UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER — Reference Nos: FS/2012/0001-5

BETWEEN:

(1) GRANADA UK RENTAL & RETAIL LIMITED
(2) GRANADA MEDIA LIMITED
(3) GRANADA GROUP LIMITED
(4) GRANADA LIMITED
(5) ITV PLC — **Applicants**

and

THE PENSIONS REGULATOR — **Respondent**

and

BOX CLEVER TRUSTEES LIMITED — **Interested Party**

Tribunal: Judge Colin Bishopp

Sitting in public in London on 28 & 29 June 2016

Lord Pannick QC, Mr Michael Furness QC and Mr Edward Sawyer, counsel, instructed by Hogan Lovells International LLP, for the applicants

Mr Nicolas Stallworthy QC and Mr James Walmsley, counsel, instructed by the Pensions Regulator, for the respondent

Mr Jonathan Hilliard QC and Mr Benjamin Faulkner, counsel, instructed by Eversheds LLP, for the interested party

DECISION

Introduction

1. The underlying question in this reference is whether the tribunal should uphold a determination of the Determinations Panel ("the Panel") of the respondent, the Pensions Regulator ("the Regulator") to issue financial support directions ("FSDs"). The FSDs would require the applicants ("the Targets"), all members of what is now the ITV group, to provide financial support to the Box Clever Group Pension Scheme ("the Scheme") of which the interested party, Box Clever Trustees Limited ("the Trustee"), is the trustee. The Targets referred the determination to the tribunal, and the Trustee was joined shortly thereafter.

2. The subsidiary, case management, question now before me is whether certain matters pleaded by the Regulator, the Trustee or both of them in the documents filed by them in this reference are new in the sense that they were not raised in the Warning Notice ("the WN") which preceded the Panel's determination or in the Determination Notice ("the DN") itself and, if so, whether permission should be given to the Regulator or, as the case may be, the Trustee, to advance them. In form, the principal application before me, brought by the Targets, is for a direction striking out parts of the Regulator's and the Trustee's pleaded cases. The application first came before Judge Herrington in September 2013, and was dismissed. The Targets appealed to the Court of Appeal which set aside his decision on the ground that Judge Herrington had applied the wrong test. The Court remitted the application to the Upper Tribunal for reconsideration in the light of its explanation of the correct test: see [2015] EWCA Civ 228, [2015] 4 All ER 919. It did not indicate whether or not the remitted application should be dealt with by Judge Herrington, but the Chamber President directed that the application should be heard by a different judge and it is for that reason that it came before me. I was also asked to make various further directions designed to steer the reference to a hearing, but they were uncontroversial and I shall say no more about them.

3. The Targets were represented before me by Lord Pannick QC, Mr Michael Furness QC and Mr Edward Sawyer, the Regulator by Mr Nicolas Stallworthy QC and Mr James Walmsley and the Trustee by Mr Jonathan Hilliard QC and Mr Benjamin Faulkner.

The material facts

4. The essential background facts are undisputed. I shall need to return to some of the detail, but can set the scene with a brief summary. The Box Clever Joint Venture ("the JV") was agreed in 1999 and completed in June 2000. The Granada group of companies agreed with its principal competitor, the Thorn group (now the Carmelite group), on the combination of their respective television rental businesses. A new group of companies, the Box Clever group, was formed; the shares in the holding company, Box Clever Technology Ltd ("BCT"), were owned equally by Granada and Thorn. Unless there is a reason to do otherwise, and despite the later changes of name, I shall use the terms Granada, Thorn and Box Clever to refer to the relevant group, or a member of it. Granada and Thorn then sold their respective rental businesses to Box Clever for £980 million, of which £600 million was payable to Granada and £380

million to Thorn. The purchase was partly funded by a loan of £860 million from Westdeutsche Landesbank ("West LB") to Box Clever; the loan was secured on Box Clever's assets. It was, as I understand it, intended that the loan would be repaid after about a year when the JV entered into a securitisation arrangement. In fact the securitisation did not occur until 2002, when the bulk but not all of the loan was discharged. Simplifying a little, as the JV was established Box Clever paid about £530 million of the loan monies to Granada and the rest to Thorn in part payment of the purchase price, and the balance was left outstanding, secured by loan notes. Neither Granada nor Thorn had any liability for payment of the capital of the West LB loan or the interest on it. Box Clever began to operate the combined rental business in June 2000.

5. The great majority of Granada's and Thorn's employees who had been engaged in their television rental activities were transferred with the businesses to Box Clever. Immediately before their transfer all or almost all of the relevant employees were members of the Granada or Thorn pension schemes, and for an interim period they remained members of, and continued to accrue rights in, those schemes because, for reasons I need not explore for present purposes, there was some delay in the establishment of the Scheme. It came into existence in October 2001, when the employees left their former schemes in order to become members of it.

6. The Box Clever business did not prosper. It was able to service its debts for about three years, but in June 2003 it entered into a suspension arrangement with West LB. In the autumn of 2003 West LB appointed administrative receivers to take control of the principal Box Clever operating companies. By this time the business was seriously insolvent. Although Granada and Thorn had hitherto been represented on the BCT board, they ceased to have any involvement in the running of the group once the administrators had been appointed. The administrators were later able to sell the group's business, but the entire proceeds were used in partial satisfaction of the secured debt: there was no residue available for unsecured creditors, including the Scheme, which had a deficiency of about £25 million on a gilts-matching basis. The deficit has now grown, I was told, to about £90 million.

7. Following the demise of the Box Clever business the Trustee began discussions with Granada and Thorn with a view to persuading them to make additional contributions to the Scheme in order to make good the deficit. I shall need to say a little more about those discussions later; for the moment it is sufficient to say that they were prolonged but fruitless, and that because they were so prolonged a considerable period of time passed between the start of the administration and the service of the WN, a factor which the Targets say militates unfairly against them. I should also mention for completeness that the Regulator has not pursued regulatory action against Thorn, and that part of the Targets' case is that the differential treatment of Granada and Thorn is unfair and is itself a reason why FSDs should not be issued against the Targets. However, that difference, and the reasons for it, are not matters with which I am concerned in the context of the present application.

The WN and the DN

8. A single WN, addressed to all of the Targets, was issued on 30 September 2011. It began with an executive summary which the parties accepted fairly reflected the case the Targets were required to answer before the Panel. Although the summary repeats

some of what I have already said, and is included in Judge Herrington's decision, it is, I think, helpful to set it out again in order that this decision is comprehensible without resort to other material. It was as follows:

"1. The Box Clever group of companies was formed as a joint venture between the Granada and Thorn groups in June 2000, to run the TV rental businesses of (from the Granada group) Granada UK Rental & Retail Limited ('Rental and Retail') and (from the Thorn group) Rental Holding Company Limited ('RHC'). Rental and Retail and RHC each subscribed 50% of the shares in BCT, which acted as the parent and ultimate holding company for the Box Clever group.

2. As part of the restructuring to create the joint venture, various Granada businesses were consolidated in or under Consumer Electronics; and staff previously employed by Rental & Retail, Granada Media Limited ('Media') and/or Granada Group Limited ('Group') had their employment transferred to Consumer Electronics. The businesses – with these employees – were then hived down into the Box Clever group where they were undertaken by the Employers.

3. The Granada group (and in particular Rental & Retail, Media, Group & Granada Limited ('Limited')) controlled the Box Clever group (and indirectly the Employers) through Rental & Retail's 50% shareholding in BCT and through Rental & Retail's appointment of directors to BCT.

4. Rental & Retail (and through it Media, Group & Limited) approved the establishment of the Scheme (and its unusually onerous defined benefit structure) to provide benefits for the Employers' employees after their accrual under the Granada group's pension scheme ceased.

5. Rental & Retail received a cash benefit of approximately £510 million on the hive down, funded by leveraging the businesses hived down into the Box Clever group with debt of over £860 million. Much of that cash was then paid up to Media, Group and Limited by way of dividends.

6. The Granada group (and in particular Rental & Retail, Media, Group & Limited) crystallised the value of the businesses hived down, and retained the ability to benefit from any continued trading of those businesses via Rental & Retail's 50% shareholding in BCT, while insulating the Granada group from (a) liability for the debt taken on by the Box Clever group (including the Employers), which exceeded £860 million; and (b) liability for future pension accrual by employees working in the businesses hived down. Around £41.167 million of the Scheme's deficit (i.e. about two-thirds) relates to accrual by members who transferred from the Granada group.

7. The hive down and the cash taken by leveraging these businesses also benefitted the Granada group by facilitating and helping to fund its strategic restructuring.

8. The Box Clever group was unable to service the debt of over £860 million assumed to finance the hive down of businesses from the Granada and Thorn groups. The Employers all entered administrative receivership in September – November 2003 and no distributions will be available for unsecured creditors such as the Trustee.

9. ITV plc ('ITV') was formed on 2 February 2004 by the merger of Limited and Carlton Communications plc, with Limited and the Granada group

receiving approximately 68% of ITV's shareholding upon its formation. ITV effectively stands in the shoes of Limited as the ultimate parent company of the group which benefitted from the hive down of the Granada businesses into the Box Clever group, and the release of cash into the Granada group to facilitate its restructuring between 2000 and 2004. ITV is successor to the position of Limited which, as ultimate parent company to the group, enjoyed 50% voting control of the employers at all material times during which the Scheme was established and defined benefit liabilities were accrued within the Scheme (and indeed thereafter, during the period in which the Employers have since remained insufficiently resourced). The hive down of businesses from the Granada group to the Box Clever group was not an arm's-length sale to or investment in an unconnected third party; it was a joint venture for which the parent company of the Granada group – ultimately ITV – was 50% responsible.

> 10. The Targets were connected or associated with the employers up until the dissolution of an intermediate holding company within the Box Clever group on 16 March 2010; and, in particular, as at 31 December 2009, which has been selected by [the Regulator] as 'the relevant time' for the purposes of s 43 PA04.
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> 11. As at that date, the Employers, which remain in administrative receivership, were all insufficiently resourced.
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> 12. As set out in paragraphs 111 to 187 below, TPR considers that it would be reasonable to impose the requirements of an FSD on each of the Targets."

9. The Regulator selected 31 December 2009 as the "relevant time" for the purposes of s 43 of the Pensions Act 2004 ("PA04") since it was the date of the end of the accounting year falling last before the dissolution of the intermediate holding company; one question in the reference, though not relevant for the purposes of this application, is whether the Targets were "connected with" the employer (*ie* Box Clever), within the meaning of PA04 s 43(6)(c), on that date. The point of significance for present purposes is that, as the law stood in 2011 (see PA04 s 43(9) and the Pensions Regulator (Financial Support Directions etc) Regulations 2005, reg 5), any determination to issue an FSD had to be made within two years of the relevant time—thus when the WN was issued, in September 2011, only three months remained for the completion of the proceedings before the Panel and the issue of its determination. That shortness of time, the Targets say, has prejudiced them in a manner which I should take into account in considering this application. I shall return to this argument.

10. Although the tone of the WN summary I have set out above, and in particular para 6, is critical the WN did not allege any kind of impropriety against the Targets or any of them, and it did not assert that the price paid by Box Clever for the former Granada and Thorn businesses was excessive. As para 9 of the summary shows, it went no further than to say that the transaction was not an arm's length sale to, or investment in, an unconnected third party. It is also clear from the following passage in the Regulator's skeleton argument produced for the hearing before the Panel that no reliance was placed on culpability:

> "[The Regulator] does not need to prove any form of fault or wrongdoing on the part of the Targets, because <u>the FSD jurisdiction is not fault-based</u>, as explained below (although no doubt in appropriate circumstances fault on the part of a target might militate in favour of an FSD being imposed). Hence the Panel does not need

to adjudicate on (a) whether or not the value placed on the businesses at hive down (and thus the cash paid to Granada) was culpably too high (although hindsight obviously suggests that the price paid was too high); (b) whether the level of debt imposed on the Box Clever JV was culpably onerous (although the fact that it ultimately proved excessive in practice is self-evident) ; or (c) whether or not transfer values offered by the trustees of the Granada scheme to the Trustee of this Scheme were in any way unfair. This simplifies the Panel's enquiry." [original emphasis]

11. The Trustee took essentially the same position before the Panel, and expressly adopted the WN, but its written representations, albeit not alleging misconduct or impropriety, were more critical of the Targets (and of Thorn). The submissions asserted, among other things, that setting up the JV with debt of £860 million "had obvious risks, which were (through no fault of their own) shared by the Scheme members", that the Scheme had been in deficit from inception, and that in Granada's case "as its accounts trumpet, [the JV] '*released*' £511m for the benefit of the higher companies in the Granada Group and their shareholders, including £352m cash" (original italicisation). The Trustee drew attention to the fact that Granada and Thorn had no liability for repayment of the loan or the interest on it, and then said:

> "24. Therefore, from the outset (and even accepting the possibility of synergy benefits from combining the Thorn and Granada rental businesses), the JV was at a significant risk that the businesses involved in it previously had not been subject to, namely the need to repay the £860m loan to stay afloat, and the need to make heavy interest repayments on the loan, which were in the region of £90m per year.
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> 25. This risk was heightened further by the fact that the rental businesses of both Thorn and Granada had been dwindling in the years up to the JV, reflecting a more general decline in the rental market generally …
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> 27. The JV was in difficulty from the outset. It never had any net assets, made substantial losses from the start, and administrative receivers were appointed after just 3 years, in September 2003."

12. At paras 48 to 50 the Trustee's submissions observed that when the JV was agreed in December 1999 the Granada pension scheme was in substantial surplus, yet none of that surplus was proposed to be transferred to the Scheme with the employees; and it drew a contrast with what was done by Granada in a later merger, when some of the surplus was transferred. The Trustee added a contention that the amount the trustees of the Granada pension scheme proposed to pay into the Scheme was inadequate. It appears that the contention had not previously been put in such terms, although it is, I think, implicit in the statement in the WN, at para 63, that "[t]he Scheme was in deficit from inception". The same paragraph mentioned that at 30 September 2002, "after just one year", the Scheme had a deficit of £8.5 million on an on-going basis, or of over £15 million on a solvency or buy-out basis.

13. The Panel broadly adopted the same approach as the WN summary. In the concluding paragraph, para 168, of the DN they provided their own summary of their reasons for determining to issue the FSDs:

> "… it is our view that it would be reasonable to issue FSDs to the Targets and to require them to secure that financial support is put in place for the Scheme, within six months of the issue of the FSDs. The factors that have weighed most heavily with us are the value of benefits received by the Targets from the Employers and

the Targets' relationship with those Employers. Overall it seems to us that this is a case where the Scheme's principal employer, [Box Clever], was set up by the Granada and Thorn groups as part of a transaction that aimed to extract value from the consumer rentals businesses of those groups, but leave them able to share in any future profit. A requirement of that transaction was that a pension scheme be set up for transferring employees; no value could have been extracted without this. Valuable financial benefits were received by the Targets, while the structure used to obtain them required [Box Clever] to borrow £860m from West LB, left all of [Box Clever]'s assets charged to secure that borrowing, and left the Scheme with a weak employer as a result. It is also relevant that this borrowing was not secured on any assets of Granada or Thorn group companies, insulating them from financial difficulties of [Box Clever]. We do not find misconduct on the part of the Targets, but consider the issue of FSDs to be an appropriate and reasonable response to the events of 1999 to 2003 in relation to [Box Clever] and the Scheme."

The "Employers" referred to in that passage were various subsidiaries within the Box Clever group.

14. At [15] of her judgment in the appeal from Judge Herrington Arden LJ (who gave the only judgment, with which Floyd and Christopher Clarke LJJ agreed) observed that this passage showed that the Panel's conclusions were based "on outcomes and not on any culpable conduct". I shall need to say more about that observation later. I should, however, record at this stage that although the Targets argued before the Panel that the absence of culpability militated against the making of FSDs, it is common ground that the Regulator was correct in saying, in its skeleton argument before the Panel, that the jurisdiction to make FSDs is not fault-based, albeit fault, if established, may be a material factor.

The reference to the tribunal

15. The Targets jointly referred the Panel's determination to issue FSDs to the tribunal in January 2012. The determination was challenged on a number of bases, of which only two are relevant for present purposes. The first appeared at para 7 of the reasons filed with the reference notice:

"The [Targets'] case is that the [Panel] was wrong [to decide to impose FSDs]. As a matter of procedural fairness, the [Panel] should have refused: …

(b) to allow [the Regulator] and the Trustee in substance to advance an amended case without [the Regulator] formally amending the Warning Notice and/or

(c) to allow the Trustee to advance a case which went beyond that set out in the Warning Notice …."

16. The second relevant passage appeared at para 12(c):

" … the benefits received by [the Targets] were not such as to make it reasonable to impose an FSD. In particular:

(i) [the Panel] attached undue weight to the price paid to [Granada] upon the sale of Granada's rental business to the Box Clever joint venture in 1999-2000 and to the structure of the West LB loan (it being common ground before [the Panel], and accepted in paragraph 148 of the Reasons—and thus not a matter which is reopened by this Reference—that the price paid was a proper one);

(ii) [the Panel] attached undue weight to the fact that Granada hoped to participate in the future value of the joint venture (even though it obtained no such value in the event) and to the alleged vulnerability of the joint venture ….”

17. Paragraph 148 of the DN appeared within a section headed “Value of benefits received from Employers”. That section is worth setting out in its entirety:

“141 We consider this a crucial factor in this case. Section 43 requires us to have regard to the value of benefits received ‘directly or indirectly’ from the Employers.

142 On any analysis the creation of the JV resulted in substantial financial returns for Rental & Retail [one of the Targets] and the Granada Group. Rental & Retail obtained approximately £352 million in cash and had liabilities of £158m repaid by the JV (or £174m according to the completion statement for the transaction). We considered these returns to be benefits of substantial value for the Targets. It also received £74 million in loan notes payable by BC Finance, but since these were eventually written off in 2003 we do not consider them a benefit in fact.

143 We also considered there was a benefit to the Targets from the method used to receive this financial return. The funds used by BC Finance to pay Granada and Thorn were almost entirely borrowed from West LB against the security of the JV’s assets on terms which provided for no recourse to the Granada or Thorn groups.

144 On this issue the Trustee quotes from:

a Granada Group meeting minutes of 16 November 1999: ‘[t]he basis of a deal with Nomura [the Thorn owners] is to extract [the value of the existing businesses] in cash now and to share equally with them in any additional value created thereafter’; and

b A Deutsche bank memo 14 June 2000, two weeks before the creation of the JV, ‘The cash has effectively been paid out to the two shareholders by way of dividend, leaving the underlying cash flows of the now leveraged Box Clever to repay the debt over time. Granada Media [also one of the Targets] received proceeds of £450 million in cash plus loan notes of £65-£70 million which constitute additional leverage of Box Clever and an investment for Granada Media’. [original italicisation]

145 We consider these quotes are indicative of the benefit that the Targets received from the structure they chose for the JV.

146 The Targets pointed out that Granada could have sold its consumer rental business to a wholly unconnected third party, in which case the current issues under the FSD provisions would not arise. However they did not. One of the key advantages of the JV approach that was adopted was the possibility of extracting the full value of the business at the time of creation and participating in future value (see paragraph 144 a above). Whilst no future value was in fact created, it was an important part of the reasoning for the JV and makes it appropriate for us to treat the situation differently from a simple sale of a business out of a corporate group.

147 The Targets do not deny that they received financial benefit from the creation of the JV. However they assert that the sale was at market value, supported by sophisticated due diligence, and that as matters have turned out they have

written off a significant investment in the Employers and borne the burden of certain pension benefits of Box Clever employees.

148 We accept those points, but consider they do not outweigh the very significant financial benefits referred to above. These are to us an important factor in deciding whether it is now reasonable to issue FSDs.

149 The Trustee asserts that the structure of the JV and its leveraging posed significant risk to both it and the Scheme. It adds that this must have been apparent to Granada in 2000. The evidence of the latter point is inconclusive, but we consider that the structure of BCT and its borrowing did leave it vulnerable to further declines in what was known to be a declining rental market. To an extent this was a necessary consequence of the decision to extract the amount of benefit from the JV that was paid in return for the rental businesses, and we therefore have regard to it in this context."

18. PA04 s 43, to which that passage refers, prescribes the circumstances in which FSDs may be made. By subsection (5)(b) an FSD may be made only if "the Regulator is of the opinion that it is reasonable to impose" an FSD on that person. Subsection (7) provides some guidance on the factors the Regulator is to take into account:

"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, where the employer is a company within the meaning of subsection (11) of section 435 of the Insolvency Act 1986, 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."

No "other matters" have been prescribed.

19. The Regulator's statement of case, served in March 2012, expressly adopted para 168 of the Panel's determination (see para 13 above) "as a fair summary of the heart of the Regulator's case", and at para 120 it repeated the statement that the hive down and the transfer of the employees into the Scheme were the means by which value was extracted from the business while at the same time the Targets were insulated from the "downside" of the financial difficulties which ensued, and from responsibility for pension liabilities accrued within the Scheme. At para 121 the statement of case added that "this method of crystallising and extracting the value of the existing businesses in cash by way of finance leveraged from those businesses without recourse to Granada or Thorn inherently left the Joint Venture vulnerable …". It is plain that those paragraphs represented a distillation of the section of the DN quoted above.

20. Paragraph 123 of the statement of case drew the threads of the Regulator's argument on this topic together, and was as follows:

> "As the Panel accepted … the consideration paid to the Granada group reflected a market valuation exercise that had been the subject of due diligence. As before the Panel, the Regulator does not contend that the price paid for the businesses on their hive-down to the Joint Venture was improperly or negligently derived. Yet that does not prevent it being entirely clear that the Granada group received significant benefits. In the event, it is plain that the valuation was based on a business plan that proved overly optimistic and that more value was extracted from the businesses than the Joint Venture could ultimately bear."

21. The statement of case did not say anything about the Targets' complaint that matters not within the WN were raised before the Panel, but at para 124 it did address para 12(c) of the reasons for the reference:

> "There is no basis for saying that the Panel attached '*undue weight*' to the consideration paid for the hive-down of Granada's rental businesses to the Joint Venture and to how that consideration was funded by leveraging the businesses. The Panel did not do so. The Panel specifically '*accepted*' the Targets' assertion that '*the sale was at a market value, supported by sophisticated due diligence*' and took that into account in its assessment of reasonableness." [original italicisation]

22. The Trustee served a response to the Regulator's statement of case in May 2012. Like the Trustee's submissions to the Panel it adopted a highly critical tone, but made no allegation of misconduct or impropriety. It did not say anything about the two passages in the reasons for the reference which I have mentioned above.

23. The Targets' reply to the statement of case was served in October 2012. At para 9 it said that the Upper Tribunal "ought to regard as common ground" a number of matters which "are not in issue", which it listed at para 10. Those relevant for present purposes were put as follows:

> "(a) that there was no misconduct on the part of the Applicants (as reflected in paragraph 168 of the Reasons and adopted in paragraph 41 of the Statement of Case);
>
> (b) that the sale of Granada's rental business to the Joint Venture was at market value and supported by sophisticated due diligence (as accepted by the Panel at paragraph 147-148 of the Reasons, and adopted in paragraph 123 of the Statement of Case);
>
> (c) that the price paid for the businesses on their hive-down to the Joint Venture was not improperly or negligently derived (as accepted at paragraph 123 of the Statement of Case);
>
> (d) that there was nothing 'non-standard' about the benefit received by the Applicants from the Joint Venture (transcript of proceedings before the Panel, day 1, page 11, line 14);
>
> (e) that nothing inappropriate was done in the Joint Venture – this was not suggested in the Warning Notice and was accepted by the Trustee (transcript of proceedings before the Panel, day 2, page 43, line 9);
>
> (f) that the Applicants were not seeking to escape any of their pre-existing pension liabilities when setting up the Joint Venture (as accepted by the

> Panel at paragraph 160 of the Reasons and not disputed in the Statement of Case) ….”

24. At para 17 the reply added that:

> “The Applicants further note that (quite rightly) neither the Regulator nor the Trustee has alleged in the Statement of Case or Response that the Applicants knew, believed or suspected, or ought to have known, at any material time that the Joint Venture would or might fail or was at any material risk of failing or of being unable to service its debt. Nor (quite rightly) have they alleged in the Statement of Case or Response that the Applicants were in any way at fault or unreasonable in relation to the operation of the business of the Joint Venture from its inception in June 2000 until its insolvency. The absence of such factors is thus further common ground, and the Applicants have prepared this Reply accordingly.”

25. All of those points were developed later, and it is clear that the Targets placed significant reliance on them. The reply repeated, in rather more detail than in the reasons for the reference, the complaint of delay, but said nothing about the claimed introduction before the Panel of arguments or material not referred to in the WN. It did, however, make a number of assertions against the Trustee, the essence of which was that it had unnecessarily taken inappropriate steps which had the result of increasing the size of the deficit.

26. What happened next was succinctly explained by Arden LJ in her judgment in the appeal from Judge Herrington as follows:

> “[21] This drew fire from [the Regulator] in [its] response, which rejected what it saw as a new positive case of proper conduct. In its reply [the Regulator] admitted that it was not in issue before the Upper Tribunal whether there was any misconduct on the part of the applicants or whether anything inappropriate was done in the joint venture. [The Regulator] also accepted that the Upper Tribunal might proceed ‘on the basis of a negative, default, assumption that there was no such misconduct or inappropriate conduct’. However [the Regulator] did not accept as common ground the positive assertions in para 10 of the targets’ reply. If the applicants wanted to establish such assertions it fell to them to prove them. [The Regulator] expressed the view that a reference to misconduct was not helpful in the context of a jurisdiction which was not fault-based.
>
> [22] [The Regulator] reserved the right, after disclosure of documents, to make further admissions or allegations as to the extent to which at any time the applicants knew, believed or suspected that the Joint Venture would or might fail. This was in addition to pointing out that the effect of the transfer of pensions liabilities had been to relieve the applicants of any exposure to them, and that the purchaser was not independent of the parties to the joint venture. It laid the ground for a case of misconduct or lack of due diligence by asserting that there was in substance no independent advice on the terms of the sale.
>
> [23] The trustee took a similar course. For example, the trustee pleaded in detail that the hive-down was not accompanied by sophisticated due diligence.”

27. I shall return to some of the details of these pleadings as I deal with the parties’ submissions. I should, however, make the observation, before going further, that there is no provision of PA04 or of the rules of procedure before this tribunal, the Tribunal Procedure (Upper Tribunal) Rules 2008, which deals with the question whether it is open to the Regulator or the Trustee to enlarge upon the WN, either in their

representations before the Panel or in their pleadings once a reference is before the tribunal. However, it is implicit in the reasoning of both Judge Herrington and of the Court of Appeal in this case not only that there are limits on what may be introduced after a WN has been served, but also that, once a reference has been made, it is for the tribunal to decide, in case of dispute, whether new allegations may be advanced by the Regulator or a trustee. In the absence of argument to the contrary I am content to make the same assumption myself.

The Targets' strike-out application

28. The present application was issued shortly after the service of the Regulator's and the Trustee's responses to the reply the Targets had served. The Targets wish to amend the application in order to reflect the Court of Appeal's decision. No objection was taken to the amendment, and I formally allow it. The basis of the application, as so amended, is summarised at para 2, which it is worth setting out in full as it represents a succinct yet comprehensive summary of the Targets' argument:

> "In summary, the Targets ask the Upper Tribunal to strike out certain new claims sought to be made by the Regulator and the Trustee at a very late stage in these regulatory proceedings. The new claims seek dramatically to widen and systemically revise the scope of the regulatory claims against the Targets. This is an attempt to subject the [Targets] to an oppressive and wholly unacceptable change of case:
>
> (a) The Regulator was under an obligation properly to investigate any claims against the Targets before ever starting proceedings, to provide the Targets with complete details of the claims made against them when it commenced proceedings, and fully to determine the claims, all within a strict statutory time limit.
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> (b) After years of investigation, the Regulator commenced regulatory proceedings and made a determination against the Targets in 2011. By that stage, the proceedings were already exceedingly stale, arising out of events in 1999-2003. But the Regulator did not make any of the claims which the Regulator and the Trustee are now seeking to add, nor did it even seek to add the new claims when the proceedings reached the Upper Tribunal in early 2012.
>
> (c) In June 2013, long after the statutory time limit expired, and long after they filed their Statements of Case before the Upper Tribunal, the Regulator and the Trustee sought radically to change and expand their regulatory claims. As recognised in the CA Judgment at [16]-[17] and [22], the Regulator, supported by the Trustee, has sought to plead a 'new case in reply' which 'laid the ground for a case of misconduct or lack of due diligence' by the Targets.
>
> (d) To make matters worse, they have not sought the Upper Tribunal's permission to make these new allegations, even though they have known ever since the CA Judgment was handed down in March 2015 that such permission was required. Such permission would not have been and should not be granted in any event. The new claims sought to be added would amount to a wholly different case; they would enormously expand the cost and complexity of this Reference and would indefinitely delay what is already a delayed and stale process.

(e) The new claims are also un-particularised and wholly unclear, being originally designed in an effort to justify ‘fishing’ disclosure requests, so as to enable the Regulator and the Trustee to investigate and (so they hope) construct a new case against the Targets.

(f) As is apparent from the CA Judgment at [60], [63] and [67]-[69], in an appropriate case it is open to the Upper Tribunal to permit the Regulator (and an Interested Party such as the Trustee) to introduce new allegations which did not appear in the Warning Notice (defined below), but this requires an exercise of discretion by the Upper Tribunal in the Regulator’s and Trustee’s favour. The discretion is to be exercised upon a consideration of all the relevant factors in the case, such as, without limitation, (a) the nature of the new allegations, (b) the reasons why the case was not previously put forward, (c) whether the Targets will be able to deal with the new allegations, and (d) whether there has been any delay by the Regulator and whether any delay would result from the new case going forward.

(g) Neither the Regulator nor the Trustee has asked the Upper Tribunal to exercise its discretion to permit them to advance the new allegations. The new claims should therefore be struck out and/or the Regulator and the Trustee barred from pursuing them. In so doing, the Tribunal can take comfort from the fact that even if the Regulator and the Trustee had asked for permission to advance the new allegations that permission would have been refused.”

29. Despite the amendment which I have allowed the essential character of the application is as it was when it was before Judge Herrington who, as I have said, dismissed it. In doing so he analysed the earlier authorities, relating to references from both the Regulator and the Financial Conduct Authority and its predecessor, in some detail. That is not an exercise I need to repeat, but it is helpful to set out a summary of the principles he derived from that analysis, and which he listed at [114]. Shortly stated, the principles he identified are as follows: the tribunal is confined to the nature of the regulatory action sought in the WN; the Regulator (and by parity of reasoning a trustee) cannot, without the permission of the tribunal, go beyond the facts and matters which were before the decision-maker—here the Panel—which are themselves to be identified by reference to the WN; the tribunal has the power to permit even a wholesale change of case as long as it is the same regulatory action which is sought; and that accordingly the Regulator and a trustee are free to advance their cases “in reliance on any facts and circumstances that were within the scope of the allegations made in the Warning Notice and which were canvassed before the [Panel] and in doing so may rely on any evidence relevant to these facts and circumstances, whether or not that evidence was available to the [Panel].”

30. At [88] Judge Herrington quoted a passage from the judgment of Stanley Burnton LJ in *Financial Conduct Authority v Hobbs* [2013] EWCA Civ 918 at [38]. Part of that passage merits repetition:

> “… in my judgment it is important for the Tribunal to consider all the facts and evidence put before it on a reference …. There are two reasons for this. The first is that its consideration of a reference is not ordinary civil litigation. There is a public interest in ensuring, so far as possible, that persons who are not fit and proper persons to perform functions in relation to a regulated activity are precluded from doing so. A narrowing of the inquiry by the Tribunal that excludes relevant

material from its assessment of an applicant is to be avoided, provided, of course, that the applicant is given a fair opportunity to address the Authority's case."

31. As that extract shows, the issue in that case was whether the respondent, Mr Hobbs, was a fit and proper person to undertake regulated activities, which is a rather different issue from that with which this reference is concerned, but I agree with Judge Herrington that there is some parallel between references from decisions of the Financial Conduct Authority and references from decisions of the Panel because, in both, there is an element of public interest—here, that the Scheme does not become a burden on the Pension Protection Fund.

32. Judge Herrington referred to the arguments advanced in paras 10 and 17 of the Targets' reply (set out at paras 23 and 24 above), and with which the Regulator and the Trustee took issue, as "the Propriety Matters", and summarised his reasoning at para 171 of his decision:

> "My overall conclusion on the Targets' Strike Out Application is therefore that the effect of the Responses is not to alter the core of the case against the Targets as originally set out in the Warning Notice and considered before the Determinations Panel. During the course of the process before the Determinations Panel the Targets sought to defend the action on the basis of the positive assertions they made regarding the Propriety Matters and these issues therefore formed part of the facts and circumstances before the decision-maker and therefore within the subject matter of the determination notice that may be referred to the Tribunal. In those circumstances, bearing in mind the Tribunal's *de novo* jurisdiction and the undesirability of narrowing its enquiry it should be able to consider the Propriety Matters and their significance in the context of a request for an FSD. The Responses should therefore stand and the application is dismissed."

33. In the Court of Appeal, Arden LJ explained at [57] to [59] why the WN represented an important protection for targets: from the moment it was served, the targets to whom it was addressed knew the case they had to meet. Despite the absence of a statutory prescription of what it must contain, common sense and the obligation on a public body such as the Regulator to act fairly, as well as the Regulator's published procedure, showed that it must be frank and transparent, and that nothing could legitimately be held back. However, that does not mean that the WN represents a kind of straitjacket:

> "[60] But it is significant that PA04 does not go on to say that either the Determinations Panel or the Upper Tribunal are constrained in the conclusions they can reach by the absence of a relevant ground in the WN. In my judgment, the absence of a provision to that effect firmly indicates that Parliament left the question whether the Determinations Panel or the Upper Tribunal could do so to their discretion.
>
> [61] Moreover, it is noteworthy that Parliament has protected the target in a number of different and quite specific ways. As I said, giving the judgment of this court in *Trustees of the Lehman Brothers Pension Scheme v Pensions Regulator* [2013] 4 All ER 744:
>
> > '[12] A salient feature of the statutory scheme for the issue of FSDs is the balance struck between the interests of the members of the pension scheme and the interests of potential targets (and their stakeholders). In particular, the interests of targets are protected by:

- the requirements already mentioned for the decisions to be made by the determinations panel and not the regulator;
- the requirement for FSDs only to be given in the circumstances specified on the face of the 2004 Act (see s 43(2));
- the imposition of the time limit in s 43(9);
- aspects of the process applicable in this case. Most relevantly: the regulator can only issue an FSD if satisfied that (among other matters) it is reasonable to do so and the Act prescribes a number of matters to be taken into account in reaching this conclusion (see s 43(5) and (7)); potential targets must receive a warning notice so that they can make representations (s 96(2)(a)).'

[62] The target is protected in other ways. As explained above, TPR must exercise its powers in the interests not only of the beneficiaries but also of the persons affected by regulatory action: s 100 PA04. Furthermore, under s 103, the Upper Tribunal is not given a completely free hand when it makes its decision. Its power is limited to determining the reference and it is required to remit the matter to the Determinations Panel with any appropriate directions for giving effect to its (the Upper Tribunal's) determination of the reference.

[63] I therefore conclude that Mr Stallworthy and Mr Hilliard are correct in their submissions that the Upper Tribunal's discretion to allow [the Regulator] to rely on additional grounds is not fettered by a threshold test of 'good reason'. I accept Mr Stallworthy's submission that, as Warren J held in paras 72, 79 and 80 of *Re Bonas Group Pension Scheme* [[2011] Pens LR 109], the Upper Tribunal can on a reference permit further evidence to be filed and receive fresh arguments, and that this supports the conclusion that it must be open to TPR, in an appropriate case, to adduce additional grounds for its proposed regulatory action on a reference to the Upper Tribunal."

34. The argument for a "threshold test of 'good reason'" had been advanced by Lord Pannick. His proposition, as it was recorded by Arden LJ at [36], was that it was not permissible for the Regulator to raise allegations which were not part of the WN or within the findings of the Panel unless the Upper Tribunal was satisfied that there was good reason for it to do so. Arden LJ continued as follows:

"[65] Moving from my conclusion that there is no threshold test of good reason, I turn to consider how the Upper Tribunal should approach the introduction by [the Regulator] of allegations which go outside the WN. The test applied by the Upper Tribunal in this case is unclear and unsatisfactory. It is either

- a test of relevancy (para 114), or
- a test whether the new allegation has been 'aired' before the Determinations Panel (para 118) or
- a test whether the new allegation affected the core allegations against the targets or
- whether the issue was aired in the WN or before the Determinations Panel or
- whether the issues formed part of the facts and circumstances before the Determinations Panel (para 171).

[66] In my judgment, each of these tests is in its own way too narrow and too prescriptive.

> [67] In my judgment, the exercise of the Upper Tribunal's discretion to allow [the Regulator] to raise a new case not contained in the WN should depend on a consideration of all the relevant factors in the case, and not just the narrow question whether [the Regulator] had good reason for seeking to enlarge its case. The Upper Tribunal has to weigh up all the facts and circumstances in deciding whether to permit [the Regulator] to adopt a new case. It would be impossible to provide a comprehensive list of those facts and circumstances, though I can give a few examples.
>
> [68] The Upper Tribunal has to consider the nature of the new allegations, and their impact on the case. If the new case involves fraud or bad faith, it may be less willing for a new case to be brought forward unless the case is clearly pleaded and appropriate detail given. It has to consider the reasons why the case was not previously put forward.
>
> [69] The Upper Tribunal has to consider whether the targets will be able to deal with the new allegations or are prejudiced in some other way. It may be that some new evidence has been found which the targets could not have anticipated (for example, dishonesty on the part of an employee who escaped all proper internal controls), or that some important evidence has been lost through no fault of the targets, or that the targets have taken some action which they would not have undertaken if they had known that [the Regulator] would raise these allegations. On the other hand, the new case may flow from information which the targets failed to disclose to [the Regulator] at an earlier stage. The conduct of [the Regulator] would also be relevant, including any delay on its part, as well as any delay that would result from the new case going forward.
>
> [70] Accordingly, I do not consider that it is sufficient for the Upper Tribunal to conclude that the matters were in some way 'aired' at some earlier stage or to limit its inquiry to asking whether the new case arises from facts and matters which were before the Determinations Panel.
>
> [71] There was a discussion during the hearing whether some concept of even handedness applied so that, if [the Regulator] could not raise a point, the same restriction would apply to a trustee who intervened to support the regulatory action proposed. In general, in my judgment, any inhibition on [the Regulator] raising a new case must also apply to the trustee who intervenes to support the case for regulatory action. I would not expect the trustee to be able to raise issues which [the Regulator] could not raise. On the other hand, Lord Pannick agreed that, if one target wished to claim that another target bore greater responsibility for the pension deficit than it did, there could be no bar on a co-target raising against another target a point which was not in the WNs issued by [the Regulator] against them. They cannot be fettered in raising points in their own defence."

Analysis of the pleadings

35. It is evident from the passage just quoted that the first step must be to identify what it is which is "new" or, as Arden LJ put it at [65], what are the "allegations which go outside the WN", since it is equally clear from the remainder of what she said that there is no restriction on the advancing by the Regulator or the Trustee of anything which was in the WN, whether or not it was accepted by the Panel and was reflected in the DN. Lord Pannick argued that this part of the enquiry was unnecessary in this case, as the Court of Appeal had already determined (see [21] to [23], quoted at para 26 above) that the responses did introduce allegations which had not previously been made,

and he sought to identify the detail of what was new by means of a list, in the form of a Scott Schedule, and highlighted versions of the two responses. There are a great many passages identified by those means, but for the reasons which follow I do not need to deal with them all in detail. Paragraph 10 of the Targets' reply (see para 23 above) represents an adequate summary, and some illustrative examples appear below.

36. I think it appropriate to begin with the reasons given for the approach adopted in the responses. At paras 4 and 5 of the Regulator's response the claim made by the Targets' reply, at paras 9 and 10 (see para 23 above), that certain matters are common ground was challenged. The Regulator said, among other things, that

> "[The Targets'] approach confuses the question of what is or is not 'common ground' with the question of what does or does not form part of a party's case. They have pleaded that certain propositions are 'common ground' when in fact the Regulator has simply not put forward a positive case on those matters."

37. The response went on to say that the Regulator did not accept the propositions set out at para 10 of the reply as common ground, and that if the Targets wished to establish those propositions it was for them to prove them. At para 7, in a passage almost the whole of which the Targets say is offensive, the Regulator said:

> "(a) The Regulator did not seek to assert any 'misconduct' by the [Targets] before the Panel and the possibility that there may have been such 'misconduct' is not something that was explored before the Panel. Hence the [Targets] mischaracterise the Panel's reasons. At paragraph 168 of the Reasons the Panel said 'we do not find misconduct on the part of the Targets'. This is not a positive finding that there was no 'misconduct' on the part of the Targets. The Regulator has not advanced a case based on 'misconduct' in its Statement of Case; and therefore accepts that it is not in issue <u>whether</u> there was any 'misconduct' by the [Targets] (in terms of behaviour which is unlawful). It is not sufficiently clear what the [Targets] intend to mean by the term 'misconduct'; but the concept of 'misconduct' is not illuminating or helpful in the context of a jurisdiction which is not fault-based.
>
> (b) The [Targets] mischaracterise the Regulator's Statement of Case in relation to the value for which Granada's rental businesses were sold to the Joint Venture. Paragraph 123 of the Regulator's Statement of Case states that 'the consideration paid to the Granada group reflected a market valuation exercise that had been subject of due diligence'. The Regulator did not (and does not) adopt the Panel's acceptance that the sale was 'at market value' or that the due diligence in question was 'sophisticated'. Indeed, to the contrary, as elaborated in paragraphs 25 and 117 below, the Regulator's position is that on the basis of the evidence presently available (i) the price appears to have been at a level favourable to the shareholders (having regard to what was apparently the highest third party indicative offer otherwise intimated and the apparently limited nature of the due diligence that inform the determination of the price); and (ii) the significant risks inherent in the Joint Venture, to which its creditors (including the Scheme) were exposed, must have been obvious to Granada when it entered the Joint Venture."

38. The response went on to elaborate on those propositions. At para 21 it argued that there had been no independent scrutiny of the reasonableness of the price paid to Granada and at para 25(b)(ii) it remarked that:

> "… It is reasonably to be presumed that West LB's focus would have been on the ability of the Box Clever group to trade in accordance with its business plan in the

short term, meet interest payments as they fell due and successfully complete the securitisation which it was envisaged would replace the bridge finance from West LB within 12 months. There is no reason to assume that there would have been concern on the part of West LB as to '*market value*'. An arm's-length purchaser might normally have been concerned not to pay more than '*market value*', but in this case the purchaser was represented by representatives of the vendors (namely, the shareholders of the Joint Venture) and there is no realistic sense in which the purchaser (BC Finance) or BCT could be characterised as being in a price negotiation with the vendor shareholders (as illustrated by the fact that BC Finance and the Box Clever group does not appear to have received any separate advice in relation to the price or to have conducted its own due diligence on the business plan in advance of the establishment of the Joint Venture)." [original italicisation]

39. The same paragraph went on to make various assertions about the quality and scope of the due diligence undertaken before the Joint Venture was established. On several occasions the response indicated that the Regulator proposed to rely upon expert accountancy or similar evidence. The overall thrust of the response made it clear that, in so far as these were relevant considerations, the Regulator's case was, or had become, that the price paid to Granada had been excessive, that the structure and financing of the JV led to obvious risks, and that the quality of the due diligence undertaken fell short of what might have been expected in the context of a genuine arm's length transaction.

40. The Trustee's response was in similar vein. It too put in issue what the Targets had maintained was common ground, and added at para 5 that:

"Many of the matters pleaded by the Targets in the alleged 'common ground' section at paragraphs 9 to 11 and in the later numerous paragraphs in the Reply that build on it seek to characterize the creation of the Joint Venture as if it were something very different, namely an arm's-length sale of the Granada and Thorn businesses to an unconnected third party. As is and always has been a central part of the Trustee's case, this is not so, and this is important, because many of the important reasonableness factors flow from this …."

41. At para 8 it asserted that "the Joint Venture partners certainly did receive a 'non-standard' benefit from the establishment of the Joint Venture in the sense of a benefit additional to that which they would have received from a third-party sale", and at paras 12 and 13, to the entirety of which the Targets object, it expanded upon that contention:

"12 The consequences of this were that:

12.1 (subject to further disclosure) it appears that Box Clever had no or no material say in whether the merger should proceed or on what terms, including the price to be paid by BC Finance;

12.2 nor does it appear that Box Clever carried out his own due diligence, the Joint Venture partners in essence dealing with themselves when setting the terms of the transfer of the businesses down to Box Clever;

12.3 the scope of the due diligence obtained and sensitivity analysis conducted by the Joint Venture partners was more limited than would ordinarily be expected in an ordinary sale of a business;

12.4 without an unconnected third party purchaser of substance on the scene, the only real limit on the cash that the Joint Venture partners could extract from the declining businesses that they were transferring to Box Clever was the amount West LB would lend to Box Clever; and

12.5 West LB had a different perspective from a third party purchaser, its interests being to satisfy itself in light of its own risk-appetite that it was sufficiently likely that the Joint Venture would pay all fees and interest owing to West LB over the year (or potentially sooner) from the creation of the Joint Venture and that West LB would then be able to recover the capital that it had lent through the planned securitisation.

13 Therefore, contrary to the suggestion in paragraph 10(b) [of the Targets' reply], it is not common ground that the price paid by BC Finance represented 'market value'. There are a number of serious reasons – outlined above – for thinking that it was not."

42. At para 16 the Trustee said that:

"… it makes little sense in paragraph 10(c) of the Reply to talk of 'improperly or negligently deriv[ing]' a price to be paid by BC Finance. From the Joint Venture partners' perspective, they had an interest in extracting as much cash as possible by requiring as high a price as possible from BC Finance, and then insulating themselves from the risks (which were exacerbated by the borrowing) so the £600m extracted was very satisfactory from their perspective."

43. At para 17 the Trustee sought to explain the basis of its case, as it was advanced in the response. In the following passage, the italicised emphasis is original; the two underlined sentences are the subject of objection by the Targets:

"All of the above actions of the Targets constitute factors in favour of it being reasonable to issue a FSD. It is not necessary for the Trustee or Regulator to go further and show that the Targets have engaged in conduct which would be legally actionable outside the FSD jurisdiction, all the more so when the FSD jurisdiction is a no-fault one. Therefore, as to paragraph 10(a), the Trustee does not contend on this reference that the Targets have engaged in conduct that is independently legally actionable. That is quite another thing from saying that their conduct in establishing the Joint Venture was creditable or that the Trustee accepts that misconduct did *not* occur. It is not necessary to go that far on the reference."

The Targets' arguments

44. Lord Pannick's first point was that the absence of any application by either the Regulator or the Trustee for permission to advance a new case was fatal to their position and that, without more, I should simply strike out those parts of their responses which sought to advance any proposition of fact or argument which was not within the confines of the WN. An application to the tribunal of that kind, that is one seeking the exercise of a discretion, should be supported by grounds and, if appropriate, evidence; but even after the judgment of the Court of Appeal, and the clear indication by Arden LJ that the responses did advance a new case and, moreover, that the Regulator and the Trustee were putting themselves in a position to expand upon their new case, no application had been made.

45. It was conspicuous that the WN did not seek to challenge the propriety of the Targets' conduct in any way, but instead focused on the structure of the JV – that is to say, the fact that Granada had disposed of its rental business in exchange for cash,

retaining the ability to benefit from future profits, if there were any, while it was insulated from the JV's liabilities. It also made the point that the sale was not at arm's length or equivalent to an investment in an unconnected third party. The Targets could not and did not object to the Regulator's and Trustee's pursuing those arguments before the tribunal, but they did object to their enlarging their case in order to allege misconduct or foreknowledge that the JV would, or was likely to, fail, or to argue that the price paid for the business had been in excess of market value or not supported by proper due diligence. The DN expressly recorded that the Panel had not found misconduct, and that it accepted the Targets' case that the sale was at market value and supported by sophisticated due diligence. The statement of case served in the reference adopted that finding. The Regulator and the Trustee had not discovered something new and unexpected, but had simply changed the basis on which they put their case. An examination of the history of the case shows that the Regulator made a conscious decision not to advance allegations of impropriety when formulating the WN and it would be oppressive and unfair to permit a change of case at this stage.

46. The Targets argue that it is clear beyond doubt that the new case is quite different from that advanced in the WN: despite their previous disavowal of an argument that there was any element of fault on Granada's part what the Regulator and the Trustee now wish to contend is that the price received by Granada was, or at least may have been, in excess of market value, that the due diligence performed was inadequate to protect Box Clever, and that Granada knew that the JV was very risky. These are not simply passing comments; the arguments are developed in considerable detail in the responses which, together, run to 146 pages. Moreover, they are serious allegations, suggesting that Granada deliberately sacrificed Box Clever's interests for, as the Targets' skeleton argument puts it, "its own unwarranted and improper financial gain".

47. Even if the Regulator and Trustee had made a formal application for permission to advance these arguments, it should be refused. The allegations have been made very late in what is already a stale case, relating to events which took place around 15 years ago, and they have been made after the expiry of the time limit for the issue of a WN. In addition, they will give rise to further delay and cost, particularly if the Regulator is right in its view that expert evidence will be required, and as the responses themselves make clear further disclosure will be required of potentially considerable volumes of documentation. Indeed, some of the allegations are put in such a way as to suggest that the further disclosure sought will amount to a fishing expedition. The risk of prejudice to the Targets if, after so long an interval, and when they no longer have access to much of the relevant documentation, they are unable to gather all the necessary evidence is obvious. Indeed, as the Trustee's response concedes, it will be almost impossible, so long after the event, to establish what price might reasonably have been expected for a sale of the businesses to an arm's-length purchaser.

48. There has, Lord Pannick continued, been considerable delay on the part of the Regulator, and no adequate explanation of the Regulator's and the Trustee's failure to advance the new arguments previously. An investigation began as long ago as 2006, if not earlier, but had not been concluded by November 2009 when both Granada and Thorn made clearance applications, seeking confirmation that FSDs would not be issued against them. The applications were substantially the same, and they drew attention to the structure of the JV which the WN eventually criticised. Importantly, the Regulator identified all of the potential issues – that is, the amount of the price paid and the

adequacy of the due diligence – long before the WN was issued, yet no attempt was made in the WN to allege that the price was excessive or that the due diligence was inadequate. It must be inferred that the Regulator had made a conscious decision not to make any such allegation. Before the Panel, the Targets argued that there was no evidence to justify the conclusion that an excessive price had been paid – on the contrary, it was asserted that at the time Granada and Thorn entered into it there was ample evidence that the JV had a real future. The Regulator made no attempt to challenge that argument, asserting instead that (as its skeleton argument before the Panel put it) the Regulator "does not need to prove any form of fault or wrongdoing on the part of the Targets, because the FSD jurisdiction is not fault-based". It also expressly disavowed any allegation that the price paid was excessive, as its skeleton argument before the Panel made clear (see the passage quoted at para 10 above).

49. The Targets also argue that the new arguments had been raised after the relevant time limit had expired. That time limit, prescribing the time within which a DN must be issued, expired on 31 December 2011 yet the responses were not served until 2013. For that reason alone the new allegations should be excluded.

50. Mr Furness added that, even in their statements of case, the Regulator and the Trustee made no attempt to advance the new arguments on which they seek to rely now. Arden LJ made the same point in her judgment, at [17]:

> "One would have thought that if [the Regulator] was going to mount a significant new case against the targets it would have done so in its statement of case. It did not do so; nor did the trustee. [The Regulator's] statement of case relied on a 'no hive-down, no benefit argument' (my description). It did not maintain criticisms of Granada's conduct of the hive-down transaction … [The Regulator] went no further than to point out that it was known that the rentals business was declining, that the extraction of value left the Box Clever group and its employees' pension rights in a vulnerable position and that the valuation of the business and the value extracted from it proved to be excessive. It disclaimed any allegation that Granada was negligent or acting improperly in fixing the hive down terms."

51. The Targets also argue that they were entitled to assume, by the time the statements of case were served, and when both the Regulator and the Trustee had eschewed any allegation of misconduct, that no such allegation was to be made and that what the Targets' reply identified as common ground was indeed common ground. That was particularly so when the reference itself said that "it was common ground that the sale was at market price and subject to due diligence"; if the Regulator and the Trustee took issue with that observation the time to do so was when serving the statements of case. In any event, the proposition that there was a material difference between "matters not in issue" and "common ground" elevated a mere semantic difference into a substantive argument. The issue was, and should have remained, whether or not it was reasonable to issue FSDs, and not whether Granada had acted in a reasonable and appropriate manner in entering into the JV. Even now some of the new allegations were ill-defined, referring to "cause for concern" and "pointers" to the effect that, for example, the price paid for the businesses might have been too high. Repeatedly it is said that the allegations will be developed following further disclosure, an indication that yet further delay will occur, that the Targets may be faced by additional arguments, and that the process will be never-ending. There was also the prospect, again repeatedly

foreshadowed by the responses, that expert evidence might be required, causing yet more delay and expense.

The Regulator's arguments

52. Mr Stallworthy began with the proposition that, contrary to the Targets' argument, the Court of Appeal did not identify any parts of the responses which represented new arguments, and they did not go through the pleadings in detail. Rather, they assumed as their starting point that some new allegations had been made and then identified the criteria which should govern the tribunal in deciding whether or not to exercise its discretion to allow those new allegations to be made. Indeed, it is not even clear that the Court of Appeal actually addressed their minds to the question whether or not the allegations truly were new. At [33] Arden LJ said "the Upper Tribunal dismissed the application to strike out [the Regulator's] further allegations because the core allegations before the Determinations Panel were not affected" and then set out [171] of Judge Herrington's decision, which is quoted at para 32 above. Although she was later to criticise his reasoning she accepted without demur the proposition that the core allegations were unchanged.

53. The Regulator's case that it is unnecessary to demonstrate misconduct is unchanged, said Mr Stallworthy. What the Regulator is seeking to do is counter the, as he put it, Pandora's box of assertions designed to show that Granada's actions were beyond reproach. Thus although the Regulator put in issue the proposition that the price paid was at market value and supported by sophisticated due diligence, it still did not, and did not intend to, argue that anything Granada did was improper: see paras 7 and 17 of its response, set out at paras 37 and 43 above respectively. Once that point was accepted it became clear that nothing in the Regulator's response was new in the sense that it was absent from the WN.

54. The reality was, he continued, that the Targets' relationship with the JV and with the Scheme had been a central issue from the outset. That Granada had had a decisive influence on the structure and operation of the JV had been at the forefront of the Regulator's case throughout. There was evidence before the Panel that both Granada and Thorn had had a very "hands-on" approach to the JV before it entered into administration, yet the Targets seek to characterise their relationship with the JV as one of merely taking an interest in their shareholding. In addition, he said, they exaggerate what is said against them by misrepresenting the Regulator's case. For example, they contend that the Regulator has argued that Granada usurped the role of Box Clever's executive management, but what the Regulator's statement of case actually said, consistently with the WN, was that Granada controlled the Box Clever group through its 50% shareholding and appointment of directors to the holding company, and that it was integrally involved in establishing the Scheme. Thus the Targets seek, by advancing a positive case of benign supervision, to distance themselves from the management of the JV and from decisions relating to the Scheme. The Targets' reply put all these matters in issue and, as Warren J said in *Bonas*, at [68], "it would be unfair if the Regulator was not allowed to adduce evidence in rebuttal".

55. It had also been clear from the beginning of the enquiry, and was a feature of the Regulator's statement of case, that the transaction was structured in a manner which insulated Granada from risk. That was so both in relation to the West LB borrowing and the Scheme: it had been the Regulator's case throughout that the JV was a method by

which Granada could extract cash without subjecting itself to any risk of future liabilities, whether in relation to the JV or the Scheme. Thus the WN expressly alleged that Granada crystallised value from the businesses hived down, that the hive down benefited Granada by releasing cash, and that Granada was insulated from any liability. It had always been the Regulator's case that Granada deliberately designed the JV in a manner which would enable it to extract the maximum value for minimum risk and this was reflected not only in the statement of case but also in the DN, which referred to the Panel's finding that the transaction "aimed to extract value". It was incontrovertible that the Targets were, as a matter of fact, protected from any liability of the JV. The argument by the Targets that all this was in some way new misrepresented the true position.

56. It could not be inferred that the Regulator had in some way accepted that the extraction of cash and the insulation from risk was accidental. It was perfectly clear, from what was said in the WN and before the Panel, that part of the Regulator's case was that Granada designed the transaction with those ends in mind. It was also perfectly clear from the contemporaneous documentation that all concerned knew that the JV would be highly leveraged, and it was self-evident that burdening the JV with so much debt imported risk. The relevant consideration was not whether Granada was at fault, but whether it appreciated the scale of the risk which was to be imposed on the JV and, through it, the Scheme, by transferring businesses operating in a market which, as the Targets themselves conceded, was known to be declining. The WN used the term "highly leveraged" when observing that Granada received a cash benefit of about £510 million in exchange for what was, effectively, nothing more than goodwill. All of the evidence before the Panel was to the effect that Granada was well aware of the risk that the JV would find it difficult to service the loan, and the Regulator's statement of case took the same line. The Targets' reply asserted, to the contrary of what had been the Regulator's case hitherto, that when setting up the JV Granada did not appreciate that there was any material risk that the JV might fail or be unable to service its debt; it could not be unreasonable to allow the Regulator to resist that argument.

57. The argument that permitting the Regulator to advance the supposedly new case would require extensive further disclosure was misplaced. The Targets had given disclosure, to the Regulator's satisfaction, as long ago as 2014 and that disclosure had not led to any further allegations. The Regulator had no intention of seeking additional disclosure. It was similarly impossible for the Targets to contend that it was inappropriate for the Regulator to rely, if appropriate, on expert evidence. It was for the Targets to show, since they maintained it, that the due diligence undertaken was sophisticated; it could not be offensive for the Regulator to rely on expert evidence about the true quality of that due diligence. In any event, the tribunal had already made directions about the introduction of expert evidence.

58. Mr Stallworthy's answer to the argument that a formal application for permission to introduce the new allegations must be made was that, once those allegations were properly analysed and found not to be new allegations at all but no more than responses to the Targets' case and building on facts and other matters which could be found in the WN, the argument simply fell away.

The Trustee's arguments

59. Mr Hilliard substantially adopted the arguments advanced by Mr Stallworthy, but added some further points of his own. The first was that, although it was necessary to reach a conclusion which was fair to the Targets, one should not lose sight of the fact that there is a statutory obligation to have regard to the interests of the members of the Scheme. Thus fairness to the members was a factor which must be weighed in the balance. He pointed, too, to the irony that the Targets objected to arguments of misconduct on their part, while advancing without any qualms arguments that the Trustee had behaved in an inappropriate manner and in so doing had increased the size of the deficit.

60. There was, Mr Hilliard continued, nothing in the complaint of delay. The Trustee had entered into negotiations with Granada in the course of which Granada had made a series of decreasing offers of a contribution to the deficit – that is, an offer was made, agreement was reached in principle, and then Granada withdrew the offer and made a lower one. Ultimately, it refused to make any offer at all. That process had gone on for a long time and although, with the benefit of hindsight, one could see that the Regulator should have taken action at an earlier stage, it was reasonable for it not to do so while there remained the prospect of a negotiated settlement.

61. The negotiating tactics were, Mr Hilliard said, symptomatic of the Targets' approach to the litigation, which was to take technical points in order to delay the proceedings and put obstacles in the path of the Regulator and the Trustee. A particular example was the Targets' complaint that the Trustee should have realised that Box Clever was in severe difficulty and taken appropriate steps to safeguard the Scheme, coupled with the objection to the Trustee's advancing the argument that it was Granada, through its appointed directors, which was heavily involved in running the business. In other words, the Targets wish to pursue arguments of fault against others while preventing those others from alleging fault against the Targets.

Discussion and conclusions

62. I deal first with the Targets' argument that a formal application should have been made for permission to advance the new, or supposedly new, arguments and that, without such an application, the Targets' application that certain passages in the responses should be struck out should succeed, at least in principle, even if the detail needed to be resolved later. For the reasons which follow I am persuaded that some features of the Regulator's and the Trustee's cases are new, in the sense meant by Arden LJ, but I do not accept the proposition, in the particular circumstances of this case, that an application for permission to advance that new case was required. Accordingly I dismiss that ground of the Targets' application. Even if I am wrong in that conclusion I would not accede to that part of the application. This particular disagreement between the parties has already been considered by this tribunal and by the Court of Appeal and is before this tribunal again. The Targets can have no real doubt about what is being argued and they are in no way prejudiced or disadvantaged by the absence of a formal, written application. In my view, at this stage, an insistence on a formal application would be inconsistent with the requirement of the overriding objective of dealing with cases fairly and justly and of avoiding unnecessary formality. If, despite that, it should be found elsewhere that there is a requirement of a formal application, I waive that requirement.

63. I come next to the test formulated by Arden LJ at [67] (see para 34 above). In my judgment the test is essentially simple, although its application may be less so. It is necessary to identify first what is "new", in the sense that it was not contained in the WN, and second what are the "relevant factors" which bear on the exercise of the tribunal's discretion. Those factors were in part identified by Arden LJ at [68] and [69], set out at para 34 above, and are, in summary, and as relevant here, whether the allegations are clearly put with sufficient detail, whether the Targets will be able to deal with them, and whether the Regulator or the Trustee have been guilty of culpable delay to such an extent that it would be unfair to permit them to rely on the new allegations. Once it has identified the relevant factors the tribunal must conduct a balancing exercise.

64. It seems to me that the *arguments* which the Regulator and Trustee now wish to pursue, essentially and primarily to the effect that the price paid was or might have been excessive, that the due diligence undertaken was or might have been inadequate, and that the borrowing was a burden the JV could not bear are "new" in the sense which Arden LJ meant. In the WN and before the Panel the Regulator, and before the Panel the Trustee, made no attempt to argue that the Targets, or Thorn, knew or even ought to have known that the price was excessive, and they made no criticism of the quality of the due diligence undertaken nor, indeed, did they argue that the due diligence was of little or no value to Box Clever itself. As Arden LJ said at [15], they based their arguments "on outcomes and not on any culpable conduct". The responses introduced a change of emphasis, not merely by putting the Targets to proof of what was said to be common ground, but by expanding and developing the criticisms which had already been made. But I agree with the Regulator and the Trustee that the *facts* on which those arguments are based have been at the forefront of their cases from the time the WN was served. Whether or not the propositions are informed by hindsight, it has always been part of their cases that the price paid was, as a matter of fact, greater than the true value of the businesses, that the borrowing imposed a burden on the JV which it was incapable of bearing, that Box Clever had no effective say in the formation or the structure of the JV, that Granada and Thorn extracted substantial sums of cash and that at the same time they insulated themselves from risk while retaining at least some measure of control over the JV. In addition, as I have said, while both have been critical of Granada's conduct, they have not alleged, and importantly do not now allege, that it was negligent or in some way improper.

65. In my view it is a matter for no great surprise that in a jurisdiction which is not based on fault, but on the factors identified at PA04 s 43(7) (set out at para 18 above), the Regulator and the Trustee did not go further, in the WN, in their submissions to the Panel or in their statements of case, and allege any kind of fault; it was unnecessary for them to do so. The opening words of that subsection make it clear that what follows does not represent an exhaustive list but it nevertheless shows that the focus is on the relationship between the potential target and the employer, and on what has happened – the outcomes as Arden LJ put it – rather than on the reasons for those outcomes. Even paras (b) and (c) of the subsection are written in entirely neutral terms. Had Parliament thought that culpability, whether in the establishment or management of the scheme or in some other way, should always be considered it could easily have said so; and Lord Pannick accepted that fault was not a necessary requirement and in many cases in which it would be appropriate to issue an FSD fault would be entirely absent. Thus in my view

the fact that neither the Regulator nor the Trustee thought it necessary to go so far as to allege impropriety in their earlier submissions and pleadings, but instead confined themselves to a critical analysis of the outcomes, is unremarkable.

66. I agree with them too that a failure to allege impropriety is not to be equated with an acceptance that no impropriety occurred. On the other hand, I recognise that the express adoption by the Regulator in its statement of case of the Panel's observation, at para 168 of the DN, to the effect that it made no finding of misconduct might be taken, not as a neutral statement, but as positive acceptance that there was no misconduct. It might therefore be thought unfortunate, in the light of subsequent developments, that the Regulator and the Trustee did not make their positions on that point more clear. Nevertheless, I bear in mind that their position at that time remained that it was unnecessary for them to establish fault, and that the relevant criteria were confined to those identified in s 43(7) of PA04.

67. There are, however, two principal factors which have persuaded me to the view that the Regulator and the Trustee should be permitted to advance the new arguments. The first is that, as I have said, the facts upon which those arguments are based are not new: they have formed part of the case the Targets must meet from the outset, and it does not seem to me in any way unfair to require the Targets to address the significance of those facts in an additional context. That must be all the more the case when, as s 103 of PA04 makes clear, the tribunal has the power to consider evidence and, inferentially, to entertain arguments which were not before the Panel. The second factor is that the Targets sought to make a virtue of what they claimed to be common ground. Everything which had gone before, in the WN and in the Regulator's and the Trustee's submissions to the Panel as well as in their statements of case, even though not alleging impropriety, negligence or any other kind of fault, was, as I have already said, highly critical of many features of the JV. I find it difficult to understand how the Targets could genuinely think, against the background of that criticism, that the Regulator and the Trustee accepted (1) that the JV was in all respects equivalent to an arm's-length arrangement, (2) that it had been negotiated on truly commercial terms from which the Targets derived an objectively reasonable price, (3) that their counterparty, Box Clever, had the benefit of sophisticated due diligence, (4) that there was no reason to think that the scale of the borrowing from West LB would place an unmanageable burden on the JV, and (5) that the Regulator or the Trustee accepted that the JV collapsed because it was overtaken by unforeseen and unforeseeable events. This, however, is essentially what the Targets say the "common ground" establishes. In my judgment the new arguments are no more than a legitimate response to the Targets' case on the supposed common ground. On that point I agree with Mr Stallworthy and Mr Hilliard, and it is for that reason that I have concluded that no application for permission was or is necessary.

68. I should add for completeness that I agree with the Regulator and the Trustee that the phrases "matters not in issue" and "common ground" are not synonymous, at least in the context of a reference of this kind, and I reject the Targets' argument that the difference of meaning between them is no more than semantic. If it is right that the focus is on outcomes rather than the reasons for them, "matters not in issue" encompasses matters which the Regulator and the Trustee need not establish, but I do not think the phrase can be interpreted as if it were an acceptance of the Targets' case. "Common ground", on the other hand, denotes a matter on which the parties have reached a positive, even if tacit, agreement.

69. I should make two further observations in case I am found elsewhere to have fallen into error. First, I did not detect, despite the arguments to the contrary advanced by Lord Pannick and Mr Furness, any reason to think that the Targets would be placed in any particular difficulty in dealing with the new arguments, and certainly not a difficulty which would affect them unfairly. The WN put in issue the scale of the cash benefit derived by the Granada group from the JV and the burdensome nature of the borrowing and I do not see any reason why the expert evidence for which a direction has already been made should not encompass the assessment of those factors at the time the JV was created, difficult though an evaluation so long after the event might be. The question which the tribunal will be required to consider is not, what should the price have been, but whether Granada and Thorn should have appreciated, at the time they created the JV, the scale of the risk to which, as subsequent events have shown, it was exposed. If the Targets are, nevertheless, placed in difficulty it is in my view a difficulty of their own making. If they wish to argue that (to take one example) the price they received from the sale of the businesses was objectively reasonable it is for them to establish it.

70. The second observation is that I reject the Targets' argument that the Regulator and the Trustee should be precluded, on grounds of delay, from advancing the new arguments. First, I do not think the shortness of time between the issue of the WN and the Panel's determination is a factor which has any relevance to the present application; it is, at this stage, water under the bridge. Second, I accept what Mr Hilliard told me about the reasons why the negotiations between the Trustee and the Targets were so protracted. The Targets had no answer to that point. Third, and at the risk of repetition, it is the terms of the Targets' reply which have led to the advancement of the new arguments and, for the reasons I have already given, I do not see how a litigant can properly be precluded from advancing arguments which respond to his opponent's case, provided that the response is itself reasonably prompt. It is true that several months elapsed between the service of the reply and the service of the responses, but the responses were served by the deadlines directed by the tribunal and in those circumstances the lapse of time between service of the reply and service of the responses is immaterial.

71. For those reasons I dismiss the Targets' application.

Judge Colin Bishopp

Upper Tribunal Judge

Date of release: 8 November 2016