Financial support direction - jurisdiction of the Tribunal – Whether Scheme Trustees are directly affected and able to make a reference – Yes – Whether determination not to include company associated with the employer within the scope of a financial support direction capable of forming the subject matter of a reference to the Tribunal – Yes – Whether Tribunal has jurisdiction to direct Regulator to issue a financial support direction notwithstanding the expiration of time for the Regulator to make such direction – Yes – Pensions Act 2004 Sections 43, 96, and 103.

THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE TRUSTEES OF THE LEHMAN BROTHERS PENSION SCHEME — **Applicant**

- and -

THE PENSIONS REGULATOR — **Respondent**

- and -

LB RE FINANCING NO 1 LTD AND 36 OTHERS — **Interested Parties**

Tribunal: Judge Colin Bishopp
Judge Timothy Herrington

Sitting in public in London on 12-15 March 2012

Nicolas Stallworthy QC, instructed by Travers Smith LLP, for the Applicant

Raquel Agnello QC, Jonathan Hilliard, counsel, and Thomas Robinson, counsel, instructed by the Pensions Regulator for the Respondent

Andrew Simmonds QC, and Joseph Goldsmith, counsel, instructed by SNR Denton UK LLP and Linklaters LLP, Andrew Spink QC and Richard Hitchcock, counsel, instructed by Weil, Gotshal & Manges, for the Interested Parties

DECISION

Background to the applications

1. As is well known the Lehman Brothers Group ("LBG") carried on a global financial services and investment banking business. Many of LBG's employees in its UK operations were members of the Lehman Brothers Pension Scheme ("the Scheme") which was sponsored principally by Lehman Brothers Limited ("LBL"). The Scheme, we were told, has a deficit of £121 million, as calculated by the Scheme's actuary as at 15 September 2008. The Scheme's trustees are four individuals who are former employees of LBG ("the Trustees").

2. On 15 September 2008 administration orders were made in respect of LBL and three other companies forming part of LBG. Administration orders in respect of a large number of other companies within LBG followed in September and October 2008.

3. On 24 May 2010 the respondent, the Pensions Regulator ("TPR") issued a warning notice in respect of its proposal to issue a financial support direction under s 43 of the Pensions Act 2004 in respect of the Scheme which, if that proposal were implemented, would require the 73 companies which were members of the LBG to whom the warning notice was addressed to put in place financial support for the Scheme. This warning notice was also later served on a further member of LBG. The Pensions Act 2004 is referred to in this decision as "the Act" and all statutory references below, unless indicated otherwise, are to the Act. All the provisions of the Act to which we refer are set out in the Appendix to this decision.

4. The 74 companies to whom the warning notice was addressed ("the Targets") fell into three categories as follows:

(1) the three main UK trading companies in LBG, namely Lehman Brothers International (Europe) ("LBIE"). Lehman Brothers Europe Limited ("LBEL") and Lehman Brothers Asset Management (Europe) Limited ("LBAM");

(2) Lehman Brothers Holdings Incorporated ("LBHI"), the ultimate parent company; and

(3) 69 other members of LBG listed in Appendix 1 to the warning notice.

5. In outline the grounds advanced in the warning notice for the issue of the financial support direction were:

(1) LBL was a "service company" for the purposes of ss 43(2) and 44;

(2) the Targets were all connected with or associates of LBL for the purposes of s 43(6); and

(3) it would be reasonable in all the circumstances to issue a financial support direction under s 43(5) and (7) because:

(i) LBL employed the vast majority of the staff working in LBG's UK businesses and provided other services to those businesses, such as office space and information technology services;

(ii) LBL was unable to meet its contingent liability for the deficit in the Scheme.

6. Under s 43(b)(c), in order to issue a financial support direction to a person, the person must be, at the relevant time, a person, other than an individual, who is connected with, or an associate of, the employer.

7. The "relevant time" is the time determined by TPR in accordance with s 43(2) being a time which falls within s 43(9). At the time the warning notice was issued s 43(9) provided that:

> "A time falls within this subsection if it is a time which falls within a prescribed period which ends with the determination by the Regulator to exercise the power to issue the financial support direction in question".

8. The "prescribed period" referred to in s 43(9) at the time the warning notice was issued was 24 months (reg 6 of the Pensions Regulator (Financial Support etc) Regulations 2005 (S.I. 2005/2188) as amended by the Pensions Regulator (Miscellaneous Amendment) Regulations 2009 (S.I. 2009/617), reg 2(2)).

9. In this case, as stated in Appendix 2 to the warning notice, TPR determined 14 September 2008 as the relevant time, being the day before LBL entered into administration. That was the date at which it had to be determined whether LBL was a service company and whether the Targets were connected with or associated with LBL. Additionally, a determination by TPR to exercise the power to issue a financial support direction in respect of the Scheme on any date prior to 14 September 2010 would fall within the "prescribed period". It was common ground between the parties that the relevant time, once chosen by TPR, cannot be changed whether on a reference to the Tribunal or otherwise. As far as the Tribunal is concerned its jurisdiction is limited to considering references related to the exercise by TPR of "regulatory functions" as set out in s 93 and the exercise of the power to determine the "relevant time" is not listed in that section as a regulatory function.

10. Appendix 2 to the warning notice set out in detail TPR's analysis as to why it considered that all the Targets met the requirements of s 43(6)(c) as referred to in para 6 above. There is no dispute between the parties on this point or as to

whether LBL was at the relevant time a "service company" within the meaning of s 44.

11. As well as being addressed to the Targets and the Pension Protection Fund as "directly affected" persons, a term which is explained in more detail in paragraph 31 below, the warning notice was also addressed to the Trustees stating it was so addressed in their capacity "as the representatives of the interests of the generality of the members of the Scheme to which the exercise of the function relates in accordance with section 100(2)(a) of the Act", s 100(1) providing that TPR must have regard to the matters referred to in s 100(2) when determining whether to exercise a regulatory function.

12. The Trustees and a number of the Targets made both written and oral representations to the Determinations Panel ("the DP") of TPR on the warning notice. A number of other Targets made written representations. By the time of the hearing before the DP, TPR had abandoned the proposal to issue a financial support direction against 30 of the Targets. Despite these representations, which were heard on 8 and 9 September 2010, on 13 September 2010, one day before the end of the prescribed period, the DP issued a determination notice.

13. By paragraph 5 of the determination notice, the DP determined that a financial support direction should be issued against six of the Targets, including LBIE, LBEL, LBAM and LBHI. By paragraph 4 of the determination notice, the DP determined that a financial support direction should not be issued to the remaining 38 Targets.

14. On 15 September 2010 the Joint Administrators of a number of the Targets applied to the Companies Court for directions as to whether liabilities arising pursuant to a financial support direction would be (a) provable debts or (b) expenses of administration or (c) neither (the "Companies Court application").

15. On 21 September 2010 the DP issued the written reasons for its determination.

16. On 25 October 2010 the six Targets referred to in paragraph 13 above referred the determination notice to the Tribunal on the grounds, amongst other things, that it was not reasonable to impose a financial support direction on them.

17. On 27 October 2010 the Trustees referred to the Tribunal the determination not to issue a financial support direction to the 38 Targets specified in paragraph 13 above. The Trustees contend that a financial support direction should be issued against all of these Targets.

18. On 22 November 2010 the Tribunal (Sir Stephen Oliver QC) directed that all the references relating to the determination notice be stayed pending final determination of the Companies Court application, with liberty to apply to lift the stay.

19. On 10 December 2010 Briggs J delivered judgment on the Companies Court application. He held that liabilities arising under a financial support direction issued after the entry of the target into administration, were expenses of the administration. The Joint Administrators appealed the decision.

20. On 8 July 2011, those of the Targets represented by SNR Denton UK LLP (the "Denton Targets") issued an application to the Tribunal for:

> (1) joinder of the Denton Targets to the Reference as interested parties under rule 9(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules");
>
> (2) a direction lifting the stay to enable the Tribunal to determine the matter referred to in (3) below; and
>
> (3) a direction pursuant to Rule 8(2)(a) and/or Rule 8(3)(c) of the Rules striking out the Trustees' reference on the grounds that the Tribunal does not have jurisdiction to direct the Regulator to issue a financial support direction against the Denton Targets and/or that the reference is bound to fail.

21. Corresponding strike-out applications were made on 11 July 2011 by those of the Targets referred to in paragraph 13 above which are represented by Linklaters LLP (the "Linklaters Targets"), and on 21 July 2011 by those of the Targets which are represented by Weil Gotshal Manges (the "Weil Targets"). There is one Target, Chancery Gate Lehman LLP, which is unrepresented and is not a party to any strike-out application. When mentioned collectively in this decision, the Denton Targets, the Linklaters Targets and the Weil Targets are referred to as "the Applicant Targets".

22. On 1 August 2011, the Tribunal issued directions which included the joinder of all the Applicant Targets.

23. On 14 October 2011, the Court of Appeal delivered judgment dismissing the appeal from Briggs J in the Companies Court application. For very much the same reasons, the Court of Appeal decided that liabilities in respect of financial support directions ranked as expenses of the administration. The Joint Administrators have now appealed to the Supreme Court and, we are told, have been informed by the Supreme Court that the appeal has been listed to be heard in 2013.

24. On 28 October 2011, the Tribunal (Sir Stephen Oliver QC) lifted the stay to enable the strike-out applications to be dealt with.

25. As briefly mentioned in paragraph 20 above, the strike out applications rely on the powers given to the Tribunal in Rules 8(2)(a), 8(3)(c) and 8(7). These provide as follows:

> "(2) The Upper Tribunal must strike out the whole or a part of the proceedings if the Upper Tribunal –

(a) does not have jurisdiction in relation to the proceedings or that part of them …

(3) The Upper Tribunal may strike out the whole or a part of the proceedings if –…

(c) in proceedings which are not an appeal from the decision of another tribunal or judicial review proceedings, the Upper Tribunal considers there is no reasonable prospect of the appellant's or the applicant's case, or part of it, succeeding …

(7) This rule applies to a respondent or an interested party as it applies to an appellant or applicant except that –

(a) a reference to the striking out of the proceedings is to be read as a reference to the barring of the respondent or interested party from taking further part in the proceedings.

(8) if a respondent or an interested party has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Upper Tribunal need not consider any response or other submission made by that respondent or interested party, and may summarily determine any or all issues against that respondent or interested party".

26. As confirmed in the Tribunal's decisions in *Re Bonas Group Pension Scheme* ("*Bonas*") (Reference FS/2010/0007) and *Desmond and Others v The Pensions Regulator and Garvin Trustees Limited* ("*Desmond*") (Reference FS/2010/0010), the strike out power in Rule 8(3)(c) is applied to TPR by virtue of Rule 8(7). As a result in the case of TPR, references to the striking out of proceedings are to be read as references to the barring of the TPR from taking further part in the proceedings. Where such a bar is involved, Rule 8(8) provides that the Tribunal need not consider any response or other submissions made by TPR and may summarily determine such issues: see paragraphs 33-35 of the decision of Warren J in *Bonas* and paragraph 10 of the decision of Sir Stephen Oliver QC in *Desmond*.

Brief summary of the applications

27. The basis of the application of the Denton Targets is that although the objective of the Trustees' reference was to ask the Tribunal to direct that a financial support direction be issued against all (or as many as possible) of the Denton Targets, no determination to issue a financial support direction was made against any of those Targets. Therefore, it is argued, there is no determination in respect of any of the Denton Targets that is capable of being referred under section 96(3) (or at all). In the circumstances, the application contends, the Trustees' reference is improper and without legal basis and the Tribunal has no jurisdiction in relation to it.

28. Further or alternatively, the application contends that the Trustees' reference is outside the jurisdiction of the Tribunal and/or has no reasonable prospect of success and/or should be struck out pursuant to an exercise of the Tribunal's inherent jurisdiction to do so for the following reasons:

(1) the "relevant time" for the purposes of section 43(2) was selected by TPR in the warning notice as 14 September 2008;

(2) therefore, the prescribed period of 24 months under section 43(9) ran from that date and expired on 14 September 2010;

(3) no determination to issue a financial support direction was made against any of the Denton Targets during that prescribed period and no determination to issue a financial support direction can now be made against any of them after the end of that prescribed period;

(4) in the circumstances, the Tribunal could not now remit the matter to TPR with a direction that it should determine to issue a financial support direction against any of the Denton Targets because such a determination would fall outside the prescribed period;

(5) the Tribunal's role is limited to determining what (if any) is the appropriate action for the Regulator to take in relation to the matter referred (section 103(4));

(6) there is nothing in section 103 (or elsewhere) that confers on the Tribunal jurisdiction to direct the imposition of a financial support direction on a Target once the prescribed period has expired and there is nothing that confers on the Tribunal any power to disapply the time limitations imposed by section 43(9);

(7) the Tribunal's jurisdiction under section 103 to remit the matter to TPR does not confer upon the Tribunal the power to direct TPR to do something that it does not have the power to do under section 43; and

(8) TPR does not now have the power to determine to issue a financial support direction against any of the Denton Targets, so the Tribunal has no jurisdiction to direct it to make such a determination.

29. In the circumstances, the application concludes, the Tribunal does not have jurisdiction to do that which the Trustees are asking it to do, namely remit the matter to TPR with a direction that it should determine to issue a financial support direction against the Denton Targets. Therefore, the Tribunal is required by Rule 8(2) to strike out the Trustees' reference insofar as it relates to the Denton Targets. Further or alternatively, for the reasons set out above, the reference is bound to fail and, therefore, consistently with the overriding objective, it ought to be struck out at an early stage pursuant to Rule 8(3)(c) and/or the Tribunal's inherent jurisdiction and consequently TPR ought also to be barred from taking any further part in the proceedings insofar as they relate to the Denton Targets.

30. The applications by the Linklaters Targets and the Weil Targets effectively adopt the grounds set out in the Denton Targets' application.

31. During the hearing of the applications, Mr Spink for the Weil Targets developed a further argument, namely that the Trustees had no right to make a reference of the subject matter of a determination notice concerning a financial support direction to the Tribunal. The basis for this contention was that this right was confined to those who are persons "directly affected" by the DP's determination. This term originates from ss 93 and 96 which deal with the "standard procedure" to be followed when TPR is exercising its regulatory functions, which include the making of a financial support direction (see s 93(2)(c) and Sch 2 para 33). Mr Spink's argument can be summarised as follows:-

(1) Section 96(2)(a) requires TPR to give a warning notice to "such persons as it appears to the Regulator would be directly affected by the regulatory action under consideration", and such a person, under the standard procedure, has the right to make representations to the DP;

(2) 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";

(3) Section 96(3) states who may refer the determination concerned to the Tribunal, namely "any person to whom the determination notice is given as required under subsection (2)(d)" (s 96(3)(a)) and "any other person who appears to the Tribunal to be directly affected by the determination" (s 96(3)(b)).

(4) These persons were confined, in the case of a determination to exercise the power to issue a financial support direction, to those who stood to suffer financial loss directly as a result of the positive exercise of the power and the Trustees' financial position, and that of the Scheme, was not changed as a result of a determination not to exercise the power against the Applicant Targets; and

(5) TPR had been right not to treat the Trustees as "directly affected" when issuing the warning notice but the DP had been wrong to do so when issuing the determination notice.

Relevant legislative provisions and issues to be determined

32. Some of the provisions relevant to the issues arising out of the strike-out applications have already been referred to in outline. The key provisions of the Act relevant to this Decision are set out in full in the Appendix. They show the relevant provisions as currently in force, save in one important respect which is relevant to the issues which are the subject of this Decision. Section 43(9) was amended with effect from 3 January 2012 by s 26(4) and (5) of the Pensions Act 2011. It now reads:

> "A time falls within this subsection if it is a time which falls within a prescribed period which ends with the *giving of a warning notice in respect of* the financial support direction in question" (emphasis added).

33. We were told that there are no current matters concerning the power in s 43 capable of reference to the Tribunal where a warning notice has been given but a determination has yet to be made by the DP, and none where a determination has been made not to exercise the power but where the time during which the matter may be referred to the Tribunal has not yet expired. Accordingly the issue as to the correct interpretation of s 43(9) as it was in force prior to 3 January 2012 will never arise again and is a matter of concern only to the parties in this particular reference.

34. In summary, the issues to be determined in respect of the strike-out applications are:

(1) Whether the Trustees have the right to make a reference to the Tribunal in respect of the determination made by the DP. This requires us to consider whether the Trustees can properly be regarded as persons who are "directly affected" by the determination, as those words are used in ss 96(2) and (3) (the "directly affected person" point);

(2) Whether the determination by the DP not to exercise the power to issue a financial support direction against the Applicant Targets, in circumstances where those Targets had been given a warning notice of a proposal to issue such a direction against them along with other Targets in respect of whom the DP did determine to issue a financial support direction, is capable of being referred to the Tribunal by a person directly affected by it. This requires us to consider whether the determination not to exercise the power can properly be regarded as being part of "the determination which is the subject matter of the determination notice" as those words are used in s 96(3) and therefore capable of being referred to the Tribunal under that provision (the "negative determination point");

(3) Whether the fact that there had been no determination by the DP to exercise the power to issue a financial support direction against the Applicant Targets by 14 September 2010, the date on which the prescribed period under s 43(9) of the Act expired, meant that even if it were minded to do so, it is not open to the Tribunal to direct TPR that it was appropriate to issue a financial support direction against the Applicant Targets because such a determination would fall outside the prescribed period. This requires us to consider whether the time limit prescribed by s 43(9) continues to run once the matter has been referred to the Tribunal (the "time limit point"). We should add that allied to this point, the Trustees argued that the amendment to s 43(9) referred to in paragraph 33 above was fully in force as regards this reference so that since the relevant warning notice was issued prior to

the end of the prescribed period, the old wording of s 43(9) was of no relevance and if there had been any doubt as to whether the time limit continued to run that had now been resolved.

35. The question as to whether the Trustees are "directly affected" in the sense intended by the Act is closely allied to the question as to whether a negative determination is capable of referral, because if there is such a right the most likely persons to wish to refer it will be the Trustees, although in this case both the warning notice and the determination notice were also addressed to the Pension Protection Fund ("PPF") as a person "directly affected", presumably on the basis that any exercise of the power to issue a financial support direction could reduce any potential claim against the PPF in respect of the deficit in the Scheme. In this case the PPF has not made a reference.

36. If we were to conclude as a matter of principle that the Trustees were not "directly affected" by the determination the strike-out applications would succeed. On that basis we will consider that issue in general terms first, then if necessary, we will consider whether the position is different where the matter sought to be referred is the determination not to exercise the power to issue a financial support direction against particular targets.

The "directly affected" person point

37. As mentioned in para 31 above, the phrase "directly affected" person originates from ss 93 and 96. Perhaps surprisingly, the Act does not provide any guidance about who might or might not be "directly affected" by the exercise of particular regulatory functions. It leaves it to TPR to identify the relevant persons on a case by case basis, through the statutory notices that are issued in the course of following the standard procedure that must be adhered to by TPR when considering whether or not to exercise its regulatory functions. The relevant decisions would be made by the executive arm of TPR at the warning notice stage in identifying those who appear to it would be directly affected by the regulatory action under consideration, giving such persons a warning notice as required by s 96 (2)(a), and at the determination stage, by the DP, whose duty it is to identify those who appear to it would be directly affected by its determination as to whether to take the regulatory action under consideration, giving such persons a determination notice as required by s 96(2)(d).

38. It has been the practice to date of the DP to treat the trustees of any scheme as being "directly affected" by the determination to exercise the power to issue a financial support direction under s 43 or the power to issue a contribution notice under s 38, and to identify them as such in the relevant determination notices. In this case, the Trustees argued that they were clearly directly affected by any determination as to whether the power in s 43 should be exercised because of their duty to manage the Scheme, for whose benefit any financial support direction would be given. They argued that they are in fact the most directly affected other than the Targets. In particular, they submitted that most financial support given pursuant to a direction under section 43 would be implemented through the Trustees being a party to the arrangements. The definition of "financial support"

contained in s 45 includes making the members of the relevant employer's group jointly and severally liable for the whole or part of the employer's pensions liabilities in relation to the Scheme (see s45(2)(a)) or providing additional financial resources to the Scheme (see s 45(2)(c)) and clearly the Trustees, they argued, would be party to any such arrangements.

39. It is also clear that in the two reported cases relating to the exercise of another regulatory function by TPR, namely the power in s 38 to issue contribution notices (where the principles must be the same in relation to this point) it has been assumed that the trustees of a scheme are directly affected by a determination in relation to the exercise of that power, see *Desmond*, at para 5 and *Bonas* where at para 66 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".

40. Mr Spink invited us to challenge the accepted wisdom inherent in the practice of TPR to date and the approach in the decisions of the Tribunal referred to above. He submitted that in neither case had there been any argument on the point. In any event the comments in *Bonas* were clearly obiter dicta, because the trustees in that case were not seeking to make a reference. Furthermore, *Bonas* was a case on contribution notices and Warren J was referring to an example where a positive determination had been made to make a contribution notice against an individual who had not himself referred the matter to the Tribunal, rather than the situation in this case where, as far as the Applicant Targets were concerned, there had been a negative determination in respect of the different power in s 43.

41. Mr Spink's principal submission on the "directly affected" person point rests on the proposition that s 100 draws a distinction between those who are directly affected by the exercise of regulatory functions by TPR and those who have a lesser interest. Section 100(1) imposes upon TPR the duty to have regard to the matters set out in s 100(2) when, among other things, determining whether to exercise a regulatory function under the standard procedure. The 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. The contention was that the Trustees fell within (a) rather than (b) and TPR had complied with its duty by giving the Trustees the right to make representations on the warning notice but had been wrong to treat them as directly affected persons by naming them as such in the determination notice, purportedly as persons falling within s 96(2)(d). The essence of this proposition was that the Trustees should be regarded as having interests that equated in all respects with those of the scheme members. Consequently, insofar as the interests of the Trustees needed to be taken into account that would be achieved through the medium of s 100, rather than giving

them rights as persons who were "directly affected". Section 100(1) required TPR to have regard to the matters mentioned in s 100(2) when determining whether to exercise a regulatory function. In complying with its duty to have regard to the interests of the scheme members it would necessarily have regard to the interests of the Trustees whose interests were identical to those of the members.

42. TPR would discharge this duty by inviting the Trustees, as it did in this case, to make representations on the warning notice and taking those representations into account before making its determination. Indeed, Mr Spink argued that is what happened in this particular case as the warning notice was addressed to the Trustees in their capacity, to quote the terms of the warning notice, "as the representatives of the interests of the generality of the members of the scheme to which the exercise of the function relates in accordance with s 100(2)(a) of the Act….", rather than by reason of a determination that the Trustees were entitled to receive the warning notice as being "directly affected" within the meaning of s 96(2)(a). Whilst s 100 did not give specific power to include the Trustees as participants in the representations process, Mr Spink submitted that the rule in *A-G v Great Eastern Railway Company* (1880*)* 5 App Cas 473 provides that an express statutory power carries implied ancillary powers where needed. As stated by Lord Blackburn at p. 481 the rule says that:

> "…. Those things which are incident to and may reasonably and properly be done under the main purpose [of an enactment] though they may not be, literally within it, would not be prohibited".

Thus in this case Mr Spink contends that the power to include the Trustees in the process derives not from s 96(2)(a) but through a power ancillary to the duty in s 100(1).

43. Mr Spink also referred us to the observations of Briggs J in *Nortel & Lehman Brothers v the Pensions Regulator* [2010] EWCH 3010, the first instance decision arising out of the Companies Court application. In considering whether creditors of the insolvent company were "directly affected" 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".

Mr Spink argued that, by analogy, the creditors equated with the members of the Scheme, and their interests would be sufficiently represented by the Trustees being permitted to make representations before the DP, and the same could be achieved before the Tribunal through the use of its case management powers to allow the Trustees to participate.

44. Mr Spink therefore contended that the executive arm of TPR had been right to include the Trustees at the representations phase as representatives of the members rather than as persons "directly affected" and that the DP had been wrong to treat them as the latter when issuing the determination notice, without giving any proper consideration as to why it was correct to treat them as such.

45. In support of his submission that the interests of the Trustees equated to those of the members, Mr Spink argued that it was not clear what the direct effect on the Trustees was that entitled them to be regarded as "directly affected", and how it was different to the effect on the members. The Trustees' role in relation to the Scheme was purely administrative; as a matter of convenience it managed the scheme on behalf of the members and its prime responsibility was to hold the Scheme's assets. Those given the status of "directly affected" persons should be confined to those whose financial interests were affected directly by the exercise of the power, in this case the Targets.

46. In considering whether it was appropriate to regard the Trustees as "directly affected" Mr Spink submitted that it was important to consider the full opportunity that the Trustees had been given to make representations before the DP. He pointed to the fact that the Trustees had been able to adduce evidence to the DP, which was very useful to the DP and was relied on in the decision making process. The Trustees had been able to make telling forensic submissions as well as legal submissions which helped turn the matter in TPR's favour.

47. In the light of that Mr Spink submitted that there would be real unfairness if the Trustees were given a "second bite of the cherry" before the Tribunal. In principle as the Trustees had adopted many of TPR's own arguments TPR would in effect have a second bite as well in circumstances where, as was common ground, TPR could not make a reference in its own right. He pointed out, that, as determined by the DP, TPR had been unable to provide any convincing evidence that would make it appropriate to issue a financial support direction against the Applicant Targets and it was unfair that there should be a second opportunity to do so through the medium of a reference by the Trustees, effectively stepping into the shoes of TPR.

48. In our view, which is discussed in more detail in paras 49 and 50 below, the way the Act is drafted, which is to leave it to TPR to decide in the course of its decision making process who is to be regarded as "directly affected" by its proposals or determinations, means that it is necessary to consider on the facts of

each particular case whether any particular person can properly be regarded as "directly affected" or not.

49. The effect of s 96 is that the primary responsibility for assessing who is to be considered to be "directly affected" in the case in question is that of TPR, which must so decide during the course of following the standard procedure. (See s 96(2)(a) in respect of the warning notice stage and s 96(2)(d) in respect of the determination notice). There is a role for the Tribunal in that s 96(3)(b) gives it power to determine if any other person than those identified by TPR can be regarded as directly affected. This would cover a situation where, for example, a party who had not been treated as "directly affected" by a determination by the DP but believed that he should have been could make an application to the Tribunal to be added as an interested party under rule 9. TPR's decision at warning notice stage (which is taken by the executive arm of TPR) to treat a person as "directly affected" by its proposals would not in itself be capable of reference to the Tribunal and the persons concerned would have the right to participate in the representations phase of the decision making process before the DP. It is for the DP to determine who are to be regarded as "directly affected" by its determination and issue a determination notice accordingly, having considered any representations made to it. It is then open to a party to challenge before the Tribunal the determination of the DP to treat a person as directly affected, as the Applicant Targets are doing here, by way of a strike-out application pursuant to rule 8(2)(a) or rule 8(2) (c).

50. Against that background we turn to the position of the Trustees in this case. As pointed out by Mr Spink, when issuing the warning notice the Trustees had not been treated as "directly affected" but as persons falling within s 100(2)(a). Neither the Trustees nor TPR were able to explain why that had been the case, and there is nothing in the warning notice itself which indicates the reasoning behind that decision. As appears from the determination notice, the DP took a different view from the TPR's executive and did treat the Trustees as "directly affected" when issuing that notice. In such circumstances it appears to us that it is incumbent upon the DP to consider carefully why it is taking a different view, consider any representations on the issue and set out its reasons for doing so when issuing its determination. Paragraph 46 of the reasons of the DP issued on 27 September 2010 refers to the issue, responding to an application by the Weil Targets that the Trustees should not be permitted to give evidence before the DP. It states as follows:-

> "Originally the application was put forward in part on the basis of the Trustees not being entitled to give evidence at all because they were not 'Directly Affected Parties' or covered by various directions. However, Mr Spink did not pursue this line of argument – rightly, it appears to us. The Warning Notice was served on the Trustees by TPR, thereby identifying them as a "directly affected" person under Pensions Act 2004 s.96(2)(a). If this was not enough, the Panel named them as 'directly affected parties', under its directions of 2 and 16 July 2010, thereby identifying them as such for the purposes of s.96(2)."

51. Two points arise out of this. First, it reveals that Mr Spink had the opportunity to pursue the argument that the Trustees were not "directly affected" before the DP but did not do so. Mr Spink's explanation for this before us was that this was not because the issue had been conceded, but because the decision had already been made through the DP's directions of 2 and 16 July 2010, to identify them as "directly affected" and submit evidence - which they had already done leaving his clients with a fait accompli. Secondly, it reveals that the DP had misread the warning notice which had not identified the Trustees as a "directly affected" person.

52. In the light of this, it is not clear what consideration the DP gave to the issues in coming to its view that the Trustees were "directly affected". We have not seen the directions of 2 and 16 July 2010, but in view of the fact that the DP was proceeding in the mistaken belief that the Trustees had been identified as "directly affected" in the warning notice, it seems to us unlikely that the issue will have been considered in that context. In a case where the DP was minded to take a different view on who was "directly affected" from the executive in its warning notice, it seems to us that these directions would have given the DP an opportunity to set out its reasons why the Trustees were to be identified as "directly affected", opening up the opportunity for representations to be made on the issue in the hearing before the DP.

53. Consequently in our view it is appropriate in this case to examine the substantive arguments as to whether the Trustees should have been identified as a "directly affected" person in this case.

54. We do not accept Mr Spink's submission that there is an identity of interest between the Trustees and the members of the Scheme such that the Trustees should be regarded as coming within the scope of s 100(2)(a) alongside the members rather than as persons "directly affected" within s 100(2)(b). We reject Mr Spink's picture of the Trustees' duties being purely administrative with no financial interests of their own. The Trustees have a clear duty to monitor the financial position of the Scheme in order to come to a view as to whether its assets are sufficient to meet the members' current and future entitlements. In common with all trustees their primary duty is to preserve the Trust's assets and where the exercise of TPR's functions (such as the issue of a financial support direction) would potentially enhance the value of the Scheme's assets they have a clear direct and personal interest in the outcome of any determination as to whether the powers would be exercised.

55. The passages in *Nortel* quoted in para 43 above were relied on by Mr Spink to show that the only persons who could be regarded as directly affected were the Targets. Our view is that these passages provide a clear analogy between the position of creditors of an insolvent company whose position Briggs J was considering in that case as potentially "directly affected" as opposed to the insolvent company itself, and that of the members of the Scheme, with the position of the Trustees being equated to the "office holders", that is the insolvency practitioners who represent the insolvent company. Just as Briggs J had no difficulty in contrasting the creditors as persons being indirectly affected

with the "office holders" in the insolvency process being directly affected, so we have no difficulty in regarding the Trustees as being "directly affected" within the meaning of s 102(2)(b) as opposed to the members of the scheme who are to be regarded as falling within s 102(2)(a) .

56. We reject Mr Spink's submission that the making of a financial support direction has no direct effect on the Trustees. Having found that the Trustees have an interest that is to be distinguished from that of the members on the basis of their duty to preserve the assets of the Scheme, it is difficult to see how they would not be directly affected by the exercise of the power which is likely to result in those assets being enhanced in value. It is the mirror image of the effect on the Targets against whom it is exercised, they are directly affected by virtue of the liability that is imposed upon them and the Trustees are directly affected by the creation of a potential benefit that is conferred upon them.

57. We find Mr Spink's submissions on the "second bite of the cherry" point summarised in para 47 above somewhat contradictory. On the one hand he argues that it is unfair to allow the Trustees to make submissions before the Tribunal as a "directly affected person" on the question as to whether TPR was wrong not to have included a particular Target as the subject of a financial support direction when TPR itself is not able to do so, yet he concedes that it was right that the Trustees were able to participate in the proceedings before the DP as the representative of the members under s 100(2)(a) of the Act. This was on the basis that the DP was right to allow the Trustees to participate so as to comply with TPR's duty to have regard to the interests of the generality of the members of the Scheme when considering whether to exercise its regulatory functions.

58. Mr Spink also stated that it would be open to the Tribunal to give to the Trustees a right of audience using its case management powers to ensure that they were given the same opportunity as they had been afforded before the DP, in their position as the representative of the members whose interests regard was to be had pursuant to s 100(2)(a).

59. We have a number of difficulties with this argument. First, the Rules and in particular Rule 5, which sets out the Tribunal's case management powers, do not envisage the participation of a person in the proceedings unless he is a party. The power to add parties to the proceedings is set out in rule 9(7) which provides:

> "The Upper Tribunal may give a direction adding, substituting or removing a party as an appellant, a respondent or an interested party".

60. An "interested party" is defined by Rule 1(3)(a), 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").

61. This is a financial services case, so the question is whether the person seeking to be joined as an "interested party" is one who could himself have made

a reference, on the basis that the position of the respondent, in a pensions case is reserved for TPR and the role of appellant has no place in a financial services case. As referred to in para 31 above, references to the Tribunal in pensions cases may only be made by those who are "directly affected" by the determination in question (ss 96(2) and (3)), and Mr Spink's submission is predicated on the basis that it is wrong to regard the Trustees as "directly affected".

62. Secondly, even if the Trustees were able to participate in the proceedings on the basis suggested by Mr Spink, it is hard to see how this overcomes the unfairness he contends that results from the Trustees being able to have a "second bite of the cherry". It is difficult to see how, once the Trustees had been given a seat at the table, the scope of their submissions and the evidence they sought to present could be restricted in some way to take account of their status being less than that of a person "directly affected" and Mr Spink made no submissions that this should be the case. That being so, it becomes a distinction without a difference.

63. Thirdly, and more fundamentally, we see no basis for the proposition that the question as to whether a person has been given adequate opportunity to make representations before the DP should be taken into account in assessing whether he is to be regarded as "directly affected" or not. As is apparent from our analysis of the position in paras 54 to 56 above, that question is to be determined by looking at how a potential party is affected by the DP's determination. If on that analysis it can be said that he is "directly affected" then he has the right to refer regardless of what has happened before the DP.

64. Moreover this conclusion is consistent with the differing roles of the DP and the Tribunal. The DP's determination is made as an administrative rather than a judicial decision. This was summarised succinctly by the DP in paragraph 50 of its reasons for its determination in responding to Mr Spink's submission that it was unfair for his clients to face effectively two prosecutors, with the Trustees acting in conjunction with, and as back up for, TPR as follows:

> "First in regard to the '2 prosecutors' argument, this is simply a mischaracterisation of what this process is. There is no 'prosecutor'. Whilst TPR may issue the Warning Notice and present the case and needs to prove on the balance of probabilities what it alleges, the Panel is not a judge or court. Rather, it is an executive committee of a regulatory body which has a separate function to the regulator as a whole. Our task is to look at the case on the facts available to us, and it would be positively wrong for us to ignore evidence which was before us simply on the basis of who it came from. When Mr Spink submitted that his clients should only have to answer the case which is put in the Warning Notice, and any evidence in support should be served with that, he was ignoring the rights of the Trustees, as is reflected in our procedure, for them to present evidence in support of their and their beneficiaries' position. To hold otherwise would deny a right of audience to the very people TPR is seeking to protect".

65. It is also important to point out the limitation on the DP's powers compared to those of the Tribunal which follow on from its status as an arm of TPR rather

than a judicial body. There are certain features of the DP's process which are similar to those of a judicial body, such as its practice of hearing oral evidence and allowing cross examination, in contrast to the corresponding body within the Financial Services Authority, the Regulatory Decisions Committee (RDC) which has fewer judicial features. Warren J in paragraph 40 of the decision in *Bonas* stated:

> "There may be some reluctance on the part of the Tribunal to hear oral evidence and cross examination if that has already taken place in front of the Panel whose findings of fact it may consider there is no need to review".

Nevertheless, the DP has no power to compel the attendance of witnesses or the disclosure of documents. It only has power to determine the matter on the basis of the evidence that is put before it by those who appear and the representations that are made to it.

66. 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 TPR to take: see ss 103(3) and (4). As Warren J stated in *Bonas* at paras 37 and 38, while the Tribunal would accord respect to the DP's determination it had to make its own decision on the evidence before it, which might well include material not before the DP, and on the arguments presented to it, which might differ from those advanced before the DP.

67. Parliament has decided that those directly affected by the DP's determination have the right to have the matter considered afresh by a wholly judicial tribunal. It would seem odd if that Tribunal were to be more restricted than the DP in deciding to whom it might give an audience, and should be able to exclude some on the basis that they had already exercised a right of audience before a body with more limited powers to examine evidence. The DP, in the passage from its reasons for determination quoted in para 64 above, was absolutely clear that the Trustees should have a right of audience before them and we conclude, assuming the DP was not open to challenge in its decision to identify the Trustees as directly affected by its determination, that they should have the same right before the Tribunal.

68. Mr Stallworthy for the Trustees put forward arguments based on the Human Rights Act 1998 and Article 6 of the European Convention on Human Rights (the "Convention") to the effect that the Trustees' potential right to receive the benefit of a financial support direction was a civil right for the purposes of the Convention and, in accordance with Article 6, the Trustees were entitled to have that civil right determined by "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …." He submitted that on the basis that the DP need not meet these requirements, but the Tribunal did, the Act should be construed so as to give the Trustees a right of audience before the Tribunal.

69. We have not found it necessary to decide this issue as our conclusion is that the domestic legislation is sufficiently clear in this case to give the Trustees the

rights to which Mr Stallworthy contends they are entitled. We were urged by Mr Spink not to make any determination on whether the DP met the requirements of Article 6 of the Convention, in that there has been no detailed examination of the constitution of the body and the manner in which it conducts its proceedings in the hearing of the applications before us. We do not need to do so for the purposes of this decision, but we observe that a formidable obstacle that those who argue that the DP is an "independent and impartial tribunal established by law" for the purposes of Article 6 of the Convention will have to overcome is that, by virtue of s 9 , the chairman and members of the DP are appointed by TPR (which is inevitable as s 9(1) requires TPR to establish the DP as a committee of itself) and TPR is necessarily a party in the proceedings before the DP. Normally it is the case that the fact that the members of the body in question have been appointed by one of the parties to the case prevents the body being regarded as "independent and impartial".

70. Our conclusion on the "directly affected" person point is therefore that on the facts of this case, the DP was right to conclude that they were directly affected when allowing the Trustees to make representations before it on the warning notice and in issuing its determination notice, and the executive arm of TPR was wrong not to do so when issuing the warning notice. To that extent we therefore follow the reasoning of Warren J in para 66 of the decision in *Bonas* quoted at para 40 above on the basis that the underlying principles for contribution notices (which were the subject of *Bonas*) and financial support directions are the same in this respect. Although we have said that the question as to whether the Trustees are to be considered to be "directly affected" by the determination to exercise a regulatory function is to be determined by TPR on a case by case basis we do not expect that it will be difficult for TPR to conclude that a determination to issue a particular contribution notice or financial support direction will directly affect the Trustees of the Scheme in question, and those who seek to argue otherwise in the Tribunal will have a heavy burden to discharge.

The Negative Determination Point

71. As indicated in para 35 above, this point is closely allied with the "directly affected" person point. The issue as to whether a reference can be made by the Trustees in respect of a determination not to exercise the power to issue a financial support direction needs to be answered by considering two questions, first, as to whether inherently a determination *not* to exercise the power in respect of a particular Target is capable of reference at all, and secondly, if it is, whether the Trustees (in this case) could be said to be "directly affected" by the determination *not* to exercise the power and are therefore able to make a reference.

72. As indicated in para 47 above, it is common ground (and we agree) that TPR itself cannot refer a negative determination to the Tribunal. Although the decision to issue the determination notice was made by the DP which operates separately from the executive arm of TPR, the DP is a committee of TPR (see s 9(1)) and is not a separate legal entity. Since neither the Act nor the Rules make provision for TPR to make a reference, where for example, the executive arm of

TPR disagrees with the determination of the DP not to exercise a regulatory function, there is no power for it do so. This was confirmed by Warren J in *Bonas*: see paras 18 and 199 of the decision.

73. Mr Spink's submissions on this point rest on the proposition that "the determination which is the subject matter of the determination notice" as referred to in s 96(3), and which by that provision is capable of being referred to the Tribunal, must be read in conjunction with the provision which sets out the requirements of the relevant regulatory function, whose determination to exercise gives rise to the right to make a reference. In this case the regulatory function in question is the power to issue a financial support direction, the requirements of which are set out in s 43. In that section, Mr Spink contends, the language points inevitably to the conclusion that a determination to exercise the power against a particular target is the only determination that is relevant for this purpose.

74. Mr Spink submits that the s 43 power to issue a financial support direction is limited by s 43(9), which sets out a time but which ends with a "determination *to exercise"* (emphasis added) the power. Thus the determination which can be the subject of a reference is thus expressly defined in terms of its *exercise*: it is a determination to exercise the power, and not a determination not to exercise it. In addition, Mr Spink contends, where s 43 does address TPR's discretion as to whether or not to issue a financial support direction as it does in s 43(7), it does not use language of making a determination but rather refers to "the Regulator, when deciding … whether it is reasonable to impose the requirements of a financial support direction on a particular person….."

75. On this analysis, Mr Spink submits, the same meaning must be accorded to the same words in s 96. For the purposes of the standard procedure, a "determination" is a "determination to issue", and does not include a determination not to issue, a financial support direction. Accordingly, the reference in s 96(2)(d), to the giving of notice of "the determination" to such persons as appear to be directly affected (defined as a "determination notice") should be read as referring to a "determination" as defined by the section which confers the jurisdiction, that is s 43 . There is thus only a determination notice (and thus an obligation to serve it on directly affected persons) where TPR has decided to impose some liability. Similarly, and crucially, the "determination" in s 96(3) which may be the subject of a reference must be a determination to issue a financial support direction. This is reinforced by the wording of s 96(5) which relates to circumstances in which s 96(3) applies and makes express reference to a "determination to exercise a regulatory function".

76. Mr Spink conceded that Warren J came to a different position in *Bonas*. In para 20 of that decision Warren J stated:

> "The determination referred to in section 96(2)(c) is clearly the decision whether or not to exercise the regulatory function concerned".

Warren J also stated, in para 56 of the decision:

> "Notice of the determination" must be given (see section 96(2)(d)) to the persons directly affected by it, all of whom should already have been given a warning notice in advance of the determination".

77. Mr Spink argued that Warren J should have adopted the approach of reading s 96(2)(c) and s 96(3) in conformity with the provision setting out the regulatory function in question (in that case to s 38) rather than reading s 96(2)(c) together with s 96(2)(d) . The former provision Mr Spink contends is quite different to s 96(2)(d) and is merely dealing with the warning notice stage; with the consideration of the representations made by the target on the warning notice and, following such consideration, with the decision to be made by TPR as to whether or not to proceed to a determination notice. It is only if TPR decided to issue a determination notice (referred to in s 96(2)(d) as "the giving of notice of the determination") that such notice need be served. Hence s 96(2)(d) (and s 96(3)) are, like s 43, inextricably linked to a decision *to* take (not *whether* to take) regulatory action, and s 96(2)(d), relied upon in *Bonas*, does not provide any support to the contrary.

78. In addition, Mr Spink submitted that the Rules did not envisage the reference of a determination not to exercise a regulatory function. Paragraph 4 of Sch 3 to the Rules makes provision for the respondent (who in a financial services case is always the relevant regulator) to file a statement of case. Paragraph 4(2) provides:

> "the statement of case must
>
> (a) identify the statutory provisions providing for the referred action,
>
> (b) state the reasons for the referred action,
>
> (c) set out all the matters and facts upon which the respondent relies to support the referred action"

79. The fact that this paragraph envisages that the statement of case will support the action taken by the respondent makes no sense, Mr Spink contends, if the matter to be referred is a determination not to exercise the power against a particular person.

80. Whilst we agree with Mr Spink that it is necessary to read s 96 together with s 43 in order to come to a conclusion as to what can correctly be regarded as the "determination which is the subject matter of the determination notice" as that phrase is used in s 96(3), Mr Spink's analysis does so on a limited and narrower basis, by focussing only on ss 96(2)(c) and (3) and linking those provisions only to ss 43(7) and (9) to come to a conclusion that a determination not to include particular targets as subjects of a financial support direction is not capable of being referred to the Tribunal.

81. In our view it is necessary to construe the sections together by looking at all the relevant provisions of both sections, not just those referred to by Mr Spink. Our starting point is s 43(2), the opening words of which state "The regulator may issue a financial support direction in relation to such a scheme", the word "such"

being a reference to the type of scheme referred to in s 43(1) which is capable of being subject to a financial support direction. In our view these words make it clear that what is contemplated is a single financial support direction being given in relation to a particular scheme rather than multiple directions. This is reinforced by the opening words of s 43(3) which, in defining the essence of a financial support direction, state that "a financial support direction in relation to a scheme is a direction which requires the person or persons to whom it is issued to secure …". These words again are based on the concept of a single direction and by referring to the subjects of it as "person or persons" indicates that a single direction can be made to one or more persons, rather than the section operating through the issue of a number of individual directions where it is proposed to include more than one person within the scope of the determination. If the section contemplated multiple directions it could have simply referred to "a person".

82. In the same vein, s 43(4) reinforces the point by making it clear that a financial support direction may be issued to one or more persons, s 43(5) refers to the conditions that must be met if any person is to be included within the scope of the direction, s 43(7) goes further by imposing specific duties on TPR when it is deciding "whether it is reasonable to impose the requirements of a financial support direction on a *particular* person" (emphasis added) and s 43(8) requires that "a financial support direction must identify all the persons to whom the direction is issued".

83. It is to be noted that s 43 is in sharp contrast to s 38, which deals with contribution notices. Here there is no equivalent of s 43(4) and the section only refers to the issue of a contribution notice to a single person, thus envisaging that if the DP determined in relation to a particular scheme to issue a contribution notice to a number of persons, separate contribution notices would be necessary. Consequently even if for convenience the DP decided to consider representations on the warning notices given in relation to a number of contribution notices in respect of a scheme at a single hearing and issued a single determination notice setting out its determination in relation to each target there would be separate determinations in respect of each notice for the purposes of ss 96(2)(c) and (3). This was affirmed by Warren J in *Bonas* to be the case: see para 54 of the decision.

84. In the light of this analysis on s 43, on which we can conclude that the exercise of the power under that section will result in the issue of a single financial support direction, we turn to s 96. The starting point is s 96(2) which sets out the "standard procedure" which must be followed by TPR in considering whether to exercise any of its regulatory functions, which in the case of a proposal to exercise the power to issue a financial support direction, will mean the executive arm of TPR up to the stage that a warning notice is issued and the DP thereafter up to the point when a determination is made as to whether to exercise the function.

85. Section 96(2)(a) sets out the first stage of the standard procedure which is the giving of notice (the warning notice) to such persons as it appears to TPR would be directly affected by the regulatory action under consideration. In this

case, as we have concluded in para 70 above, TPR was correct in giving the warning notice to each of the Targets as persons "directly affected" but incorrect in not treating the Trustees as such.

86. Section 96(2)(b) gives those identified as "directly affected" the opportunity to make representations, which will be to the DP, following which it is the duty of the DP to consider those representations pursuant to s 96(3)(c) and determine "whether to take the regulatory action under consideration".

87. Pausing there, to link s 96(2)(a) (b) and (c) together with s 43, it is clear on the basis of our conclusions on the characteristics of a financial support direction set out in para 84 above, that what is under consideration is whether to issue a financial support direction and if so, against which of the Targets named in the warning notice.

88. In our view the issue of the warning notice, giving details of the Targets against whom regulatory action is proposed, is critical in establishing both the permitted boundaries of the DP's determination and of what can be regarded as the "subject matter of the determination" that, pursuant to s 96(3), is capable of being referred to the Tribunal. The boundaries may change in relation to those who are to be regarded as "directly affected" to the extent that the DP determines that persons not treated as such in the warning notice are to be so for the purposes of the determination notice. Clear authority for this proposition in relation to the DP is to be found in *Bonas*. In para 48 of that decision Warren J referred to s 95(2) which defines the question of what is the "regulatory action under consideration" for the purposes of s 96, as being "the exercise of the one or more regulatory functions which the Regulator considers it may be appropriate to exercise", and stated in para 49:

> "It is that regulatory action which must be the subject matter of the warning notice for which the standard procedure must provide under section 96(2)(a). Section 95(2) and section 96 (2)(a) must clearly be read together. They require the identification of regulatory functions which the Regulator considers it may be appropriate to exercise and the giving of a warning notice in relation to such function".

Further support is to be found in para 82 where Warren J said, when considering the extent to which it is possible for the DP to rely on evidence which was not relied on in the warning notice:-

> "That sort of case is entirely different from one where the warning notice fails to identify and address the exercise of a regulatory power which the Regulator subsequently wishes to see exercised. In the case of a failure to identify and address a particular regulatory power, the effect of section 96 is to preclude a determination by the Panel to exercise that power for the reasons discussed above"

And, in para 84:

> "The position is the same in my view, on a reference to the Tribunal. Once the relevant determination has been identified (for instance a determination to issue a contribution notice to a person in a specified sum) it is open as a matter of jurisdiction for the Tribunal to rely on any act identified in the evidence before the Tribunal to support the regulatory action originally sought in the warning notice. But it is not open to the Tribunal to decide that regulatory action not identified in the warning notice should be taken".

91. It follows logically from that analysis that the "determination" referred to in s 96(2)(c) must be the determination of whether it is appropriate to exercise the regulatory function identified in the warning notice and inevitably that must be whether or not it is appropriate to issue a financial support direction, and, if so, to whom that direction should be addressed. This again is consistent with Warren J's analysis in *Bonas* where he stated in para 55, having considered whether in the case of contribution notices determined to be issued to a number of persons in relation to a scheme each is to be regarded as a separate determination:

> "I add that whichever approach is correct the "determination" within the meaning of section 96 is the determination whether to take the regulatory action under consideration, in the present case whether to issue a contribution notice".

92. It follows from that conclusion that the persons to whom the determination notice should be given under s 96(2)(d) should include all of those to whom the warning notice was given. Again there is authority for this in *Bonas* where Warren J said in para 56:

> "Notice of the determination must be given (see s 96(2)(d)) to the persons directly affected by it, all of whom should already have been given a warning notice in advance of the determination. A person directly affected by a particular determination made by the Panel must be given notice of that determination, but he is not entitled to be given notice of any other determination which does not directly affect him".

93. It is inherent in Mr Spink's submissions that there is no need to give a notice under s 96(2)(d) to any Target who is not made the subject of a determination to issue a financial support direction. On his analysis s 96(2)(d) is inextricably linked to s 43(9) which refers only to a determination to exercise the power, and s 96(2(c) is not to be linked as it merely deals with the warning notice stage. We reject that submission. In our view s 96 must be read in its entirety and in particular s 96(2)(c) and (2)(d) must be read together. As a result the relevant determination is whether it is appropriate to exercise the power to issue a financial support direction and, if so, to whom it should be addressed, in the light of our conclusion that what is envisaged by s 43 is a single financial support direction. On this basis it is not correct to conclude that the determination not to issue a financial support direction against a particular Target can be severed from the determination to do so against others; there is a single determination arrived at by considering the proposals set out in the warning notice through the standard procedure.

94. Moving on to consider s 96(3) in the light of that analysis, the inevitable conclusion is that "the determination which is the subject matter of the determination notice" must be what is determined in relation to the proposals that were set out in the warning notice and upon which the determination has been made, whether that be a determination to exercise the power against all, some or none of the Targets against whom regulatory action was proposed in the warning notice.

95. Finally, as was submitted by the Trustees, s 96(5) envisages that a determination which is the subject matter of a determination notice need not be the exercise of the power. If the contrary were the case then it would not be necessary to preface the prohibition in that provision on exercising the power pending a tribunal reference with the words "where the determination which is the subject matter of the determination notice is a determination to exercise a regulatory function", because that would apply, by definition, in all cases where a reference was possible.

96. Mr Spink's analysis would lead to some anomalous results, as was pointed out by Miss Agnello in her submissions on behalf of TPR. If, for example, at the warning notice stage it was proposed to issue a financial support direction against A, B and C, but after having representations the DP determined only to issue the direction against B and C, B and C are, on Mr Spink's analysis, clearly directly affected as they will have to bear the whole of the financial burden of the direction, and could refer the determination to the Tribunal on the basis that it was wrong to exclude A and thereby increase their potential exposure. A, however, could not refer the matter because a negative determination was made against him and he cannot therefore be regarded as "directly affected", and only persons who are identified as such have a right of reference. The matter would then proceed before the Tribunal where it might be decided that the DP was wrong to exclude A, without A being able to participate in the proceedings.

97. Such a conclusion would go against the principle we identified in para 67 above, namely that Parliament has decided that those directly affected by a determination of TPR should have the right to have that determination reviewed by the Tribunal. In our view that objective cannot be achieved unless all those who were able to participate in the proceedings before the DP are also able to do so before the Tribunal. To decide otherwise would give the Tribunal a lesser jurisdiction than the DP.

98. Applying the same principles leads to the conclusion that the Trustees should be regarded as being directly affected by a determination not to exercise the power to address a financial support direction to a particular person in the same way that we concluded they would be by an exercise of the power against a person. The reasoning set out in para 54 above, which justifies the Trustees being treated as directly affected on the basis of their duty to preserve the Scheme's assets, is equally applicable whether the determination is positive or negative against a particular person. In the same way as A in the example given in para 96 above is directly affected by a decision not to include him as a target of a financial support direction such that he should be allowed to participate in Tribunal

proceedings when his exclusion is challenged, so the trustees of the scheme in that example should likewise be able to do so where the outcome of the proceedings could be to strengthen the support available to the scheme by the inclusion of a further target.

99. This reasoning is consistent with the observations of Warren J in *Bonas* referred to in para 39 above. He was referring to the right of the trustees of the scheme to refer the determination to issue a contribution notice that the trustees felt was too lenient. On the basis of our analysis that there is a single financial support direction, a determination to exclude from that direction targets who had been included in the warning notice could be regarded by the Trustees as being too lenient.

100. The same reasoning was adopted by the Financial Services and Markets Tribunal (FSMT) in the case of *Jabre v Financial Services Authority* (FIN 2006/0006). The scheme of the legislation under the Financial Services and Markets Act 2000 (FSMA) in relation to decision making by the Financial Services Authority (FSA) and references to the tribunal (which since 2010 have been to this Tribunal which took over the functions of the FSMT) are similar in many respects, in that under FSMA if the FSA wishes to exercise its disciplinary functions it must first set out its proposals in a warning notice on which the subject has the right to make representations to the RDC, following which a decision of the RDC that regulatory action should be taken gives rise to the right of the subject to refer the matter to the Tribunal.

101. At the relevant time, section 133(4) of FSMA provided:-

> "On a reference the Tribunal must determine what (if any) is the appropriate action for the Authority to take in relation to the matter referred to it".

In that particular case the warning notice issued to Mr Jabre proposed to impose a penalty on him for market abuse and also to withdraw the approval given to him by the FSA under s 59 of FSMA that allowed him to perform certain functions for his employer, a firm regulated by the FSA, on the basis that his actions meant that he was not fit and proper to perform those functions.

102. Having considered Mr Jabre's representations the RDC decided to maintain the financial penalty but declined to withdraw Mr Jabre's approval and issued a decision notice accordingly.

103. When Mr Jabre referred the decision to impose the financial penalty to FSMT, the FSA in its statement of case argued for Mr Jabre's approval to be withdrawn in addition to the imposition of the financial penalty. Mr Jabre argued that it was not open to the FSMT to take that course because it did not form part of the "matter" referred to the tribunal as it was not provided for in the RDC's decision notice. FSMT decided that the "matter" referred was not the decision as expressed in the decision notice, but it was the circumstances on which the decision is based that fall to be considered and evaluated; it was for FSMT to

decide what was the appropriate action to take in the light of those matters and any further relevant evidence presented to it.

104. The decision in *Jabre* therefore provides strong support for the proposition that on a reference a decision not to exercise a regulatory function can form part of the "matter referred". Likewise, it supports the finding in *Bonas* that the trustees of a scheme can refer a determination that they find too lenient.

105. We now deal with Mr Spink's submission that the Rules are ill suited to a situation where TPR seeks to argue for a more extensive exercise of a regulatory function than that determined by the DP, on the basis that para 4(2) of sch 3 to the Rules requires its statement of case to set out, the matters and facts on which it relates "to support the referred action".

106. This point was also dealt with in *Jabre*, where the relevant rule applicable to FSMT was very similar to para 4(2). Stephen Oliver QC (as he then was) dealt with this issue at para 35 of the decision as follows:

> "In the first place, whatever the meaning of the Rules, they do not define the jurisdiction of this Tribunal. This is covered by section 133. Rule 5(1) deals with the contents of the statement of case and not the jurisdiction of the Tribunal. In the second place the Authority's statement of case does support the referred action in that it proposes, consistently with the decision notice, that action be taken by the Tribunal under Part V of the Act for Mr Jabre's failure to perform his regulated activities and under Part VIII for market abuse".

107. The same judge dealt with the same issue in *Desmond*, approving a similar conclusion by Warren J in *Bonas* at para 71 of that decision in the following terms:

> "The rules do not, as Warren J recognised in paragraph 71 in *Bonas*, determine the statutory authority of the Tribunal. They cannot therefore be read as cutting down the effect of the primary legislation. Properly interpreted, I think the expression "support the referred action" and "support of the referred action" cover all facts, matters and documents brought into the reckoning in determining the referred action, whether those facts, matters and documents were explicitly relied upon by the Panel or not. They "support" the determination in the sense of being underlying evidence and considerations".

108. In our view it is correct to follow the reasoning in these cases on this point and therefore we do not believe that the Rules affect the position.

109. Our conclusion on the negative determination point is therefore that the determination that is the "subject of the determination notice" and which pursuant to s 96(3) is capable of being referred to the Tribunal is the single determination of the DP to exercise the power to issue a financial support direction against 6 of the Targets as identified in para 13 above and not to issue such a direction to the remaining Targets. This is subject to our conclusions on the time limit point to which we now turn.

The time limit point

110. The effect of our findings on the negative determination point is that the boundary defining the subject matter that is capable of reference is fixed by reference to the proposed regulatory action set out in the warning notice. During the hearing we used the analogy of a "box" which was passed to the Tribunal on a reference containing the relevant material that would form the subject matter of the reference. At this stage of our consideration of the issues the analogy leaves us with a box that still has one side open. The question is whether that box becomes closed by the fact that there was a determination to exercise the power to issue a financial support direction to a limited number of Targets within the prescribed period as determined by s 43(9) and which ended on 14 September 2010. Alternatively, was the box still open because there had been no determination to exercise the power against the Applicant Targets within the prescribed period, and the power could no longer be exercised because that period had long expired and there was no power to add them to the direction through a variation of the determination that had been issued, because any variation would be treated as a fresh exercise of the power?

111. Mr Simmonds took the lead for the Applicant Targets on this issue. His submissions rest on the proposition that the determination to issue a financial support direction under s 43 may only be made within 2 years of the "relevant time" determined by TPR in accordance with s 43(1), the "relevant time" being the date at which it must be judged whether:

> (1) the relevant employer is a "service company" or is "insufficiently resourced"; and
>
> (2) the relevant target is a person falling within s 43(6) (in this case, a person who is connected with or an associate of the relevant employer).

112. Consequently, the DP having determined (on 13 September 2010, the day before the end of the prescribed period) that a financial support direction should not be issued against the Applicant Targets it is now too late for TPR, pursuant to a direction made by the Tribunal under s 103(5), to issue a financial support direction against these Targets.

113. Mr Simmonds contended that the correct analysis on this point is as follows:-

> (1) The "relevant time" for the purposes of s 43(2) and (5) is 14 September 2008, this being the date determined by TPR in Appendix 2 to the warning notice.
>
> (2) It follows from s 43(9) that the last day on which it was permissible for TPR to determine to exercise the power to issue "the financial support direction in question" was 14 September 2010.

(3) The only financial support direction which TPR determined to issue on 14 September 2010 was one against the six Targets referred to in paragraph 5 of the Determination Notice.

(4) Even if the Tribunal were to be persuaded (on the substantive merits) that appropriate action for the TPR to take "in relation to the matter referred" to it (as that phrase is used in s 103(4)) is to determine to exercise the power to issue a financial support direction against the 38 Targets referred to in paragraph 4 of the Determination Notice (or any of them), the Tribunal may only "remit the matter to TPR with directions to give effect to the Tribunal's determination (s 103(5)).

(5) However, the powers of TPR are limited to those conferred on it under the Act. The Tribunal plainly cannot direct the TPR to do something which TPR itself has no power to do under s 43.

(6) TPR could not determine to exercise the power to issue a financial support direction against any of the Applicant Targets (being "the financial support direction in question" for the purposes of s 43(9)) because such a determination would fall outside the prescribed period.

(7) By way of elaboration of (6) above, there are potentially two courses which might be directed by the Tribunal, namely:

(i) a determination to issue a fresh financial support direction against some or all of the Applicant Targets;

(ii) a determination to substitute for the financial support direction made against the six Targets one against those six and some or all of the Applicant Targets.

However, course (i) would plainly be prohibited by s 43(9). By the same token, course (ii) would also be prohibited because a financial support direction against up to 44 Targets is self-evidently a different financial support direction from one against 6 Targets. In any event, it cannot sensibly be suggested that Parliament envisaged the statutory time limit applying differently depending on whether course (i) or course (ii) was adopted.

114. Mr Simmonds contends that this analysis is entirely consistent with the analysis and conclusions reached in *Desmond*. That case concerned a contribution notice under s 38 rather than a financial support direction under s 43.

115. The facts of *Desmond*, so far as relevant, were that the DP determined to issue contribution notices against Mr Desmond and Mr Gordon but did not do so against Mrs Desmond, in respect of whom a warning notice of a proposal to issue such a notice had previously been given. The trustees of the relevant scheme referred the refusal to issue the contribution notice against Mrs Desmond to the

Tribunal. The relevant legislation (being the Northern Ireland equivalent of s 38(5)(c)) provided at the relevant time, in wording that is in parallel terms to the limit imposed in respect of financial support directions in s 43(9), that an act or failure in respect of which a contribution notice may be given must be either:

> "(i) an act which occurred during the period of six years ending with the determination by the Regulator to exercise the power to issue the contribution notice in question, or
>
> (ii) a failure which first occurred during, or continued, for the whole of part of that period".

116. This period had not expired at the time of the DP's determination but had expired by the time the trustees made their reference.

117. Sir Stephen Oliver QC decided that Mrs Desmond's application to strike out the reference succeeded on the time limit point. His reasoning was as follows at paras 34 to 36 of the decision:

> "34. I have already observed that Article 34(3) provides that the Regulator may only issue a contribution notice if (among other things) there has been a relevant act or failure to act within paragraph (5) of that Article. Article 34(5) provides that an act or failure to act only falls within the paragraph if, among other things, the conditions of subparagraph (c) are met; in essence, that act must have occurred "during the period of six years ending with the determination by the Regulator to exercise the power to issue the contribution notice in question". Even if I were to adopt the interpretation of "determination" throughout Article 91 as covering a determination whether or not to exercise a regulatory function, the six year limitation period in Article 34 is applicable. Article 34 prescribes and ties in that limitation period to the exercise of the power to issue the contribution notice. The limitation period has no reference to a determination not to issue a notice. I mention in this connection that there is nothing in the *Bonas* decision that suggests the contrary: see the analysis of Section 34 (the equivalent of Article 34) at paragraphs 85-102 of the *Bonas* decision.
>
> 35. In the present circumstances there has, as noted, been no determination by the Regulator to issue a contribution notice against Mrs Desmond. The reverse is the case. Even assuming that this Tribunal has jurisdiction to address the question of whether or not a determination should have been issued in respect of Mrs Desmond, the Regulator will now be out of time to issue a notice. This is because the last act or failure to act identified by the Regulator was the MVL that took place on 3 June 2004. The Regulator's statutory powers to issue a Contribution Notice will have ceased by effluxion of time on 2 June 2010. It is not therefore open to the Trustees to seek to resurrect the Regulator's statutory powers by seeking to make a reference in respect of such a person, in this case, Mrs Desmond.
>
> 36. The Tribunal's role on references is, as noted, limited to determining what (if any) is the appropriate action for the Regulator to take in relation to the matter referred (see Article 97(4)). The Regulator is a creature of statute

> and its powers are limited to those contained in the statute. In determining and directing "the appropriate action for the Regulator to take in relation to the matter referred", the Tribunal cannot enlarge the Regulator's authority. Consequently the Tribunal cannot therefore direct as the appropriate action something that is outside the Regulator's statutory authority. It could not, I think, be appropriate for the Tribunal to direct the Regulator to issue a contribution notice that sought to grant rights and to impose obligations in circumstances where the makers of the 2005 Order had not conferred such a power on the Regulator; the Tribunal cannot make itself the source of such rights and obligations. For that reason I am satisfied that there is no reasonable prospect of the Trustees' application succeeding".

118. Mr Simmonds submits that *Desmond* supports two key elements of the Applicant Targets' case. First, his contention that once TPR's power to issue a financial support direction or contribution notice has expired the Tribunal cannot resurrect a power that has expired by effluxion of time and second, the Tribunal's directions under s 103 do not operate retrospectively so as to relate back to the date of the DP's determination, whether or not that determination was a positive or negative exercise of the power.

119. Mr Simmonds' contention was that to find against him on the time limit point we would have to decline to follow *Desmond* unless we could find a way of distinguishing it on the basis there was a significant difference in the nature of a financial support direction issued under s 43 and a contribution notice issued under s 38. Mr Simmonds regarded the distinction that we identified in paras 81 to 84 above, namely that a financial support direction can be issued against one or more persons, whereas a contribution notice can only be issued against a single person as being immaterial.

120. Mr Simmonds' analysis of the interplay between s 43(9) and s 103 was that any directions given by the Tribunal to TPR to give effect to the Tribunal's determination of the reference, as set out in s 103(6) must, where such directions amount to directions to vary the original determination (s 103(6)(b)) or substitute a different determination (s 103(6)(c)) be implemented through the issue of a fresh determination which would supersede the original determination. Any such determination would in this case (where, for example, it directed that the original determination be varied so as to include additional Targets) necessarily be made outside the prescribed period and therefore ineffective. Mr Simmonds rejected the Trustees' submission that in giving directions the Tribunal did not have to require TPR to go through the (admittedly) purely mechanical process of issuing a determination and then exercising the power through the issue of the financial support direction, because in his submission a financial support direction (even one to be issued at the direction of the Tribunal) had to follow on from a determination that had been made by TPR within the prescribed period.

121. Mr Simmonds accepted that his analysis resulted in an anomaly in that where a person directly affected by a determination (including trustees, employers, or other targets) considered the determination to be unreasonably lenient he would find his right of reference illusory in that the determination by the DP, the determination of the reference by the Tribunal and the conclusion of

any further appeal proceedings to the Court of Appeal or thereinafter to the Supreme Court would have to be completed within the prescribed period, that is the date by which the original determination by the DP had to be made. This would be in contrast to the position of a target who had been made the subject of the determination but made a reference because he considered that it was wrong to have been included.

122. Even in that situation, Mr Simmonds accepted, there was an anomaly if the target who objected to his inclusion won his reference so that the Tribunal directed TPR to vary the determination so as to exclude him from the financial support direction. On his analysis that variation results in the issue of a fresh determination and because that determination was made outside the prescribed period for the purposes of the original determination the result would be that the entire determination falls away.

123. Mr Simmonds submitted that the latter problem would be solved if the "financial support direction in question" within the meaning of s 43(9) were construed as being one to be issued to the person or persons in question, so that time would stop running in relation to each target who is subject to a positive determination. Consequently, a target could be removed from the scope of a financial support direction without affecting the validity of the financial support direction in relation to the remaining targets.

124. Mr Simmonds submitted that these anomalies were preferable to those created by the Trustees' position. Their submission, he contended, meant that if the DP, for example, made a determination to issue a financial support direction against just one Target out of a large number identified at the warning notice stage, it opened the door for all the others to be brought back within the scope of the direction, whereas if the determination had been wholly negative, that door would be shut. Also the effect of the Trustees' argument would be that the Targets would have no certainty as to when their potential liability would cease, whereas on his construction there would be clear certainty for the Targets as to when they could be regarded as free of potential liabilities. In his submission, a construction which gives certainty on the end date of potential liability is the better one when both have unintended consequences. In his submission, the clear purpose of s 43(9) was to give a measure of protection to the Targets to enable them to know when they are "off the hook" for any potential liability in respect of a financial support direction, so that in this case the Targets were able to know that if a financial support direction had not been determined to be made against them by 14 September 2010, whether as a result of the DP's determination or a direction from the Tribunal or a higher court following a reference, then their potential liability was at an end.

125. Mr Simmonds supported this position by reference to a principle of statutory construction known as the principle against doubtful penalisation. This principle, he submitted, requires that a person should not be penalised except under clear law, and a court or Tribunal should strive to avoid adopting a construction which penalises a person where the legislature's intention to do so is doubtful, or penalises him in a way which was not made clear.

126. Mr Simmonds submitted that the principle was applicable to any statutory provision that inflicts a detriment of any kind through the state's coercive power and did not apply merely to legislation seeking to impose a penalty in the conventional sense. Likewise, where in the legislation there is a provision providing relief against the inflicting of the detriment, as is the case here with the time limit in s 43(9), the relief should be construed liberally, so that if there is any doubt as to whether the time limit had expired or not that should be resolved in favour of the Targets.

127. Mr Simmonds acknowledged that the policy behind the legislation needed to be taken into account in deciding whether the principle should be applied rigorously, for instance, where Parliament had found it necessary to lay down a detailed system of regulation, the courts may find it impossible to avoid inflicting detriments which taken in isolation are unjustified. Nevertheless, Mr Simmonds referred us to *ESS Production Limited (in administration) v Sully* [2005] EWCA Civ 554. This case concerned ss 216 and 217 of the Insolvency Act 1986, the provisions of which impose a personal liability on a director whose company goes into insolvent liquidation and who then becomes a director of a company which is known by the same or a similar name. Under those provisions, the director becomes personally liable for the debts and liabilities of the latter company. In other words, the statute imposes a private law obligation. In that respect, the context is not dissimilar to the determination to issue a financial support direction under s 43 which also imposes a private law obligation upon the target in question. Mr Simmonds noted that this legislation had been introduced to counteract the mischief of "phoenixing", where the management of an insolvent company sought to transfer its assets into a new company trading under a very similar name. The relevant legislation makes it a criminal offence for a person who was a director of the insolvent company at any time in the 12 months prior to it going into liquidation to be a director of a company with the same or a similar name (a "prohibited name") as well as being liable for debts incurred by the company using the prohibited name at any time whilst he was involved in its management. In this particular case, which concerned such an example of "phoenixing", the creditor of the insolvent company wished to make a director of the new company liable for its debts. Arden LJ applied the principle against doubtful penalisation (see para 78 of the judgment) and held that the director was only liable for the relevant debts which were incurred whilst the second company traded under the prohibited name. Mr Simmonds invited us to find a close parallel between ss 216 and 217 of the Insolvency Act, seeking to impose a regulatory code on the practice of "phoenixing" and s 43 which seeks to impose a civil liability on those members of a group which contains an employer of a pension scheme in need of financial support, and to resolve any doubts about the scope of that provision in the Targets' favour.

128. In our view Mr Simmonds' submissions are based upon a mischaracterisation of the purpose of s 43(9). As we see it s 43, as well as setting out the characteristics of a financial support direction (see s 43(3)), also prescribes particular conditions which have to have been met at a particular time if the power is to be exercised. In particular, the key requirements are that the status of the

employer and the resources available to it and the necessary association between the employer and the potential targets of the financial support direction are determined by TPR at a time chosen by it which falls within a period ending with the date on which it determines to exercise the power.

129. The policy, as it appears to us, is that these conditions should be tested at a particular time rather than be subject to reassessment in the light of circumstances. The legislation leaves it to TPR to determine the most appropriate date at which the tests should be applied. Unsurprisingly, in this particular case TPR chose the date before the day that the principal LBG companies went into administration. It also seems to us that there are good policy reasons why the date so chosen fixes the prescribed period to end on a date that, consistent with TPR having sufficient time to investigate the underlying evidence on which it might base a determination to exercise the power, is as close as possible to the date on which it is determined to exercise the power, and that there should be a discipline on TPR to make a determination as soon as practicable after it commences an investigation.

130. In the light of experience, the relevant time has been changed on two occasions. When the Act was passed the prescribed period for the purposes of s 43(9) was only one year, a short period of time for TPR to complete both an investigation and build in sufficient time to allow representations to be made before it made a determination. Although the period was extended to two years in April 2009, TPR also considered that to be insufficient in complex cases. The reason for the latest change implemented in the Pensions Act 2011 and which, as mentioned in para 32 above, provided for the prescribed period to end on the date a warning notice was issued, was described in the Impact Assessment issued in respect of the legislation that led to the Pensions Act 2011 as follows:

> "to ensure the time periods for representations relating to the Regulator's anti-avoidance powers operate fairly for business particularly in cases with inherent complexities, such as large multi-national and multi-employer groups".

131. This statement supports the proposition that the purpose of the time limit is to act as a parameter for TPR's own processes. It is consistent with that rationale that, the parameters for the DP's determination having been fixed in this way, they should also determine the boundary of the Tribunal's jurisdiction upon a reference of the DP's determination. Thus, to return to the "box" analogy, the "relevant time" is another side of the box containing the subject matter of the reference before the Tribunal.

132. This interpretation is consistent with the underlying principle we established earlier that the legislation should be construed on the basis that Parliament intended that the Tribunal's jurisdiction should not be narrower than that of the DP (see paras 67 and 97 above). We accept the submissions of the Trustees and TPR to the effect that if the matter is referred to the Tribunal with a time limit still running then in effect the right of reference for the "directly affected" person who regards a determination as having been too lenient is in effect illusory.

133. Even if the provision in s 43(9) can, as submitted by Mr Simmonds, be regarded as a limitation period it would operate on the basis of his arguments very differently to conventional limitation periods which typically reference the end date as the last date on which proceedings can be commenced, rather than determining a date by which proceedings must be concluded. Mr Simmonds justifies his analysis on the basis that it gives the Targets certainty as to when they can file their papers away and be confident they will no longer be concerned that they may be called upon to support the Scheme. However, the alternative interpretation puts them in no different position than is the case with civil litigation; a party who is served with proceedings has no certainty as to when those proceedings will be determined as the legal processes take their course but there is certainty in knowing that the matter is over if those proceedings have not been commenced by a certain time.

134. So, in our view, it is with regulatory proceedings of this type. Although s 43(9) as it was before implementation of the Pensions Act 2011 might be said to have a limitation period determined by reference to when proceedings have finished rather than commenced, that is only the case with respect to TPR's own administrative decision making processes, and as the Tribunal gives a directly affected person the right to have the DP's determination considered afresh, the date by which the DP's determination must have been made can be seen to be the relevant date which must be met in order to give rise to the right to commence proceedings in the Tribunal, which, as in the case with civil proceedings, will be determined in the usual course without any further limitation period.

135. In any event, our analysis on the characteristics of a financial support direction as set out in paras 81 to 83 above inevitably leads to the conclusion that time ceased to run when the DP issued its determination notice. Our conclusion on the "negative determination" point was that the outcome of the proceedings before the DP was that a single financial support direction had been determined to be issued and the fact that it did not include all the Targets to whom the warning notice had been issued does not prevent the Tribunal considering on a reference whether it is appropriate to include those Targets within the financial support direction.

136. Following on from this analysis, which concludes that the determination which is the subject matter of the determination notice is whether or not to issue a financial support direction and if so against which Targets, it is clear that there has been a determination to exercise the power within the prescribed period, as required by s 43(9) which opens the door to a reference to the Tribunal to consider all relevant matters that were within the scope of the original warning notice.

137. We do not accept that Mr Simmonds' submissions on the process for implementing the directions of the Tribunal following the determination of a reference pursuant to s 103(6) in any way undermines this analysis. It is to be recalled that the basis of Mr Simmonds submission on this provision was that any determination made pursuant to those directions to include additional Targets would necessarily be out of time.

138. First, s 103(6) is not exhaustive of the form that directions from the Tribunal must take. Although s 103(6) appears to envisage that TPR, on receiving the Tribunal's directions, will issue a further determination and then exercise the power which is the subject of it, we see no reason why that should always be the case. The two stage process that TPR must follow before exercising the power is required because s 96(5) does not allow the exercise of the power either during the time that the period for a reference to the Tribunal is still running, or, if a reference is made, until the reference is finally disposed of. Clearly, there is no reason on that account for there to be a two stage procedure once the Tribunal has determined a reference and we can see no other reason why the Tribunal should not, if it saw fit, merely direct TPR to issue a financial support direction to named Targets. The making of a further determination would appear to serve no useful purpose, and if no further determination by TPR was necessary then s 43(9) could not conceivably be of any further relevance.

139. Secondly, even if the directions from the Tribunal took the form of a direction to vary the original determination so as to add additional Targets, in our view that would not amount to the issue of a fresh determination, on the basis of our analysis that there has been a determination to issue a single financial support direction, which remains in place but with different Targets as its subject. Indeed, Mr Simmonds accepted the absurdity of the proposition that a decision to narrow the scope of a financial support direction by removing one Target from its scope would amount to a fresh determination, stated that in that situation the direction would be construed as having been addressed to one or more targets, which remained in place as such in relation to those targets who were subject to a positive determination. In our view this reasoning is equally applicable if the result of the reference is a direction to add a Target.

140. With regard to the decision in *Desmond*, in our view the case is clearly distinguishable. We have concluded in para 84 above that there is a clear difference in the characteristics of a contribution notice as opposed to a financial support direction in that a single contribution notice is required for each target whereas a single financial support direction is required for each scheme regardless of the number of targets to whom it is addressed. We can therefore see why Sir Stephen Oliver was able to conclude that as TPR had not determined to issue a contribution notice to Mrs Desmond before the six year limitation period had expired it was not open to the Tribunal to direct it to do so. In the present case, the power to issue a financial support direction was exercised within the prescribed period, and the addition or subtraction of Targets from its scope does not affect that fact. A better comparison would be if in *Desmond* a contribution notice had been issued against Mrs Desmond within the period prescribed for the purposes of the Northern Ireland equivalent of s 38 and the trustees referred the matter to the Tribunal on the basis that it was too lenient. Let us suppose that the Tribunal after the limitation period had expired directed TPR to increase the amount sought by the notice. On the basis of our analysis this would not amount to a fresh determination and TPR would not be being asked to exercise its power out of time.

141. The actual facts in *Desmond* are comparable to a situation where the DP had issued a wholly negative determination. We do not need to come to a conclusion on whether that should lead to the same conclusion as in *Desmond* as we are not faced with a wholly negative determination in this case. The effect of doing so would be contrary to the principle that the Tribunal's jurisdiction should not be narrower than that of the DP and that it should be open to the Tribunal to consider on a reference by the trustees the facts and matters relied on in the warning notice and which were the subject of the DP's determination. Whilst Sir Stephen Oliver stated in para 36 of the *Desmond* decision that the Tribunal cannot enlarge TPR's authority, it is not clear whether it was argued before him that this would be putting too narrow a construction on the provisions relating to contribution notices he was considering (and by analogy s 43(9)) if it were used to prevent the Tribunal exercising a power that TPR could have exercised at the relevant time.

142. In order to come to that conclusion it would be necessary to argue, as the Trustees did before us, that s 43(9) should be construed as if the words "or not" appeared after "whether" so that the prescribed period would end with any determination on the proposals set out in the warning notice, whether positive or wholly negative. This would be on the basis that it is necessary to give the section that construction to give full effect to the principle that the Tribunal's jurisdiction should not be narrower than that of the DP. We come to no conclusion on that point, which is the position Sir Stephen Oliver came to on the comparable wording of the provisions relating to contribution notices, but even if we were led to the conclusion that the inevitable consequence of the clear difference in wording between s 43(9) and s 96(3) was that directions from the Tribunal to make a financial support direction following a reference of a wholly negative determination had to be made within the prescribed period, anomalous though that may seem, it would be less anomalous than a construction which restricted the powers of the Tribunal even further than we believe was intended in the case of a reference following a determination to exercise the power against a limited number of targets.

143. We have considered whether the application of the principle of doubtful penalisation should make any difference to our analysis. We accept Mr Simmonds' submission that the cases establish that the principle is capable of being applied where a statutory code seeks to impose a civil liability which is not a penalty in the conventional sense. As noted above Mr Simmonds accepts that in such cases the underlying policy of the legislation must be taken into account and in our view the principle must be regarded as being of limited application in such cases. In the case of the Act, the purpose of the legislation is to create a rescue framework for pension schemes which are in deficit. TPR has been given statutory objectives by Parliament and these include, among other things, by virtue of s 5(1)(a):

> " to protect the benefits under occupational pension schemes of, or in respect of, members of such schemes",

and by virtue of s 5(1)(c):

> "to reduce the risk of situations arising which may lead to compensation being payable from the Pension Protection Fund".

144. In order to help it to achieve these objectives TPR has been given tools which if used will necessarily affect the financial position of those against whom they are used, as would be the case with the exercise of the power to issue a financial support direction under s 43. We should give due weight to TPR's objectives in construing the scope of s 43 and much less weight to the principle of doubtful penalisation against the background of a clear objective set out in the legislation to protect the interests of scheme members in the wider public interest.

145. In our view *ESS Production Limited*, the facts of which are described in para 127 above, can be distinguished on this basis. In any event, in that case the statute concerned had potential for both civil and criminal consequences for a director who was in breach of its provisions. The possibility of a criminal sanction will lead towards a more strict construction of the penalising statute.

146. It is clear from the authorities that a strict construction should not be given to a penal enactment if other interpretative factors, in which we would include the factors referred to in paras 139 and 140 above, weigh more heavily in the scales. For example in *Re Lo Line Electric Motors Ltd* [1998] Ch 477, Browne-Wilkinson V-C rejected the submission that because section 22(5) of the Company Directors Disqualification Act 1986 had penal consequences the word "director" should be strictly construed. The judge said at page 489D:

> "But as I have said, the paramount purpose of disqualification is the protection of the public not punishment. I therefore approach the question of construction on the normal basis".

147. It is also necessary to balance the principle against other principles of statutory construction, notably the presumption that we should seek to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. The concept of absurdity will include results which are unworkable, impracticable or anomalous. Mr Simmonds' construction of s 43(9), which results in a right of reference by a directly affected person who contends that a determination by the DP is unduly lenient being largely illusory is clearly unworkable, impracticable and anomalous and should not be adopted in the absence of any countervailing factors.

148. Our conclusion on this issue is therefore that our analysis that s 43(9) should not be given the narrow interpretation that Mr Simmonds contends is not affected by the principle of doubtful penalisation.

149. Mr Stallworthy for the Trustees had submitted that a detailed analysis of s 43(9) as it was in force before 3 January 2012 was not necessary because on that date it was amended by s 26(4) and (5) of the Pensions Act 2011 so as to provide that the prescribed period ends with the giving of a warning notice in respect of the financial support direction in question.

150. Mr Stallworthy submitted that although s 38 of the Pensions Act 2011 gave the Secretary of State power to make an order to provide for transitional provisions in relation to the commencement of this provision he had not done so. In the absence of such provisions, Mr Stallworthy submitted that it was clear that the amendment had immediate and full effect for all purposes, including for regulatory action which was already underway.

151. We have not felt it necessary to deal with this submission in detail in the light of our finding on the interpretation of the version of s 43(9) as in force prior to 3 January 2012. Whilst we accept Mr Stallworthy's submission that there is no reason why legislation imposing regulatory obligations for the public good (which we accept is the purpose of the Act) should not seek to do so in respect of circumstances which arose prior to those obligations having effect, we do not accept that the amendments in s 26(4) and (5) of the Pensions Act 2011 go so far as to affect regulatory proceedings that have already commenced at the time those amendments came into force.

152. It is a well known principle of statutory construction that unless the contrary intention appears, an enactment is presumed not to be intended to have a retrospective operation. In the absence of any transitional provisions being made in respect of the amendments to s 43(9) effected by the Pensions Act 2011, our starting point is that the presumption applies in this particular case.

153. We accept, however, that the mere fact that a change is operative with regard to past events does not mean that it is objectively retrospective: see Bennion on Statutory Interpretation 5th edition (2008) at paragraph 97, page 317. Consequently, we accept that bearing in mind the purpose of the Act is to confer regulatory powers for the public good, that the amendments must be capable of being construed as applying to events that have occurred prior to the amendments taking effect. That, however, is different from applying the amendments to proceedings before the DP that have already concluded and on the basis of which proceedings have commenced in the Tribunal. So, for example, we accept that without specific transitional provisions, the amended section would apply in respect of all matters under investigation where a warning notice has not yet been issued, notwithstanding the fact that at the time the investigation commenced, the subject of the investigation might have thought that the relevant time for establishing the conditions for the issue of a financial support direction would be calculated by reference to the date of the DP's determination to issue one. That seems to us to be in the nature of a procedural change that does not affect the subject's substantive rights. However, the position is quite different in relation to proceedings that have already taken their course under the previous legislation and which have given rise to substantive rights. Any attempt to apply the new provisions to those proceedings is clearly retrospective and should not result without very clear provisions which could have been the subject of transitional provisions but which were not.

Conclusions

154. We commend the ingenuity of counsel in extending the argument before us over a period of four days on what was described in the applications as a relatively short point of law. We are grateful to all counsel for their very helpful submissions.

155. Our conclusions on the issues raised in the applications are that:

(1) The Trustees are capable of making a reference of the determination set out in the notice of determination of the DP issued on 13 September 2010;

(2) On that reference the Tribunal has jurisdiction to consider whether any Target in respect of whom it was proposed in the warning notice dated 24 May 2010 that it be made the subject of a financial support direction issued under s 43 but against whom no such determination was made should be made the subject of such a direction; and

(3) Any directions made by the Tribunal to include any such Target within the scope of a financial support direction would be effective notwithstanding that the relevant time for the determination by TPR to exercise the power to issue such a direction has now passed.

156. Accordingly, the applications are dismissed. The proceedings in respect of the references remain stayed in accordance with Sir Stephen Oliver's directions of 22 November 2010 pending final determination of the Companies Court application by the Supreme Court.

COLIN BISHOPP
JUDGE OF THE UPPER TRIBUNAL

TIMOTHY HERRINGTON
JUDGE OF THE UPPER TRIBUNAL
RELEASE DATE: 14 JUNE 2012

APPENDIX

Relevant provisions of the Pensions Act 2004

9 The Determinations Panel

(1) The Regulator must establish and maintain a committee consisting of

(a) a chairman, and

(b) at least six other persons,

(in this Part referred to as "the Determinations Panel")

(2) The Regulator must appoint as the chairman of the Panel the person nominated in accordance paragraph 11 of Schedule 1 (nomination by a committee established by the chairman of the Regulator).

(3) The chairman of the Panel must –

(a) decide the number of persons to be appointed as the other members of the Panel, and

(b) nominate a person suitable for each of those appointments.

(4) The Regulator must then appoint as the other members of the Panel the persons nominated by the chairman of the Panel.

(5) The following are ineligible for appointment as members of the Panel–

(a) any member of the Regulator;

(b) any member of the staff of the Regulator;

(c) any member of the Board of the Pension Protection Fund;

(d) any member of the staff of that Board

(6) The Panel may establish sub-committees consisting of members of the Panel.

(7) Further provision about the Panel is made in Schedule 1 including provision as to the terms of appointment, tenure and remuneration of members and as to its procedure.

10 Functions exercisable by the Determinations Panel

(1) The Determinations Panel is to exercise on behalf of the Regulator-

(a) the power to determine, in the circumstances described in subsection (2) whether to exercise a reserved regulatory function, and

(b) where it so determines to exercise a reserved regulatory function, the power to exercise the function in question.

(2) Those circumstances are-

(a) where the Regulator considers that the exercise of the reserved regulatory function may be appropriate, or

(b) where an application is made under, or by virtue of, any of the provisions listed in subsection (6) for the Regulator to exercise the reserved regulatory function.

(3) Where subsection (1) applies, the powers mentioned in that subsection or not otherwise exercisable by or on behalf of the Regulator.

(4) For the purposes of this Part, a function of the Regulator is a "reserved regulatory function" if it is a function listed in Schedule 2.

(5) Regulations may amend Schedule 2 by –

(a) adding any function of the Regulator conferred by, or by virtue of, this or any other enactment,

(b) omitting any such function, or

(c) altering the description of any such function contained in that Schedule …

38 Contribution notices where avoidance of employer debt

(1) This section applies in relation to an occupational pension scheme other than-

(a) a money purchase scheme, or

(b) a prescribed scheme or a scheme of a prescribed description.

(2) The Regulator may issue a notice to a person stating that the person is under a liability to pay the sum specified in the notice (a "contribution notice")-

(a) to the trustees or managers of the scheme, or

(b) where the Board of the Pension Protection Fund has assumed responsibility for the scheme in accordance with Chapter 3 of Part 2 (pension protection), to the Board.

(3) The Regulator may issue a contribution notice to a person only if-

(a) The Regulator is of the opinion that the person was a party to an act or a deliberate failure to act which falls within subsection (5),

(b) the person was at any time in the relevant period-

(i) the employer in relation to the scheme, or

(ii) a person connection with, or an associate of, the employer,

(c) the Regulator is of the opinion that the person, in being a party to the act or failure, was not acting in accordance with his

functions as an insolvency practitioner in relation to another person, and

(d) the Regulator is of the opinion that it is reasonable to impose liability on the person to pay the sum specified in the notice, having regard to-

(i) the extent to which, in all the circumstances of the case, it was reasonable for the person to act, or fail to act, in the way that the person did, and

(ii) such other matters as the Regulator considers relevant, including (where relevant) the matters falling within subsection (7).

(4) But the Regulator may not issue a contribution notice, in such circumstances as may be prescribed, to a per son of a prescribed description.

(5) An act or a failure to act falls within this subsection if-

(a) the Regulator is of the opinion that the material detriment test is met in relation to the act or failure (see section 38A) or that the main purpose or one of the main purposes of the act or failure was –

(i) to prevent the recovery of the whole or any part of a debt which was, or might become, due from the employer in relation to the scheme under section 75 of the Pensions Act 1995 (c.26) deficiencies in the scheme assets), or

(ii) to prevent such a debt becoming due, to compromise or otherwise settle such a debt, or to reduce the amount of such a debt which would otherwise become due,

(b) it is an act which occurred, or a failure to act which first occurred-

(i) on or after 27 April 2004, and

(ii) before any assumption of responsibility for the scheme by the Board in accordance with Chapter 3 of Part 2, and

(c) it is either-

(i) an act which occurred during the period of six years ending with the determination by the Regulator to exercise the power to issue the contribution notice in question, or

(ii) a failure which first occurred during, or continued for the whole or part of, that period …

(6) For the purposes of subsection (3)-

(a) the parties to an act or a deliberate failure include those persons who knowingly assist in the act or failure, and

(b) "the relevant period" means the period which –

(i) begins with the time when the act falling within subsection (5) occurs or the failure to act falling within that subsection that occurs, and

(ii) ends with the determination by the Regulator to exercise the power to issue a contribution notice in question.

43 Financial support directions

(1) this section applies in relation to an occupational pension scheme other than-

(a) a money purchase scheme, or

(b) a prescribed scheme or a scheme of a prescribed description.

(2) The Regulator may issue a financial support direction under this section in relation to such a scheme if the Regulator is of the opinion that the employer in relation to the scheme-

(a) is a service company, or

(b) is insufficiently resourced, at a time determined by the Regulator which falls within subsection (9) ("the relevant time").

(3) A financial support direction in relation to a scheme is a direction which requires the person or persons to whom it is issued to secure-

(a) that financial support for the scheme is put in place within the period specified in the direction,

(b) that thereafter that financial support or other financial support remains in place while the scheme is in existence, and

(c) that the Regulator is notified in writing of prescribed events in respect of the financial support as soon as reasonably practicable after the event occurs.

(4) A financial support direction in relation to a scheme may be issued to one or more persons.

(5) But the Regulator may issue such a direction to a person only if-

(a) the person is at the relevant time a person falling within subsection (6), and

(b) the Regulator is of the opinion that it is reasonable to impose the requirements of the direction on that person.

(6) A person falls within this subsection if the person is-

(a) the employer in relation to the scheme,

(b) an individual who-

(i) is an associate of an individual who is the employer, but

(ii) is not an associate of that individual by reason only of being employed him, or

(c) a person, other than an individual, who is connected with or an associate of the employer.

(7) The Regulator, when deciding for the purposes of subsection (5)(b) whether it is reasonable to impose the requirements of a financial support direction on a particular person, must have regard to such matters as the Regulator considers relevant including, where relevant, the following matters—

(a) the relationship which the person has or has had with the employer (including, section 435 of the insolvency Act 1986 (c. 45), whether the person has or has had control of the employer within the meaning of subsection (10) of that section),

(b) in the case of a person falling within subsection (6)(b) or (c), the value of any benefits received directly or indirectly by that person from the employer,

(c) any connection or involvement which the person has or has had with the scheme,

(d) the financial circumstances of the person, and

(e) such other matters as may be prescribed

(8) A financial support direction must identify all the persons to whom the direction is issued.

(9) A time falls within this subsection if it is a time which falls within a prescribed period which ends with the determination by the Regulator to exercise the power to issue the financial support direction in question.

(10) For the purposes of subsection (3), a scheme is in existence until it is wound up.

(11) No duty to which a person is subject is to be regarded as contravened merely because of any information or opinion contained in a notice given by virtue of subsection (3)(c). This is subject to section 311 (protected items).

(12) In this section "a warning notice" means a notice given as mentioned in section 96(2)(a).

44 Meaning of "service company" and "insufficiently resourced"

(1) This section applies for the purposes of section 43 (financial support directions).

(2) An employer ("E") is a "service company" at the relevant time if-

(a) E is a company as defined in section 1(1) of the Companies Act 2006

(b) E is a member of a group of companies, and

(c)E's turnover, as shown in the latest available individual accounts for E prepared in accordance with Part 15 of that Act, is solely or principally derived from amounts charged for the provision of the services of employees of E to other members of that group.

(3) The employer in relation to a scheme is insufficiently resourced at the relevant time if-

(a) at that time the value of the resources of the employer is less than the amount which is a prescribed percentage of the estimated section 75 debt in relation to the scheme, and

(b) condition A or B is met.

(3A) Condition A is met if-

(a) there is at that time a person who falls within section 43(6)(b) or (c), and

(b) the value at that time of that person's resources is not less than the relevant deficit, that is to say the amount which is the difference between-

(i) the value of the resources of the employer, and

(ii) the amount which is the prescribed percentage of the estimated section 75 debt.

(3B) Condition B is met if-

(a) there are at that time two or more persons who-

(i) fall within section 43(6)(b) or (c), and

(ii) are connected with, or associates of, each other, and

(b) the aggregate value at that time of the resources of the persons who fall within paragraph (a) (or any of them) is not less than the relevant deficit.

(4) For the purposes of subsections (3) to 3B)-

(a) what constitutes the resources of a person si to be determined in accordance with regulations, and

(b) the value of a person's resources is to be determined, calculated and verified in a prescribed manner.

(5) In this section the "estimated section 75 debt", in relation to a scheme, means the amount which the Regulator estimates to be the amount of the debt which would become due from the employer to the trustees or managers of the scheme under section 75 of the Pensions Act 1995 (c. 26) (deficiencies in the scheme assets) if-

(a) subsection (2) of that section applied, and

(b) the time designated by the trustees or managers of the scheme for the purposes of that subsection were the relevant time.

(6) When calculating the estimated section 75 debt in relation to a scheme under subsection (5), the amount of any debt due at the relevant time from the employer under section 75 of the Pensions Act 1995 (c.26) is to be disregarded.

(7) In this section "the relevant time" has the same meaning as in section 43.

45. Meaning of "financial support"

(1) For the purposes of section 43 (financial support direction), "financial support" for a scheme means one or more of the arrangements falling within subsection (2) the details of which are approved in a notice issued by the Regulator.

(2) The arrangements falling within this subsection are-

(a) an arrangement whereby, at any time when the employer is a member of a group of companies, all the members of the group are jointly and severally liable for the whole or part of the employer's pension liabilities in relation to the scheme,

(b) an arrangement whereby, at any time when the employer is a member of a group of companies, a company (within the meaning of section 1159 of the Companies Act 2006) which meets prescribed requirements and is the holding company of the group is liable for the whole or part of the employer's pension liabilities in relation to the scheme;

(c) an arrangement which meets prescribed requirements and whereby additional financial resources are provided to the scheme;

(d) such other arrangements as may be prescribed.

(3) The Regulator may not issue a notice under subsection (1) approving the details of one or more arrangements falling with subsection (2) unless it is satisfied that the arrangement is, or the arrangements are, reasonable in the circumstances.

(4) In subsection (2), "the employer's pension liabilities" in relation to a scheme means-

(a) the liabilities for any amounts payable or on behalf of the employer towards the scheme (whether on his own account or otherwise) in accordance with a schedule of contributions under section 227, and

(b) the liabilities for any debt which is or may become due to the trustees or managers of the scheme from the employer whether by virtue of section 75 of the Pensions Act 1995 (deficiencies in the scheme assets) or otherwise.

51 Sections 43 to 50: interpretation

(1) In sections 43 to 50-

"group of companies" means a holding company and its subsidiaries (and references to a member of a group of companies are to be read accordingly); and "holding company" and "subsidiary" have the meaning given by section 1159 of the Companies Act 2006.

(2) For the purposes of those sections-

(a) references to a debt due under section 75 of the Pensions Act 1995 (c.26) include a contingent debt under that section, and

(b) references to the amount of such a debt include the amount of such a contingent debt.

(3) For the purposes of those sections-

(a) section 249 of the insolvency Act 1986 (c.45) (connected persons) applies as it applies for the purposes of any provision of the first Group of Parts of that Act.

(b) section 435 of that Act (associated persons) applies as it applies for the purposes of that Act, and

(c) section 74 of the Bankruptcy (Scotland Act 1985 (c.66) (associated persons) applies as it applies for the purposes of that Act.

93 The Regulator's procedure in relation to its regulatory functions

(1) The Regulator must determine the procedure that it proposes to follow in relation to the exercise of its regulatory functions.

(2) For the purposes of this Part the "regulatory functions" of the Regulator are-

…

…

(c) the reserved regulatory functions (see Schedule 2) …

(3) The Determinations Panel must determine the procedure to be followed by it in relation to any exercise by it on behalf of the Regulator of-

(a) the power to determine whether to exercise a regulatory function, and

(b) where the Panel so determines to exercise a regulatory function, the power to exercise the function in question

(4) The procedure determined under this section-

(a) must provide for the procedure required under-

(i) section 96 (standard procedure), and

(ii) section 98 (special procedure), and

(b) may include such other procedural requirements as the Regulator or, as the case may be, the Panel considers appropriate.

(5) This section is subject to-

(a) sections 99 to 104 (the remaining provisions concerning the procedure in relation to the regulatory functions), and

(b) any regulations made by the Secretary of State under paragraph 19 of Schedule 1.

95 Application of standard and special procedure

(1) The Regulator must comply with the standard procedure (see section 96) or, where section 97 applies, the special procedure (see section 98) in a case where-

(a)the Regulator considers that the exercise of one or more of the regulatory functions may be appropriate, or

(b)an application is made under or by virtue of-

(i) any of the provisions listed in section 10(6), or

(ii) any prescribed provision of this or any other enactment,

for the Regulator to exercise a regulatory function.

(2) For the purposes of section 96, references to the regulatory action under consideration in a particular case are-

(a)in a case falling within subsection (1)(a), references to the exercise of the one or more regulatory functions which the Regulator considers that it may be appropriate to exercise, and

(b)in a case falling within subsection (1)(b), references to the exercise of the regulatory function which is the subject matter of the application.

(3) Neither section 96 (standard procedure) nor section 98 (special procedure) apply in relation to a determination whether to exercise a regulatory function on a review under section 99 (compulsory review of regulatory action).

96 Standard Procedure

(1) The procedure determined under section 93 must make provision for the standard procedure.

(2) The "standard procedure" is a procedure which provides for-

(a) the giving of notice to such persons as it appears to the Regulator would be directly affected by the regulatory action under consideration (a "warning notice"),

(b) those persons to have an opportunity to make representations,

(c) the consideration of any such representations and the determination whether to take the regulatory action under consideration,

(d) the giving of notice of the determination to such persons as appears to the Regulator to be directly affected by it (a "determination notice"),

(e) the determination notice to contain details of the right of referral to the Tribunal under subsection (3),

(f) the form and further content of warning notices and determination notices and the manner in which they are to be given, and

(g) the time limits to be applied at any stage of the procedure.

(3) 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.

(4) …

(5) Where the determination which is the subject matter of the determination notice is a determination to exercise a regulatory function and subsection (3) applies, the Regulator must not exercise the function-

(a) during the period within which the determination may be referred to the Tribunal, and

(b) if the determination is so referred, until the reference, and any appeal against the Tribunal's determination, has been finally disposed of.

(6) …

(7) In this section "the Tribunal", in relation to any reference under subsection (3), means-

(a) the First-tier Tribunal, in any case where it is determined by or under Tribunal Procedure Rules that the First-tier Tribunal is to hear the reference;

(b) the Upper Tribunal in any other case

100 Duty to have regard to the interests of members etc

(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.

103 References in relation to decisions of Regulator

(1) This section applies to references to a tribunal in relation to a decision of the Regulator.

(2) On a reference, the tribunal concerned, may consider any evidence relating to the subject matter of the reference, whether or not it was available to the Regulator at the material time.

(3) On a reference, the tribunal concerned must determine what (if any) is the appropriate action for the Regulator to take in relation to the matter referred to it.

(4) On determining a reference, the tribunal concerned must remit the matter to the Regulator with such directions (if any) as it considers appropriate for giving effect to its determination.

(5) Those directions may include directions to the Regulator-

(a) confirming the Regulator's determination and any order, notice or direction made, issued or given as a result of it;

(b) to vary or revoke the Regulator's determination, and any order, notice or direction made, issued or given as a result of it;

(c) to substitute a different determination, order, notice or direction;

(d) to make such savings and transitional provision as the tribunal concerned considers appropriate.

(6) The Regulator must act in accordance with the determination of, and any direction given by, the tribunal concerned (and accordingly sections 96 to 99 (standard and special procedure) do not apply.

(7) The tribunal concerned may, on determining a reference, make recommendations as to the procedure followed by the Regulator or the Determinations Panel.

(8) An order of the tribunal concerned may be enforced-

(a) as if it were an order of a county court, or

(b) in Scotland, as if it were an order of the Court of Session.