Neutral Citation: **[2025] UKUT 00257 (TCC)**

Case Number: UT-2024-000019

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Rolls Building, London

PENSIONS REGULATOR - contribution notice-whether applicant party to act or series of acts causing material detriment to pension scheme - yes - whether reasonable to issue a contribution notice to applicant – yes – amount specified in contribution notice increased

Heard on: 30 April and 1 May 2025
Judgment date: 01 August 2025

Before

JUDGE MARK BALDWIN
MR CHARLES FARQUHARSON
MR MICHAEL HANSON

Between

ELIZABETH ANN PELGRAVE

Applicant

and

THE PENSIONS REGULATOR

Respondent

Representation:

For the Appellant: Michael Uberoi and Charlotte Elves of counsel, instructed on a direct access basis

For the Respondents: Thomas Robinson KC of counsel, instructed by The Pensions Regulator

DECISION

INTRODUCTION

1. By a reference (the "Reference") dated 23 February 2024, the Applicant ("AP") referred to this Tribunal a determination made by the Determinations Panel (the "Panel") of the Respondent ("the Regulator") that a contribution notice ("CN") should be issued to her under section 38 of the Pensions Act 2004 ("PA 2004") in the sum of £180,218.50, together with £37,134.66 as a passage of time adjustment. The Regulator argues on this Reference that a CN should be issued to AP in the sum of £360,437 plus a passage of time adjustment that as at 16 April 2025 stood at £143,330.

2. We will analyse the factual matrix in more detail in due course, but by way of introduction the Reference concerns three acts which are alleged to have extracted value from a company called Discovery Flexibles Limited ("DFL"), which was the sole sponsoring employer of an occupational pension scheme called the Danapak Flexibles Retirement Benefits Scheme ("the Scheme"), over a period when the Scheme was in deficit on all funding measures and DFL was paying minimal deficit repair contributions in reliance on its weak financial state.

3. AP was one of two directors of DFL until 23 March 2016. She was also one of four ultimate owners of DFL, through a 25% shareholding in a company called Discovery Flexibles Holdings Limited ("DFHL"), which was DFL's parent. The other owners of DFHL were (i) AP's brother Paul ("PW"), (ii) her brother Chris ("CW"), and (iii) her parents.

4. The three acts which the Regulator relies on against AP are:

(1) Monthly extractions of £20,000 from DFL since September 2015 (increasing to £23,000 in November 2017) as "management charges" or "dividends", for the benefit of CW and his wife.

(2) The use of DFL's resources to fund the purchase on 18 September 2015 of the shares in DFHL held by AP and other shareholders. The purchase was funded by an £800,000 drawdown from DFL's invoice finance facility. That money was paid away by DFL to an associated company called Pink Printers Limited ("Pink") in return for an unsecured, interest-free receivable, which was never paid and which DFL has written off in its accounts. The Regulator says that this led to DFL being financially weakened and no longer having the £800,000 available for the Scheme, while AP received £360,437 of that money in or about March 2016 as the purchase price for her shares in DFHL.

(3) The use of DFL's assets since September 2015 to support other group companies, leading to a write-off of debt of £224,481.

THE LAW

5. Section 38 PA 2004 authorises the Regulator to issue CNs. So far as relevant, at the time which is relevant to these proceedings, it provided:

> "**38 Contribution notices where avoidance of employer debt**
>
> (1) This section applies in relation to an occupational pension scheme other than–
>
> (a) a money purchase scheme, or
>
> (b) a prescribed scheme or a scheme of a prescribed description.
>
> (2) The Regulator may issue a notice to a person stating that the person is under a liability to pay the sum specified in the notice (a "contribution notice")–
>
> (a) to the trustees or managers of the scheme, or

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

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

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

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

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

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

(c) …, and

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

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

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

(4) ...

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

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

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

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

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

(i) on or after 27th April 2004, and

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

(c) it is either–

(i) an act which occurred during the period of six years ending with the giving of a warning notice in respect of the contribution notice in question, or

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

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

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

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

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

(ii) ends with the giving of a warning notice in respect of the contribution notice in question.

(7) The matters within this subsection are—

(a) the degree of involvement of the person in the act or failure to act which falls within subsection (5),

(b) 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 (c. 45), whether the person has or has had control of the employer within the meaning of subsection (10) of that section),

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

(d) if the act or failure to act was a notifiable event for the purposes of section 69 (duty to notify the Regulator of certain events), any failure by the person to comply with any obligation imposed on the person by subsection (1) of that section to give the Regulator notice of the event, loss of employment),

(ea) the value of any benefits which directly or indirectly the person receives, or is entitled to receive, from the employer or under the scheme,

(eb) the likelihood of relevant creditors being paid and the extent to which they are likely to be paid,

(ec) the effect of the act or failure to act on the value of the assets or liabilities of the scheme or any relevant transferee scheme,

(f) the financial circumstances of the person, and

(g) such other matters as may be prescribed.

(7A) In subsection (7)(eb) “relevant creditors” means—

(a) creditors of the employer, and

(b) creditors of any other person who has incurred a liability or other obligation (including one that is contingent or otherwise might fall due) to make a payment, or transfer an asset, to the scheme.

(7B) In subsection (7)(ec) "relevant transferee scheme" and the reference to the assets or liabilities of any relevant transferee scheme have the same meaning as in section 38A.

(8) For the purposes of this section references to a debt due under section 75 of the Pensions Act 1995 (c. 26) include a contingent debt under that section.

(9) Accordingly, in the case of such a contingent debt, the reference in subsection (5)(a)(ii) to preventing a debt becoming due is to be read as including a reference to preventing the occurrence of any of the events specified in section 75(4C)(a) or (b) of that Act upon which the debt is contingent.

(10) For the purposes of this section–

(a) section 249 of the Insolvency Act 1986 (connected persons) applies as it applies for the purposes of any provision of the first Group of Parts of that Act,

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

(c) section 229 of the Bankruptcy (Scotland) Act 2016 (associated persons) applies as it applies for the purposes of that Act.

(11) For the purposes of this section "insolvency practitioner", in relation to a person, means–

(a) a person acting as an insolvency practitioner, in relation to that person, in accordance with section 388 of the Insolvency Act 1986, or

(b) an insolvency practitioner within the meaning of section 121(9)(b) (persons of a prescribed description).

(12) Subsection (13) applies if the Regulator is of the opinion that—

(a) a person was a party to a series of acts or failures to act,

(b) each of the acts or failures in the series falls within subsection (5)(b) and (c), and

(c) the material detriment test, the employer insolvency test or the employer resources test is met in relation to the series, or the main purpose or one of the main purposes of the series was as mentioned in subsection (5)(a)(i) or (ii).

(13) The series of acts or failures to act is to be regarded as an act or failure to act falling within subsection (5) (and, accordingly, the reference in subsection (6)(b)(i) to the act or failure to act falling with subsection (5) is to the first of the acts or failures to act in the series).

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

6. Section 38A PA 2004 explains what is meant by the "material detriment test" in section 38. So far as relevant, at the time which is relevant to these proceedings, it provided:

"**38A Section 38 contribution notice: meaning of "material detriment test"**

(1) For the purposes of section 38 the material detriment test is met in relation to an act or failure if the Regulator is of the opinion that the act or failure has detrimentally affected in a material way the likelihood of accrued scheme benefits being received (whether the benefits are to be received as benefits under the scheme or otherwise).

(2) In this section any reference to accrued scheme benefits being received is a reference to benefits the rights to which have accrued by the relevant time being received by, or in respect of, the persons who were members of the scheme before that time.

(3) In this section "the relevant time" means—

(a) in the case of an act, the time of the act, or

(b) in the case of a failure—

(i) the time when the failure occurred, or

(ii) where the failure continued for a period of time, the time which the Regulator determines and which falls within that period;

and, in the case of acts or failures to act forming part of a series, any reference in this subsection to an act or failure is a reference to the last of the acts or failures in that series.

(4) In deciding for the purposes of section 38 whether the material detriment test is met in relation to an act or failure, the Regulator must have regard to such matters as it considers relevant, including (where relevant)—

(a) the value of the assets or liabilities of the scheme or of any relevant transferee scheme,

(b) the effect of the act or failure on the value of those assets or liabilities,

(c) the scheme obligations of any person,

(d) the effect of the act or failure on any of those obligations (including whether the act or failure causes the country or territory in which any of those obligations would fall to be enforced to be different),

(e) the extent to which any person is likely to be able to discharge any scheme obligation in any circumstances (including in the event of insolvency or bankruptcy),

(f) the extent to which the act or failure has affected, or might affect, the extent to which any person is likely to be able to do as mentioned in paragraph (e), and

(g) such other matters as may be prescribed.

(5) In subsection (4) "scheme obligation" means a liability or other obligation (including one that is contingent or otherwise might fall due) to make a payment, or transfer an asset, to—

(a) the scheme, or

(b) ...

(6) ...

(7) ...

(8) In this section—

(a) "work-based pension scheme" has the meaning given by section 5(3);

(b) any reference to rights which have accrued is to be read in accordance with section 67A(6) and (7) of the Pensions Act 1995 (reading any reference in those subsections to a subsisting right as a reference to a right which has accrued).

(9) In deciding for the purposes of this section whether an act or failure has detrimentally affected in a material way the likelihood of accrued scheme benefits being received, the following provisions of this Act are to be disregarded—

(a) Chapter 3 of Part 2 (the Board of the Pension Protection Fund: pension protection), and

(b) section 286 (the financial assistance scheme for members of certain pension schemes).

(10) ..."

7. Section 38B PA 2004 provides a statutory defence to the issue of a CN by reference to the material detriment test in certain circumstances, but this is not relied on here.

8. Section 39 PA 2004 explains what sum may be specified in a CN. The basic rule in subsection (1) is as follows:

> "(1) The sum specified by the Regulator in a contribution notice under section 38 may be either the whole or a specified part of the shortfall sum in relation to the scheme."

9. So, the shortfall sum acts as a cap on each CN amount. The shortfall sum is defined in 39(2). Section 39(2)(a) deals with the position where a section 75 (of the Pensions Act 1995) debt has been triggered, and section 39(2)(b) deals with the situation where it has not been. A debt under section 75 of the Pensions Act 1995 can be triggered by certain events, usually employer insolvency. If there is a trigger event, then there is a comparison made between the value of the assets of the scheme at that point in time and its liabilities. The difference between them is treated as a debt due to the trustees of the scheme from the employer. Here we are in section 39(2)(b) territory, and the statute tells us that the shortfall sum is the amount the Regulator estimates would be the section 75 debt if it were triggered at the time of the acts or failures relied on to support the issue of a CN. Here the Regulator's estimate was that the shortfall sum was not less than £5 million and this is not disputed. The warning notice issued by the Regulator in relation to the Scheme sought £3.2 million in total against a shortfall sum (overall cap) not less than £5 million.

10. The sum specified in a CN is, therefore, the amount the Regulator considers to be reasonable subject to the cap in section 39(1) PA 2004.

11. In *Shah v The Pensions Regulator*, [2023] UKUT 00183 (TCC) at [27], the Upper Tribunal summarised the tests or conditions for the issue of a CN to a target as follows:

> "(1) The Scheme Test: the scheme in question must be an occupational pension scheme other than a money purchase scheme or a prescribed scheme or a scheme of a prescribed description: see s 38(1).
>
> (2) The Connection Test: the target must, at any time during the relevant period (being the period beginning with the time when the act or failure to act falling within s 38(5) first occurs and ending with the giving of a warning notice), either be the employer or a person connected with or an associate of the employer: see s 38(3)(b)(ii).
>
> (3) The Party Test: the Regulator must be of the opinion that the target or targets were a party, having regard to s 38(6)(a), to an act or a deliberate failure to act which falls within s 38(5): see s 38(3)(a).
>
> (4) The Act Test: the act or failure to act must fall within s 38(5). This requires either the "material detriment" test or the "main purpose" test to be satisfied, and the act or failure to act must have occurred within certain time limits.
>
> (5) The Reasonableness Test: the Regulator must be of the opinion that it is reasonable to impose liability on the target to pay the sum specified in the contribution notice: see s 38(3)(d)."

12. It is common ground in this case that the Scheme Test and the Connection Test were met, in the case of the Connection Test by AP's being a director of the employer.

THE ROLE OF THE TRIBUNAL

13. Section 96(3) PA 2004 provides that a determination which is the subject matter of a determination notice (in this case the determination by the Panel to issue a CN to AP) may be referred to this Tribunal by any person to whom the determination notice is given, in this case AP.

14. According to section 103(3) PA 2004, on such a reference the Tribunal may consider any evidence relating to the subject matter of the reference, whether or not it was available to the Regulator at the material time.

15. Section 103(4) PA 2004 provides that on a reference, the Tribunal must determine what (if any) is the appropriate action for the Regulator to take in relation to the matter referred to it. In this case, the matter referred is whether a CN should be issued to AP and, if it should be, what amount would be reasonable to specify in it.

16. As this Tribunal made clear in *Re Bonas Group Pension Scheme,* [2011] Pens. LR 109 ("Bonas"), the basis of the Tribunal's jurisdiction is that it considers the matters in dispute de novo rather than as an appeal. Warren J said at [37] of that decision:

> "There is nothing in these provisions, or elsewhere in PA 2004, which constrains the Tribunal's approach to its function in the way that an appellate court usually feels itself constrained on an appeal, whether the appeal is by way of review or rehearing… (both of which terms have led to many pages of case reports). Nor is there anything in any other statute which has been brought to my attention or in the Upper Tribunal Rules which does so…".

17. Accordingly, once a reference has been made, the Tribunal's function is to provide the final stage in the regulatory process to determine what is the appropriate action for the Regulator to take, having considered all the evidence relating to the subject matter of the reference. In effect, it stands in the shoes of the Panel and (here) must decide whether it is appropriate for the Regulator to issue a CN. This point was elaborated on by Warren J in *Bonas* at [38]:

> "The decision which the Tribunal makes is, however, its own decision, formed after its own assessment of the evidence before it (which may differ from that before the Panel) and after hearing the arguments addressed to it (which may differ from those presented to the Panel). The Tribunal does not sit as an appellate body from a decision of the Panel; it is not necessary to show that the Panel was in error. It is often the case that a committee or other body of persons (such as the Panel or indeed a tribunal or court) is faced with a range of decisions which it would be reasonable to make. On an appeal from a decision of such a committee or other body or persons, it might be necessary to show that they had acted outside that range even though the appellate court would, if the decision had been for it to make, have reached a different decision. The Tribunal's function in relation to the Panel is not of that sort. Rather, it is for the Tribunal to make its own decision; it may do so, indeed it is bound to do so, even if it thinks that the decision of the Panel fell within the range of the reasonable."

18. However, although the Tribunal is tasked with reaching its own decision, as Warren J's comments in *Bonas* make clear, it should not ignore the decision and process of the Panel. At [37] he observed:

> "Of course the Tribunal will pay due respect to the decision of the Panel and will usually be slow to depart from the Panel's decision if made after an oral hearing if there has been full evidence and argument."

At [72] he commented:

> "None of this is to say that the Tribunal will start all over again as if the Panel had not considered the matter in the first place. This is particularly so when the Panel has heard live evidence and cross-examination of witnesses. The Tribunal will be slow to allow either the target or the Regulator to re-open the

> Panel's findings of fact. But that it has jurisdiction to do so in an appropriate case is, I consider, clear."

In this case there was an oral hearing of two days before the Panel and there was cross-examination and full argument. Accordingly, whilst we have jurisdiction to allow the Regulator or AP to reopen findings of fact if we consider it appropriate, we should be slow to do so.

19. A particular point of relevance for us is the ability of the Regulator to argue for an outcome that is higher than the outcome that the Panel decided, which is what the Regulator is looking to do here. It is arguing for a larger sum, not larger than that specified in the warning notice, but larger than the sum in the determination notice. Warren J addressed this issue in *Bonas* when (at [69]-[70]) he said:

> "69 Clearly the Regulator is entitled to argue before the Tribunal that its own determination or that of the Panel should be upheld. But can it argue in favour of something different? In particular, where the Panel has determined that a contribution notice in a specified sum should be issued to a person, can the Regulator argue in favour of a larger sum, at least up to the amount specified in the warning notice?
>
> 70 In my view, the Regulator is entitled to argue that the Tribunal should depart from the determination of the Panel so as to exercise the relevant regulatory function in the way which it, the Regulator, considers appropriate at the time when the matter is dealt with by the Tribunal. The Panel, as we have seen, exercises powers on behalf of the Regulator; it is no doubt for that reason that the Regulator itself cannot refer the determination of the Panel to the Tribunal. But once the decision of the Panel has been challenged, there is no reason, in my view, why the Regulator should be bound by that determination. By referring the matter to the Tribunal, the target must accept that he becomes subject to the power of the Tribunal to determine the appropriate action. The Regulator must be allowed, in my judgment, to present to the Tribunal what it sees as the appropriate regulatory action at that time. It may be that it cannot go beyond the relief sought in the warning notice, but that issue does not arise in the present case."

20. Having made its determination, as provided by section 103(5) PA 2004, the Tribunal must remit the matter to the Regulator with such directions as it considers appropriate for giving effect to its determination which, by virtue of section 103(6), may either confirm, vary, or revoke the Regulator's determination or substitute a different determination.

21. Section 103(7) PA 2004 provides that the Regulator must act in accordance with the determination of, and the directions given by, the Tribunal.

22. It is well established in references of financial services cases in this Tribunal that the burden of proof lies with the Regulator and the standard of proof to be applied is the ordinary standard on the balance of probabilities, namely whether the alleged events more probably occurred than not.

PROCEDURAL HISTORY

23. The Warning Notice was issued on 16 September 2021. Regulatory action was proposed in relation to four individuals, CW, his wife ("EW"), PW and AP. At that time, the focus of the Case Team's case was on an alleged series of four acts each said, in some way or other, to have involved the extraction of value from DFL.

24. Shortly before the Panel's determination meeting a settlement was reached between the Regulator and CW and EW under which they agreed to pay a total of £2m to the Scheme and the Regulator agreed to cease its regulatory action against them. This meant that the process

was then concerned with the proposed regulatory actions in relation to PW and AP only. The settlement also meant that the focus of the matter shifted from the alleged series of four acts to the second of the four acts, the sale of shares in DFHL and the related financing arrangements.

25. At the Determination Meeting the Case Team sought CNs on a sole liability basis against each of PW and AP in the sum of £360,437 plus an adjustment to reflect the passage of time. The Panel determined to issue a CN on a sole liability basis to each of PW and AP in the sum of £180,218.50 (being 50% of £360,437), plus an adjustment to reflect the passage of time since 2016. PW has not referred the Panel's determination against him to this Tribunal.

26. One important factor the Panel took into account in reaching its conclusion on the amount to be sought from PW and AP was that, until the regulatory action against CW and EW was stayed, the Case Team's case was that it would be reasonable to impose on each of PW and AP liability of £360,437 (plus a passage of time adjustment) on a joint and several basis with CW. The Panel commented (at [126]) on the consequences of this, saying:

> "The effect of such liability of £360,437 being joint and several is that it would be open to the Scheme to choose who to recover from up to the sum of £360,437 (so that, for example, it would be open to the Scheme to recover the full sum from one of the two debtors) and that there would be rights of recovery as between the two debtors (in each case) such that each would (as between them, and subject to the ability in practice to enforce having regard to the financial resources available to the parties) be liable for 50% of the debt.
>
> The financial information supplied by Chris and Elizabeth Wrigley is such that the Case Panel considers it reasonable to suppose that if liability had been imposed on each of Paul Wrigley and Ann Pelgrave for the full sum of £360,437, but in each case on a joint and several basis with Chris Wrigley, they could each have expected ultimately to bear the burden of just 50% of the debt of £360,437. That is to say, they could each expect ultimately to have borne the burden of £180,218.50 (either after recovery themselves from Chris Wrigley or recovery by Chris Wrigley from them).
>
> It follows therefore that until the regulatory action against Chris and Elizabeth Wrigley was stayed, the Case Team's case was to the effect that the reasonable regulatory outcome was one on which Paul Wrigley and Ann Pelgrave each bore (after taking into account prospective contribution claims) an effective regulatory burden of £180,218.50 (always at this stage in the analysis putting to one side the question of a passage of time adjustment).
>
> In circumstances where the Case Team has not sought to suggest that the regulatory outcome previously sought was unreasonably generous to Paul Wrigley and Ann Pelgrave, the Case Panel does not agree with the Case Team's position that it is now (simply because the Case Team has reached a settlement with Chris Wrigley) the reasonable regulatory outcome to impose a debt burden of £360,437 on each of the two remaining targets of regulatory action, on a sole liability basis.
>
> …
>
> In considering the reasonable response to the circumstances as they have developed, the Case Panel has considered it helpful to ask itself, if Chris Wrigley were still involved in this process, but the Case Panel considered it appropriate to impose liability on a sole liability rather than joint and several basis, what would have been the reasonable (sole) liability to impose? On the available information, taking into account that it was Paul Wrigley and Ann Pelgrave who received the sums in question but that it was Chris Wrigley who was the apparent driver and architect of the transaction, the Case Panel

considers that it would have been reasonable to impose liability on each of Paul Wrigley and Ann Pelgrave on the basis that they should each share liability referable to the payment received by them 50/50 with Chris Wrigley. It is appreciated that there is a difference between the question "What liability is it reasonable to impose, there having been a settlement with Chris Wrigley?" and "What liability would it have been reasonable to impose on a sole liability basis had the regulatory action against Chris Wrigley still been pursued?" Nonetheless the Case Panel has, on the facts of this case, found it helpful to consider the latter question as part of its considerations when answering the former."

THE SCHEME

27. The Panel provided some useful background to the Scheme in the Determination. This was not challenged before us, and we gratefully adopt their account.

28. The Scheme was established by a Definitive Trust Deed and Rules in 1998. DFL was from the outset the statutory employer in relation to the Scheme. The Case Team had set out the valuation history of the Scheme in a table as follows:

Valuation Date	Assets £m	Deficit (TPs) £m	Deficit (PPP) £m	Deficit (buyout) £m
1.4.08	16.5	5.3	5.9	19.2
1.4.11	18.5	3.4	5.5	17.9
1.4.14	20.6	4.4	8.8	26.4
1.4.17	24.7	16.2	13.4	26.3
1.4.20	22.8	19.6	17.0	24.8

29. The repeated message from DFL to the Trustees from May 2009 onwards was that its business was under cashflow pressure, which made supporting the Scheme difficult for DFL to manage. DFL asked the Scheme to help by paying the Pension Protection Fund ("PPF") levy. Significant sums of PPF levy were paid by the Scheme, in at least some cases on the basis that DFL would in due course reimburse the Scheme. Over the period 2012 to 2017 inclusive the total PPF levy paid by the Scheme amounted to £899,138. The Case Team also drew attention to the fact that the Scheme bore a further £318,470 of expenses that were not reimbursed by DFL.

30. Annual deficit repair contributions paid by DFL to the Scheme, as set out by the Case Team, were as follows:

Date	Amount of deficit repair
2008-2009	£232,726
2009-2010	£238,002
2010-2011	£240,000
2011-2012	£130,000
2012-2013	£80,000
2013-2014	£77,220

2014-2015	£83,499
2015-2016	£88,149
2016-2017	£90,675
2017-2018	£92,944
2018-2019	£95,264

31. In late 2015/early 2016, the most recent triennial valuation had a valuation date of 1 April 2014. This valuation was signed off in July 2015 and included a recovery plan extending to 30 June 2030. The employer contributions required to repair the deficit at the valuation date started at £88,824 in 2015/16 and increased to £617,268 in 2029/30.

32. Most recently, the recovery plan finalised as part of the triennial valuation dated 1 April 2020 and signed off in July 2021, included a schedule of annual deficit repair contributions for the period June 2021 to April 2046; these started at £199,384 in 2020/2021 and rose to £923,677 by the twentieth year of the plan. These show a significant increase over the previous valuation.

THE EVIDENCE BEFORE US

33. We heard from AP, who provided three witness statements and was cross-examined by Mr Robinson.

34. AP explained that the idea of a family business came about when CW approached her father in about 1992 saying he was unhappy with his job and asking if their father would put up the finances and join him in a business. Her father suggested setting up a family business with equal shares that CW could run with AP and PW (her other brother) joining if and when they wanted to. With this in mind CW left his job and their father funded him while they searched for a suitable business to buy.

35. In November 1993 her father purchased Tressanda Ltd ("Tressandra") (a litho printing business) splitting the shares 4 ways between AP's two brothers, AP herself and her parents. CW became the Managing Director ("MD") of Tressanda and took on the day to day running of the company with both parents helping out (with no remuneration) whilst CW found his feet. Her father continued to help out part time in Tressanda taking no remuneration right up to the point it closed in May 2019. AP's then husband (Ian Hartley) joined the business early in 1996.

36. Over the years the business grew and invested in new products and eventually invested in additional businesses (all on the same principle of a four-way ownership split) including DFL, which was acquired in May 2008 using DFHL.

37. In May 2008 DFL entered an invoice discounting facility with RBS. This was initially limited to £500,000 but later increased. As part of this arrangement a debenture was granted to RBS over DFL's assets. That debenture was to have priority over the sums owed to the Scheme. The facility was for the purposes of providing DFL with working capital; it was not limited to invoice discounting. It was clearly recognised that entering the invoice discounting facility, and the giving of security for it, risked prejudicing the Scheme, and so DFL needed to seek clearance from the Regulator.

38. In 2009 AP and her then husband (Ian Hartley) separated. CW removed Ian from all the businesses and any shares Ian held in the family companies were transferred to AP's father who held them on her behalf until her divorce was finalized in 2011, at which point the shares were transferred to her.

39. At the time of Ian's removal, CW asked AP to take over Ian's roles as director and secretary of the companies. This was presented to her as a necessity, as CW believed that it was a legal requirement that these positions were filled and that it was not possible for him to act as sole director. In January 2010 AP became director and company secretary of DFL and other family companies. She says that she took these positions on with no prior experience, training or explanation of the responsibilities involved and no knowledge of the legal responsibilities that went with accepting the roles. Prior to taking on the roles, she had for several years been a "stay-at-home mother", joining Tressanda on a part-time basis when her children went to school. She accepted the roles primarily as she was the only family member other than CW employed within the businesses and because she felt responsible for these vacancies due to the breakup of her marriage.

40. AP says that, despite becoming a director in 2010, CW treated her no differently to any of the other shareholders. She was given no additional information and not involved in any of the day to day running or outside audit of any of the companies other than Tressanda, in which she was working full time. In her opinion, CW did not want any additional input and appeared to see Mr Hartley leaving as an opportunity not to have any interference in his day to day running of the businesses.

41. Mr Robinson took AP to several emails (in both 2011 and 2015) where she forwarded emails from Mr Kelly ("GK"), the Finance Director, containing financial information about DFL to her brother PW. AP said that it was not regular practice for her to receive this information. It would usually be when CW was doing something such as amending his salary or at the time of the share sale. She agreed that, at least since 2011, it had been apparent that this material existed, and she could ask for it if she wanted it.

42. AP only received remuneration and benefits in relation to her work for Tressanda. Unlike (she says) CW and his team, the maximum salary she received for working at Tressanda, including when she was MD, was £45,000 per annum with no company car or bonuses. Rather than taking money out of the company, she supported it with money of her own for as long as she could to protect the employees' jobs and try every way possible to save the company.

43. AP says that CW learned in 2011 that only one director was required, but chose to leave the position as it was for a number of reasons. He felt that DFL only having one director would adversely affect its credit rating. From a purely practical point of view if CW were to have an accident or become incapacitated there would need to be someone who could sign any necessary forms as a director. CW had been advised that, should the family sell the companies at any point, entrepreneur's relief (which could reduce the rate of capital gains tax paid on gains made on selling the shares to 10%) would apply to anyone who was a director. Once he learnt this he tried to persuade her brother PW and their father to become directors or company secretaries so that they could utilize this relief should they ever sell. AP says that it was only ever suggested that they would be directors/company secretaries 'on paper' as CW had no desire to have any additional input in the management and running of the companies.

44. AP gave an account of tensions in the Wrigley family in the run up to the 2016 transaction. She says that over the years as the businesses grew CW came to see it more as his business empire, rather than a family business. It appeared that he felt that his achievements were undervalued, and he was being constrained by having to answer to other shareholders. CW had suggested that the businesses were "supporting" AP.

45. In 2011, following the acquisition of DFL, CW proposed a significant (50%) salary rise and that he should have a controlling interest in the companies. After much family discussion, the salary increase and its payment through a company called Ash 126 Ltd ("Ash 126") were agreed. As CW was spending a lot of time on other family companies, it was at this point

(following a suggestion from her father) that AP took over the role of MD at Tressanda. This company encountered financial difficulties and CW's response to requests for support from other companies could never be predicted; he could often be quite abusive and unpleasant if he did not agree with something.

46. In July 2012 CW was again pushing to close Tressanda. He proposed that a family company pay a dividend to all shareholders and that PW and he took theirs, whilst AP and her father should invest their dividends in Tressanda. When they refused, CW removed AP as a signatory on Tressanda's bank accounts. She only found out when she called the bank as she could not gain access to the accounts.

47. Around this time CW removed all the funds from the Pink's bank accounts and, in AP's words, proceeded to hold the shareholders to ransom over the splitting up of the companies. His suggestion at the time was that he took DFL whilst the others took on the remaining companies. AP's parents sought the advice of their financial advisor who in turn introduced them to a lawyer. It was pointed out to them that they could have legal recourse against CW as he had removed company monies without consent, but at this stage this was not something they were willing to do. A compromise was put to CW under which he would become a 51% owner of the businesses, able to run them on a day-to-day basis as he saw fit, but with contractual protections for the other shareholders. This was discussed, but because of difficulties CW was encountering with another business, this proposal was not implemented.

48. AP says that, as she had to deal with CW regarding Tressanda, she very much ended up as the "go-between" between the rest of the family and CW. She was trying to keep any discussions as non-volatile as possible and attempting to protect her parents from any distress. Her evaluation of the situation was that, by September 2015, when CW first proposed buying the rest of the family out, the family had very much been split into two factions when it came to anything to do with the family business. Those were her parents, PW and herself on one side and CW on the other. As a result, CW's offer came totally out of the blue, as previously he had only used aggressive tactics to try and gain control of the business.

49. During 2015, the shareholders had become aware of a range of patented new products that were expected to bring significant growth and when the offer to buy the other shareholders out was made by CW, the others suspected that CW wanted to buy them out before any success with these products could further increase the value of the company. AP says that a review of information supplied by Mr Urquhart (the current owner of DFL) to the Regulator since the issue of the Warning Notice shows that several of these patents are still expected to generate future revenues.

50. Turning to the sale process, AP says that on 14 September 2015 she and the other shareholders received a proposal from CW to buy out their shareholdings in DFL and Pink. This offer was completely out of the blue, as there had been no hint or mention of a sale prior to this. Because of her previous dealings with CW, she was wary of taking the proposal at face value and she thought CW may well have a hidden agenda. She was also nervous that the others could be subject to an angry outburst if they did not agree or at least respond in some way quite quickly. So, she adopted the approach of asking CW lots of questions. This was both a stalling strategy to give her, PW and her father time to talk, as well as an attempt to get CW to reveal more of his underlying motives.

51. AP says that she was busy with Tressanda at the time and spent very little time on probing the details of a sale as she believed it was being correctly and professionally handled by Ashgates (a firm of accountants). Her main concern at the time was evaluating the proposal put forward by CW and its implications for her going forward, rather than considering how he

was proposing to fund the buyout, especially as he was buying the shareholders out and any finance he took out for the purchase would be his responsibility going forward.

52. AP says she took any reference CW made to funds not being available if there was a downturn in business to be typical of the methods employed by him to browbeat the shareholders into making a snap decision and not giving them adequate time to evaluate the proposal. There was no indication during the time from the funds being drawn down to the sale of the shares (approximately 6 months) that there was a need for these funds to be returned to DFL to cover other financial commitments.

53. Despite misgivings, AP was quite happy to accept CW's offer as she saw it as offering a reasonable price for her shares and an opportunity to get away from as much business involvement with CW as possible and so to protect herself and the rest of her family (particularly her parents) from potential future upset.

54. Turning to the sale process in more detail, CW made his offer in an email to AP, her father and PW on 14 September. His email is as follows:

> "Hi All,
>
> There are several things happening at the moment which I will get to below. Firstly ,though, I think it is worth giving you an idea of the businesses we run. I was concerned at Paul's comments last Xmas, whereby he stated that he preferred bonuses to be "long term". Proctor and Gamble can afford to be long term, we don't have that luxury. We bought [DFL] for £1 and the multinational who sold it to us high fived each other for getting it off their hands! Basically, it has a multimillion pound hole in its pension fund which I have simply kicked down the road for the last 7 years.
>
> We are in trouble at the moment. I come back to Paul's comment. We do not own Proctor and Gamble. We own businesses that sit on the edge of bankruptcy every day. We lost c£57K in July at [DFL].
>
> [One of DFL's customers] spent c£6M with [DFL] last year and c£2M this year. It hurts.
>
> However, there is an upside. We have virtually no borrowings against our invoice financing facility.
>
> So, I am thinking, here is your opportunity to cash in.
>
> There is £400k in Pink. If I can drawdown £800K from [DFL] I could pay you £400K each for the shares. I would have to keep it running for 20 months to get my £400K but I will take that challenge.
>
> I am not concerned (personally) whether you go for the idea or not. Please believe me, I am not trying to take advantage and this has nothing to do with the Foils debacle. I just see an opportunity for us.
>
> What do I see? Grandchildren who would welcome £50K+ at this time in their lives. Ann would be financially secure.
>
> Have a think but, don't think too long. If we lose £57K next month then we have £57K less to pay you.
>
> I am just seeing a window of opportunity.
>
> Regards, Chris"

55. PW worked for Proctor and Gamble at the time of this email. AP "replied to all" on 15 September asking a number of questions, including why the companies did not pay dividends and then observing:

> "If you draw down 800k from invoice financing in [DFL] how would you move it to you to buy the shares? If there is a connection to Pink and something happens to [DFL] could RBS (the invoice financing company) seize the assets of Pink and in effect bring down AF & Tressanda"

56. AP agreed that at this point she was envisaging DFL being unable to pay RBS and wondering what that would entail, in particular what it would mean for Tressanda. She also raised some points and questions about the implications of the proposal for her tax and pension position. In answer to a question from Mr Robinson, she agreed that she did not ask what these arrangements meant for the Scheme (DFL's main creditor) but said that was "because I had no knowledge of the Scheme or how it's run or anything".

57. AP was travelling home from holiday at the time, and she does not think that she took advice or spoke to anyone before replying.

58. CW replied on 16 September. He did not like the idea of paying dividends, as "We would pay a vast amount of tax" and concluded that part of his email by saying, "Please remember that I see a window. I do not see another window to pay out another £1.2M so my thinking is... take it whilst you can." In response to AP's specific question (quoted above), he said, "I would simply say to RBS "I want to drawdown £800K as a part of my payment to buy out the other shareholders" The debt would sit with [DFL] so, no risk to Tressanda." AP agreed that CW was trying to reassure her that there was no risk to Tressanda here, but was making it absolutely clear that the debt would sit with DFL and DFL would owe money to RBS.

59. AP replied the next day (17 September) asking quite detailed and specific questions, to which CW replied at 7am on 18 September. As well as replying to AP's detailed questions, he made these opening remarks:

> "I talked to Paul yesterday and suggested we need to do the deal by 10th Oct before the Sept: results are in. I am concerned that [DFL] will make another loss and the bank might squeal at me drawing down £800K. I don't think the loss will be as big as August. However, I have been awake all night worrying about whether you were going to send me a shedload more questions and carne up with this plan. I don't think Gerry will have sent the bank the August figures yet so, when I have finished this email I am going to tell him to draw down £800K and pay it to Pink. So there will be your £1.2.M ring fenced. It can be undone if we wish. I will tell Gerry and Jimmy exactly why I am doing it. I need to treat them with respect."

60. AP agreed that she understood that CW was making it clear that the money would be in Pink, but this could be unravelled. She agreed that she did not object to what CW was proposing.

61. CW instructed the drawdown that morning as he said he would. At 07:06 a.m. on 18 September 2015 CW wrote an email to GK in the following terms: "Gerry, Please would you draw down £800K and pay it to Pink. You have the bank details from the monthly invoices. I am trying to buy out the other shareholders." GK responded at 08:27 a.m. that morning to say that: "The drawdown is complete and I now await the funds reaching our current account."

62. On 18 September AP's father emailed AP and PW observing:

> "It is possible that Chris is using the downturn in [DFL's] results to bounce us into selling the shares to him at a knockdown price. He has long wanted to own 100% of it. We propose to suggest a meeting late next week to discuss the exit strategy for Pink and Tressanda."

63. Mr Robinson suggested that her father does not appear to doubt that there was a downturn in DFL's results. AP described it more that he "is believing what CW said in his statement" but agreed that she did not have the knowledge to contradict or question what CW said.

64. Mr Robinson took AP to some of the management information she was receiving. On 14 September, CW told AP about DFL's £57,000 loss in July. On 17 September CW forwarded her an email from GK attaching the August results which showed a loss of £78,000 with sales £91,000 down on the previous year.

65. CW forwarded a similar email on 15 October, which had the September results. This showed a monthly profit of £37,000 against forecast of £68,000. In the year-to-date losses were £41,000 against £14,000 the year before.

66. On 28 September CW emailed David Newborough (at Ashgates) starting a discussion around the structure of the sale and involving Claire Howard (at Lings, a firm of accountants which acted for AP's parents and their family trust). At that point various issues (including the exact ownership of some of the companies) were unclear and the possibility of appointing shares out to grandchildren was raised. On 2 October AP emailed CW and Mr Newborough with the results of some research she had carried out into the history of the various companies. AP agreed with Mr Robinson that she understood what was being proposed and had undertaken the "exam question" of working out who owns what, which was critical for the transaction to go forward.

67. On 12 October Mr Newborough wrote to AP, PW, CW and their father with his thoughts on what Ashgates had been asked to advise on. Ashgates had not been asked to advise on the deal between the family members or its terms, but he gave detailed advice on the structure and tax implications. He asked several questions and CW responded on the same day by annotating Mr Newborough's email and on 13 November AP further annotated CW's reply.

68. One of the issues being discussed was the possibility of all or part of the transaction being deferred. CW commented "Personally, I think 12 months is too long to wait due to the significant chance that some or all of the money held in Pink for the transaction may have to be transferred back to [DFL] for working capital. That would scupper the deal. For info, [DFL] had a reasonable sales month in September but a very poor orders month which doesn't bode well for the future." The purpose of a delay would be to give AP's children (and other grandchildren of her parents) an opportunity to claim a particular capital gains tax relief if they were given shares. On this, AP observed:

> "To summarise Clare and Judy have little to gain by splitting the transactions all the others have at least £3k to gain but the question is do we have an issue waiting. Chris is really the best to answer this as he has in the point below where he has made his concerns clear about the money possibly not being there if we wait too long."

69. The reference to "the point below" is to the following comment by CW (underlined by us below) in response to a question from Mr Newborough:

> "Would the timing of delaying one of the transactions until 6 April 2016 be too long to wait given the potential tax savings? <u>I think so as I said above. I did consider doing [DFL] now and Pink next tax year. However that exposes the Pink sale to [DFL] working capital requirements again because Pink owes [DFL] £800K. Also delaying any of the transactions delays paying everyone."</u>

70. On 26 October CW forwarded the emails from family members to Mr Newborough (copying the other family members including AP) and commenting:

> "The shareholders would like to complete the deal as quickly as possible, paying as little tax as possible but are averse to being challenged by HMRC. There is no appetite for waiting 12 months and incorporating new directors. There appears to be a preference to do the deal now rather than over 2 tax years due to the uncertainty of funds availability in the future."

71. AP agreed that none of the family members responded to that email or challenged CW's view. Some further fact finding and structuring discussions followed.

72. On 30 October Mr Newborough wrote to CW, AP, PW and their father setting out where he and Ms Howard had got to and making a proposal for the way forward. On 2 November CW replied to Mr Newborough (copying in the other family members) to say, "All the shareholders have agreed your proposals as set out below. Please proceed." Mr Newborough's proposal was the following:

> "1. Pink sells the assets that it owns that are used by Tressanda Ltd to a Newco that is owned by all of the family members in the same shareholding allocation as Pink currently is. (NOTE the assets could be sold direct to Tressanda Ltd which would remove the need for another company with annual compliance, but would leave the assets at risk should Tressanda hit financial difficulties — my best estimate of compliance is around £lk pa)
>
> 2. The loan balance between Pink and Tressanda is formally written off by way of board meeting minutes
>
> 3. We undertake a valuation exercise to consider whether a total value of £1.6m for Pink and [DFHL] combined value (after the above changes to Pink position) is likely to have any issues if challenged by HMRC as not a true market value
>
> 4. We provide the advice letters to the companies based on the structure of the deal (I.e. the formalising some of the comments already in the emails) and the valuation
>
> 5. We provide advice letters to [CW] and [AP] regarding their personal tax implications of the transactions
>
> 6. Bob & Irene take their advice from Claire
>
> 7. [PW] takes advice as he sees fit
>
> 8. Assuming the above is all satisfactory, Bob & Irene gift their shares to [CW, AP & PW] and holdover the capital gain
>
> 9. Newco(s) are formed and acquire the entire shareholdings of Prink (sic) and [DFHL] (or Ash 126 could perhaps be used?)
>
> 10. [CW, AP and PW] consider whether they wish to make any gifts to their children from their proceeds"

73. Mr Newborough highlighted that the legal form of the transaction would be a share sale by CW, PW and AP and commented:

> "Assuming the position is that a Newco is purchasing Pink and Flexibles (or perhaps 2 newco's), this is a legal purchase of shares by Newco(s) from Chris, Ann and Paul. I must recommend that legal advice is taken by both sides to cover the legal and risk implications for the buyers and the sellers individually, although this is really an issue for Chris as the buyer. Normally a seller is very happy to have no agreement other than "you have my shares and I will have your cash", as they have not given any assurances or guarantees!

> We do have a very brief document that is sometimes used when the transactions are inter-group or similar, so this could be used, although it would have to be on the basis that we cannot give any legal advice, so we would need to show we had advised you to take legal advice and you had chosen not to do so.
>
> I appreciate that this, along with other comments in my emails can look like I am always trying to highlight risks, but I should say that this is just a requirement of our firm's risk management procedure. We can give our best advice based on our knowledge and experience, but cannot give guarantees so have to word things accordingly, and whilst we may have our view on risks being small in some cases we still have to highlight them for your consideration."

74. In answer to a question from Judge Baldwin, AP said that she had not taken any advice (for herself or the company) except Ashgates' tax advice. She thought that Ashgates would tell her if they needed to take advice from anyone else. She also thought that getting HMRC clearance would highlight any pitfalls, if there were any.

75. On 9 December Ashgates wrote ("Dear Chris & Ann", i.e. CW and AP) to the Directors of DFHL and Pink outlining what was now proposed. The letter notes that the directors had approached Ashgates to state that it had been agreed that AP, PW and their parents would each sell their respective shareholdings in both Pink and DFHL for £400,000. An own share purchase had been considered but was rejected as at least some of the proceeds (in the case of both companies) would be subject to income tax as some shares had not been owned for at least 5 years.

76. The overall objectives were for AP and PW to receive their share of proceeds tax efficiently and for their parents to pass down their share of the proceeds as tax efficiently as possible. The resulting structure was a purchase by a new company of all the shares in DFHL and Pink with the "funds for the transaction are being borrowing (sic) from the current cash flow" of Pink and DFL. If there was a shortfall in funds, the balance could be left owing to CW. Mr Newborough said that the loan balances could be cleared by a dividend through the group or left outstanding, as to which he said that "As long as there are sufficient reserves that the balance could be cleared if the directors chose to do so, then there is no problem with the loan remaining outstanding between the group companies."

77. As far as AP's parents were concerned the idea was that they would give their shares to CW, PW and AP, hold over the gain for CGT purposes (with the shares qualifying for business property relief from Inheritance Tax) with the result that CW and AP would pay 10% CGT on the gain arising on the sale (PW was resident in Switzerland at the time), which would be a lower rate than their parents would pay (as they did not qualify for entrepreneurs relief). It was envisaged that the three children would use the additional proceeds "to support their children, but this is not a condition of the gift".

78. The letter concluded "You have instructed us to press ahead with actions to move these transactions forward as quickly as possible." AP agreed that she did not suggest pausing to consider the impact of the proposal on DFL or the Scheme.

79. On 11 December Mr Newborough sent an email to AP, CW, PW and their father attaching a copy of that letter "for completeness". He observed that it contained nothing new and that Ashgates had approached HMRC for pre-transaction clearance to give additional assurance as to the tax treatment.

80. On 23 December Mr Newborough sent CW, AP, PW and their father Ashgates' valuation letter. In his covering email he wrote:

> Please find attached the valuation letter in accordance with our engagement letter with the companies. I should say that we do not anticipate HMRC challenging the valuation, but we are obliged to point out the risk that it is possible. The valuation report has been signed off by my colleague that has significant experience in this area, and the conclusion is that the valuation is at the very top end of the range due to the pension deficit. Therefore if it were challenged by HMRC we would fight to defend the valuations and may succeed, but we are not able to put our assurance behind the higher figure due to the risk of HMRC concluding the pension risks give a lower valuation.
>
> If HMRC did challenge the valuation and conclude a lower figure, then the excess above this would be taxed as dividend income rather than as capital gains.

81. The valuation letter (addressed to the Directors of DFHL and Pink and designed to support the price being paid for DFHL and Pink) dated 22 December 2015 made the following comments in relation to DFL and the Scheme:

> "The company has a defined pension benefits scheme. Per the audited 31 July 2014 accounts, the scheme had a deficit of £1,590,000.
>
> We have received the FRS 17 Actuary report, prepared by JLT Benefit Solutions Ltd showing the scheme position as at 31 July 2015. The report shows a scheme deficit of £4,182,000, an increase in the deficit £2,592,000.
>
> However, management have indicated they believe the assumptions in this report are unreasonable. Whilst the actuary has prepared illustrative figures using a more beneficial discount rate, under these assumptions the deficit is £1,735,000, however they have stated this would be hard to justify.
>
> Given the signed report shows a deficit of £4,182,000, this is the figure we have had to use in our valuation."

82. Ashgates valued DFHL at "between £1 and £1,200,000", commenting that the company was very difficult to value given the uncertainty of the amount and timing of the pension deficit and that "In order to argue a £1,200,000 valuation of [DFHL], the company would have to prove that the pension deficit is highly unlikely to crystalise." AP says that she was aware that the pension deficit figure being used (prepared by the actuaries as at 31 July 2015) was higher than the one in the July 2014 accounts; she just thought Ashgates were taking a prudent approach to valuing the company and it gave her comfort in the valuation process. Ashgates also commented that "In terms of a value we believe we could defend if HMRC were to investigate the value you have agreed would be in the region of £500,000."

83. Ashgates' valuation was attached to an e-mail sent to AP's work email on 23 December 2015. By then she had gone on annual leave for Christmas and only had access to her work email via her mobile which (she says) would have made reading attachments very difficult. Mr Newborough did not ask recipients of his email to comment or raise any points regarding the valuation, although he did ask for some information he needed to start drafting the documentation.

84. AP says that she was aware from the accounts and the very basic information relayed during the purchase of DFL that there was a pension scheme deficit, but she was not aware of the figures. The only figures she recalls seeing were those in the annual audited published accounts, which showed a positive trend, with a gradually reducing deficit. The only comments she can remember CW making about the Scheme were throwaway comments along the lines that the deficit should improve over time as members pass away and that, should the membership get sufficiently low, there might be an opportunity to buy them out of the Scheme. Neither of these items was ever discussed in detail. She says that she had no experience of

company pension schemes as her only business knowledge had been gained within Tressanda, a small limited company with no pension scheme other than a statutory workplace pension scheme introduced in 2016. Similarly, she says that she was not aware that DFL was asking the Scheme trustees to reduce contribution levels.

85. On 26 February 2026 GK forwarded DFL January management accounts to AP among others, commenting "Not a nice month with sales approx. £50k behind our break-even figure." AP agreed that she had no reason to think that that is an inaccurate statement or that these attachments were inaccurate. She commented that in the valuation, they had put in that they were expecting good sales for the year. She said this may have been a glitch or CW "massaging the figures to keep us moving along."

86. Ashgates corresponded with HMRC with a view to obtaining clearances for the benefit of the shareholders of DFHL and Pink under section 701 of the Income Tax Act 2007 and section 138 of the Taxation of Chargeable Gains Act 1992. We do not have all the correspondence, but the hearing bundle contains a letter from Ashgates dated 26 February 2016, apparently responding to concerns by HMRC about CW receiving cash consideration. Ashgates proposed revisions to the proposed structure under which "the shares in both companies that were to be gifted to [CW] by his parents will instead by (sic) gifted directly to [CW's] adult children. [CW] will then receive shares in the acquiring companies instead of receiving any cash consideration. [CW's] children will then be given the choice to retain their shares or to sell some or all of them to the acquiring company at the same price as the other shareholders".

87. AP received £360,437 in exchange for selling her shares in DFHL to Ash 160 Limited ("Ash 160"), subsequently renamed Discovery Flexibles Group Limited ("DFG"), an entity itself then owned by CW and his wife. The Panel noted that the available evidence was not conclusive as to when this money was received, but the Case Panel considered the reasonable course on the evidence to be to treat the sums as having been received on 1 April 2016. Of this total, £87,379 was received for the shares gifted by her parents as part of the sale process on the understanding that following receipt of the cash for those shares AP would gift the money on to her children. The remaining £273,058 was received in return for the shares she had held for some years.

88. On 17 March CW forwarded to AP the February 2016 management accounts of DFL prepared by GK. This showed a loss of £20.4k. DFL was £473k behind on sales compared to the previous year and was showing a loss of £206k in the year to date.

89. On 27 April AP was forwarded the March management accounts, which showed a net loss of £81.5k in the month (£287k in the year to date with sales £600k down on the year before).

90. On 2 June 2016 AP emailed CW to say that she had spoken to Mr Newborough and her understanding was that there was no reason for her not to stand down as a Director of AF Reprographics ("AFR"). She commented, "As I have no involvement in AF I feel I am more open to being accused of failing in my directorial duties if I stay on as a director than being accused of any wrong doing if I step down so I would really like to be removed as a director as soon as possible." When asked by Mr Robinson, she said that she did not understand what directors' duties she was referring to; she just knew she was not performing any of them as she was not acting as a director.

91. Mr Robinson showed AP an email dated 19 August 2016 from CW to GK instructing him to record the loan from DFL to Pink as having been repaid on 23 March and a loan of £800,000 made by DFL to DFG on the same day. AP says that she did not know anything about this at the time.

92. As regards DFL's financial position, AP says that all the information supplied to the shareholders in the 3 years leading up to the sale of DFHL gave the impression that the company was, whilst having the occasional testing time and hurdles to negotiate (as all companies do), in a stable and improving financial position. As shareholders, they had been given no cause for concern with regards to the profitability of the company over the previous four years. In fact, they were asked to approve substantial bonuses for the DFL management for 2011-2014.

93. In the published accounts for the years ending 2012, 2013 and 2014 DFL was profitable (once the exceptional costs relating to redundancies are removed from the 2014 figures) and there was a strong improvement in its cash flow. Mr Robinson took AP to financial information on DFL in the Warning Notice. This showed sales declining (from £14.7m in 2011 to £10.4m in 2014). Profit before tax rose from £0.04m in 2011 to £0.2m in 2012, £0.3m in 2013 and a loss of £0.04m in 2014. Net assets rose from £1.4m in 2011 to £2.3m in 2014. In 2015 they rose to £5.8m because the directors decided to recognise a deferred tax asset of £3.4m. The 2015 accounts were not published (or shown to AP, PW or her father) until after the sale. AP considered that the fact that the 2015 accounts were delayed until after the sale might indicate that CW was trying to hide the increase in net assets from £2.3m to £5.8m. She suspects that CW thought that if the rest of the family knew the true value of the company, they would not have agreed to the sale price of £1.1m. AP agreed that the £800k cash drawn down from RBS would be about a third of the 2014 net assets.

94. Mr Robinson questioned AP at some length about how she thought Pink (and then DFG) would repay the loan from DFL. AP described this as CW "taking his salary in the form of dividends and therefore using it that way" or selling the shares in the company. She said the family's expectation was that CW was buying the DFL shares to make a profit.

95. AP says that she did not try to speed up the transaction. Indeed, she queried whether it might have been better to split the transaction into two halves and straddle two tax years. That would have delayed some of the sale. She says that her main concern was that the transaction was done correctly, that the shareholders got the clearances Ashgates said were needed and that "everything was done legally and above board".

96. On 15 February 2019 the entire issued share capital of DFG, the owner of DFHL, was sold to a management buyout vehicle Pack34 Ltd ("Pack34"). At the time DFG still owed £800,000 to DFL. Similarly, the RBS invoice financing facility used by DFL and referred to above remained in a debit balance of at least £800,000. Subsequently, the loan between DFL and DFG was written off.

Monthly Payments to CW

97. From the time of the acquisition of DFL in 2008 until CW sold DFL in February 2019, DFL made monthly payments for the benefit of CW and his wife.

98. CW requested a substantial increase in salary in March 2011 along with a controlling interest in the companies owned by the shareholders. He justified the increase in salary as being reasonable remuneration for his position of CEO of a substantial group of companies and in line with remuneration received by other CEOs of similar sized groups. The demands made by CW were discussed at a shareholder meeting in May 2011. Following the meeting there were various discussions between the shareholders and eventually the salary increase was unanimously agreed by the shareholders in July 2011, but his other demands were refused. CW also requested at that time that his remuneration be paid through another company (Ash 126). AP explained that her father wanted to check that this was "above board" and spoke to Ashgates who reassured him.

99. Mr Robinson took AP to the relevant contracts. The first (dated 23 December 2011) is between DFL and Pink under which Pink agrees to provide services (broadly, management assistance, consultancy and administrative/accounting support) for £23,000 (plus VAT) per month. Under another contract of the same date between Ash 126 and Pink, Ash 126 agrees to provide services (defined in the same way as under the DFL/Pink contract) to Pink for £20,000 (plus VAT) per month. In both cases, the monthly fee was increased in line with RPI on each anniversary.

100. AP says that, to the best of her knowledge, these monthly payments were for the benefit of CW and his wife as remuneration for CW's services and something from which she gained no benefit.

101. These agreements were drawn up in November 2011 and signed by CW on behalf of DFL and Ash 126 and AP on behalf of Pink. She recalls that Ashgates advised that she should sign them on behalf of Pink as they felt it would not be correct for CW to sign on behalf of all parties. She was not involved in the conception or drafting of these contracts in anyway and never questioned why these payments were being made by DFL/Pink.

Support for AFR

102. As regards the intercompany loan between DFL and AF Reprographics Ltd ("AFR"), AP says that she has a very limited knowledge of the loan but her understanding at the time was that the loan was made to ensure that AFR continued to trade, as it was in DFL's best interests for it to do so as DFL relied on AFR to produce the engraved gravure cylinders necessary for the printing process at DFL. Whilst there were other gravure cylinder engravers operating at the time, her understanding was that the volume of work put through them by certain customers would mean that they would be very reluctant to deal with a customer's competitor if it meant they could risk losing work from the initial customer. She was not involved in the day to day running of AFR and neither was she involved in any decisions to loan money from DFL to AFR.

103. Mr Robinson showed AP a debenture given by AFR in favour of DFL. He also showed her exchanges of emails (in which she was copied) which showed bonuses being paid by AFR to CW and two other executives and a later email (in which she was not copied) which showed DFL's loan being increased to cover these payments.

104. In January 2016 GK commented to CW and Jimmy Urqhuart that AFR's assets were significantly below the level of its debt to DFL and he described this as "A massive hit to [DFL] should anything happen to [AFR]". This was consistent with financial information AP was receiving from Ashgates about AFR, but she never questioned DFL funding AFR.

AP's Financial Position

105. Of the £360,437 received from the sale of her shares, AP says that £36,048 was paid to HMRC as capital gains tax (with entrepreneur's relief). The shares gifted to her by her parents prior to the sale were gifted on the understanding that her parents would like any benefits received from those shares to be passed on to her children. Accordingly, she gifted approximately £78,460 (the net of tax proceeds of selling the shares her parents gave her) to her two children. The remaining £250,000 was invested in low interest savings. This enabled her to forgo a salary from Tressanda at a time when it was struggling.

106. In her third witness statement AP summarised her financial position in relation to her savings, pension and share of the matrimonial home. Before us, she updated the headline figures. Although we have not set them out in full here, we have borne these figures in mind when considering the CN figure.

107. AP earns a modest salary from working at an accountancy firm. She anticipates that she will lose this employment if a CN is issued against her due to the nature of her employment.

THE REGULATOR'S SUBMISSIONS

108. Mr Robinson says that the three acts relied on by the Regulator (the monthly payments to CW; the "draw down" of £800,000 from DFL to Pink and subsequent transfer of part of that money to AP in March 2016 (as to £360,437) as part of a purchase of shares in DFHL; the use of DFL's assets since September 2015 to support other group companies, leading to a write-off of debt of £224,481) form part of a "series of acts" within the meaning of section 38(12) because they are a succession of different ways of extracting money from DFL, for the benefit of CW and his family, at the instigation of CW and with the participation of AP (and others). The OED defines "series" as "a number of things of one kind (freq. abstract, as events, actions ..) following one another in time or in logical order". That definition is met in this case. It was met in *Shah* because the UT accepted that the acts in question had "some underlying connection between [them]", while leaving open the possibility that a series could be formed simply by a chronologically ordered list of acts with no other connection (see [183]-[184]).

109. AP must be "a party to" an act for it to be taken into account in a CN issued to her. Section 38(6) tells us that parties to an act include, but aren't limited to, those who knowingly assist in it. Mr Robinson says that "party to" should be given its ordinary and natural meaning. That was the approach Warren J took to other words ("prevent" and "recovery") in section 38 in *Re Bonas* at [93]. Mr Robinson rejects Mr Uberoi's "hierarchy" argument. The "party" test is separate from and not informed by the connection test; there are all sorts of ways of being "connected", not just being a director: see section 249 of the Insolvency Act 1986. These various ways of showing connection are not identifying decision-makers. They are more about proximity. And so, Mr Robinson says, it is wrong to argue that the connection test supports an interpretation of "party to" as requiring a decision-making role.

110. In relation to all three acts, AP was a director of DFL from January 2010 to March 2016. Her submission that she was a "paper director" only is without merit.

111. As to the first act, she signed the contracts for services that caused the monthly payments making up the first act, and (with other family members) approved CW's remuneration in 2011.

112. As to the sale of DFHL, AP agreed to the proposal laid out by CW in his email of 14 September 2015 and by Ashgates in their email of 12 October 2015. These and the subsequent communications from Ashgates and CW made crystal clear that the £800,000 to be used to part fund the share purchase was a drawdown from DFL, at a time it was financially weak and had a major pensions problem. At the very least her repeated agreement to the DFHL share sale amounts to knowing assistance in this act. But further she was "party to" this act by effecting the stock transfer of her shares in DFHL and receiving consideration as a result. The email exchanges show knowledge of what is proposed in the form of the transaction and its use of employer funds. It then reveals detailed and astute questions from Mrs Pelgrave about the implications of the use of employer funds.

113. At no point did she press a pause button, saying, "Hold on, what does this removal of £800,000 from the employer mean for the employer or for the Scheme?" That inaction is a form of participation. AP was one of two directors at the time and a director cannot simply do nothing. Mr Robinson referred to re Park, a case on director disqualification, and Barings, a case on directors' duties, to support that proposition. A duty to take action is something that directors accept when they become a director of the company.

114. The last point under the party test: does it matter that the extraction from DFL happened without AP's specific approval? CW's email saying he was going to draw down the £800k

was sent at 7am and acted on at 7.06am. AP says (understandably) that she would not have seen that email before it was acted on, but the email itself says in terms that "this can be undone if we wish". The relevant time is not the six minutes between 7am and 7.06am. It is the 6 months between September when the planning starts and March the next year when the cash transfer happens.

115. As to the third act, AP was copied into emails showing DFL's advances to AFR and the use of AFR to pay bonuses at a time it owed increasing sums to DFL. AP did not object to the use of DFL's money to support AFR, nor did she request professional advice be taken on the impact of this on the Scheme.

116. The series of three acts meets the material detriment test, as does the second act on its own. As regards the second act, it reduced the extent to which DFL was able to meet its obligations to the Scheme and so directly engages the comparison set out in s.38A(4)(e) and (f). The DFH Share Sale Act resulted in £800,000 that was available to DFL under an invoice finance facility being paid away from DFL and replaced with an interest free unsecured intercompany loan from DFG that has now been written off. But for the DFHL share sale and surrounding financing this money would have been available to support the Scheme, including by repaying (or avoiding the Scheme's payment of) the PPF levies and expenses that the Scheme paid on DFL's behalf. These totalled £899,138 (PPF levies) and £318,470 (expenses) in the period September 2015 to February 2019.

117. Looking at the Scheme valuation as at April 2014, the Scheme liabilities on every valuation measure exceed the market value of the Scheme assets; there is on any basis a multi-million pound deficit. So that means that the employer is a critical source of money for this scheme. No one else is under a liability to pay into it. The valuation sets out a schedule of contributions (the annual payments due from DFL to the Scheme to make up that deficit). The Panel noted was that this is a very long set of contributions. The recovery plan is 15 years long and, as they said at paragraph [88] of the Determination Notice, that indicates a weak employer.

118. The reduction was material. DFL's net assets as at 31 July 2015 were £5.820m, of which £3.402m was a deferred tax asset that was illiquid and dependent on future profitability in order to be realised. It had not been recognised until 2015 and DFL's auditor advised in 2013 that DFL's future profits were too uncertain to utilise it. £800,000 represents approximately one third of DFL's net assets in mid-2015, excluding the deferred tax asset. DFL's employer covenant at that time had been assessed as weak, and its recovery plan was 15 years long. The Scheme would be dependent on DFL's resources long into the future. £800,000 represents approximately nine years of the deficit repair contributions pledged for the year 2015-2016 (£88,149). Even the sum received by AP alone (£360,437) was over four years' worth of those contributions.

119. Given that the employer had net assets of only £2.3 million and was making losses, that extraction has certainly affected, or at the very least, looking at section 38A(4)(f), has affected or might affect the extent to which the employer can meet its scheme obligations.

120. AP's position is that the material detriment test is not met because all that happened in relation to the DFHL share sale was DFL borrowing from its bank and adding to its assets in the form of a new receivable. But the material detriment test is far more nuanced than AP's argument suggests. In essence, section 38A(4) asks the Regulator to consider the effect of the act in question by looking at the position as regards certain specified matters before and after the act. The comparisons that are identified in section 38A(4)(a) to (f) include quantitative comparisons such as the effect of the act on the value of a scheme's assets (section 38A(4)(a) and (b)), but also qualitative comparisons such as whether the act changes the country in which a person's obligations to pay a pension scheme would fall to be enforced (section 38A(4)(c)

and (d)). AP's argument looks only at the book value of the receivable, not its actual true value or the qualitative reasons why the employer is worse off in that scenario.

121. Both Pink and DFG were unable to repay the £800k loan. As AP indicated, DFG might have been able to sell DFL, but whether it could raise £800k would depend on the value of DFL. Ashgates had materially caveated their valuation of DFL and the asset (shares in a private company) were illiquid. None of the other ways AP suggested the loan could be repaid (dividends or raising another loan) were realistic. The new loan solution involves finding a commercial lender for £800,000 on the strength of DFG's weak balance sheet. And the "dividend" solution depends on dividends from DFL, which at the time was making losses and really amounts to an argument that DFL should fund its own repayment of the loan. The detriment did not occur when the loan was written off. A write-off does not cause a loan to become irrecoverable; it is the loan's irrecoverability that causes the write-off. In this case the write-off simply recognised the pre-existing reality that DFG could not repay the loan.

122. As regards the series, this also meets the material detriment test. It reduced the extent to which DFL was able to meet its obligations to the Scheme. It resulted in £1,872,481 that was available to DFL, and would have been available to support the Scheme, being paid away from it.

123. As regards the monthly payments to CW, AP also says that the first act occurred over six years before the Warning Notice was given and is thus time barred. That is not correct. The act comprises the monthly extractions themselves, from September 2015 until February 2019, by which CW removed £20,000 or £23,000 per month from DFL for the benefit of him and his wife. Those acts are in time.

124. Section 38(7) makes it a condition of issuing a CN that the Regulator must be "of the opinion that it is reasonable to impose liability on the person to pay the sum specified in the notice" having regard to certain identified factors. Mr Robinson endorses the Panel's conclusion on the reasonableness of issuing a CN for the reasons it gave (at [101]-[117]). In essence, he points to the facts that AP:

(1) knew of the deficit in the Scheme and of the financially weak position of its employer DFL,

(2) knew of proposals to extract value from DFL, particularly in the form of the £800,000 drawdown to be used to fund the DFH Share Sale Act,

(3) distrusted CW's motives and knew of his history of misusing company money, but

(4) at no time raised the impact of these proposed extractions on the Scheme or DFL itself, or asked for professional advice to be taken on that question, or objected to the transactions proceeding regardless. Instead AP formally agreed to the sale of shares in DFHL, together with the other shareholders, and benefited significantly from it.

125. It was not reasonable for AP, knowing what she did, to approve the proposal without at least raising the issue of its impact on DFL and possibly also the Scheme. The most obvious way to do that would have been to ask whether professional advice had been taken and we know AP did not take any advice from lawyers or actuaries. Only Ashgates advised and they were very careful to say whom they are advising and what they are advising on. When CW had moved money out of Pink, she took legal advice. There is no reason why that couldn't have been raised on this occasion as well.

126. Looking at the overall circumstances (section 38(3)(d)(i)), Mr Robinson says that AP had knowledge of the scheme deficit and DFL's financial weakness. She knew and understood the transaction that was proposed, in particular the use of DFL's finance facility, and its potential

impact on DFL in the sense that RBS might have to look elsewhere for repayment. And she was one of only two directors of the employer and had a deep distrust of the other one.

127. Looking at the factors in section 38(7), AP had an important level of involvement throughout, she was a director of DFL (and so had a fiduciary relationship with the company, to protect it and to consider the interests of its stakeholders, including the Scheme), she received benefits in the region of £360k.

128. As regards quantum, Mr Robinson says that the reasonable sum at the time of the acts is £360,437. That is the amount AP received as a result of the sale of her DFHL shares. There is no reason (except possibly when it comes to financial circumstances) to take tax or her gifts to her children into account, and care should be taken before taking gifts/sending out of benefits into account. AP's financial circumstances are sufficient to pay the CN sum the Regulator seeks.

129. Although financial circumstances are relevant, it is important to see that factor in its proper perspective. In *Shah* (at [300] et seq) the Upper Tribunal made these comments about financial circumstances:

> "300. It is important to bear in mind that the issue of a CN is not akin to the imposition of a financial penalty by a regulator for the breach of regulatory provisions. In those circumstances, as is the case with the imposition of criminal penalties, the financial circumstances of the individual concerned are a very important factor. Even then, financial circumstances will not always be given strong weight in the most egregious cases where it is important not to dilute the deterrent effect of any penalty. As we have said, the purpose of s 38 PA 2004 is to ensure that a person with a close connection with a scheme and its employer and who has been party to acts or failures to act which have caused material detriment to the scheme makes a contribution to scheme in circumstances where it is reasonable to do so.
>
> 301. The second point to be made is that in our view a target who wishes to rely on straitened financial circumstances as a factor tending against the issue of a CN must put forward cogent evidence which clearly demonstrates his financial position.
>
> …
>
> 302. The Regulator has given some helpful guidance on these matters in a report which it issued under s 89 PA 2004 following the determination it made in relation to The Carrington Wire Defined Benefit Pension Scheme in May 2015 which we gratefully adopt:
>
>> "When considering the reasonableness of a contribution notice, the reference to a target's 'financial circumstances' under section 38(7)(f) is not limited to the target's current financial worth but also includes consideration of how the target has ended up in the financial position in which he currently finds himself. This includes taking into account the target's receipt of monies and how they have been used.
>>
>> The Panel accepted that it was correct to draw a distinction between the issuing of a contribution notice and its enforcement. Questions about the ability to recover and the costs and proportionality of so doing are far less relevant to the decision to issue a contribution notice than to decisions over whether and how it should be enforced.""

130. It is reasonable to adjust for the passage of time, whether or not the £800k would have been paid into the Scheme. *Shah* (at [320]) tells us that we are not to adopt a compensatory analysis; the CN sum is not dictated by "Can I show compensation? Can I show money would

have gone to the scheme, how much worse off is the scheme". In any event, on the facts here, there was money that should have gone into the scheme. DFL had promised to pay expenses and didn't and there is the PPF levy element as well.

131. The Regulator seeks interest at the rate of 2% p.a. above Bank of England base rate on a compound basis up to the date of the Upper Tribunal's determination of this matter, followed by interest at the rate of 2% p.a. above Bank of England base rate on a simple basis until the date of payment. AP argues for the lower of these rates to apply until the conclusion of this Reference, with the higher rate only taking effect from the date of any CN. Such an approach simply incentivises every target to make a reference, however unmeritorious, and would reduce the compensation to the Scheme from the level the DP had found reasonable simply because AP has chosen to make this Reference. The resulting figure is well below the shortfall sum of £5 million.

132. It is wrong to reduce the amount sought because the £360,437 was originally sought on a joint and several basis with CW. AP says that this would have left her with a burden of £180,218.50 but that is to misunderstand the nature of joint and several liability. The whole point of joint and several liability is that it gives the creditor the option of pursuing one defendant alone for the full amount sought. Whether the "paying defendant" ends up bearing all the liability, or less, depends on whether that defendant brings contribution claims and with what result. The availability of those contribution claims does not affect its effective burden vis a vis the claimant.

133. If we were to approach this point (as the Panel ultimately seemed to do) with an eye to who was responsible for the transaction, we should consider the effect of the transaction. Our starting point then would not be a CN sum of £360k. It would be higher. It would be at least £800k plus something for the time value of money. We might then go higher because we might consider the effect of that £800k coming out in terms of what it means for DFL's ability to pay PPF levies or pay the expenses of the Scheme that it has promised to pay and didn't (which come to £1.2m).

134. Looking briefly at the other two acts cited against AP, Mr Robinson says that it is perfectly possible for us to reach a decision on the DFHL share sale act without needing to go here. Nevertheless, he says that there is a series of acts, and the material detriment test is met in relation to the series. The payments to CW and his wife total £848,000 in the period of six years ending with the warning notice. And the use of employer resources to support associated companies led to a cost of £224k.

135. As to whether there is a series, he says that a chronological list of acts is sufficient. However, if some kind of link or interconnection is required, we can see that here as all the acts complained of are a succession of different ways of extracting money from DFL for the benefit of CW and his family at his instigation and with the participation of AP and others.

136. On the limitation point, Mr Robinson says there are two acts, one (signing the contracts/approving CW's remuneration) relied on for the party test and another (the monthly extractions) which is the act which causes detriment. We can perfectly well rely on events of participation before the six-year period starts.

MRS PELGRAVE'S SUBMISSIONS

137. Mr Uberoi says that, so far as the sale of shares in DFHL and its associated financing are concerned, the Regulator has not established that there was a relevant act to which AP was a party.

138. He says that the Regulator has struggled to conceptualise exactly what this act is. It now describes the act as "The "draw down" of £800,000 from [DFL] to an associated company

called Pink on 18 September 2015 and subsequent transfer of £360,437 of that money to [AP] in or about 1 April 2016 as part of a purchase of her shares in [DFHL]". Despite what he describes as a "consistent reformulation" he says that the Regulator remains vague as to how this act caused material detriment.

139. Money was drawn down by DFL, using its facility with RBS, and then loaned to Pink. AP was told in emails (by CW and Ashgates) that this was a loan. Loans are to be repaid. The loan was shown in the Pink management accounts sent to AP by Ashgates as a current liability of £800k owed to DFL. Loans are to be repaid and at the point that she is bought out, this is still a loan. A loan does not cause any material detriment to the Scheme, and there would be no reason for AP to think that it would. It remained a loan for years until apparently something changed and it was written off after the Panel meeting last autumn.

140. The loan to Pink was in fact treated as repaid and then re-loaned to DFG. Little is known about the circumstances of those arrangements (and CW could not be asked about it, the Regulator having settled its case against him). It is not alleged that AP was responsible for the debt being moved over to DFG.

141. In any event, there is no material detriment established by the evidence. The employer (DFL) increased its indebtedness (by adding to its borrowings beforehand) but it also increased its receivables. At that point, that is not materially detrimental, even to the employer, let alone to the once removed Scheme for which this money was never going to be utilised. It is impossible to dispute that there isn't material detriment if Pink's obligation to repay is broadly comparable to the value of the loan and it is plausible that Pink will be repaying the loan.

142. There is no evidence that Pink has lots of competing creditors or money going out of its account in lots of different directions or was about to become insolvent. On the face of it, it is an active company that has suddenly got £800,000 in its bank account and £800,000 in borrowing. It is no different to how it was before this loan was sent across to it and things are neutral. When one focuses on the fact that AP was expecting the loan to be repaid before she departed the scene in March 2016, there isn't an act of material detriment on those facts.

143. There is no forensic accounting evidence before this Tribunal (nor was there before the Panel) to explain why an intercompany loan was a materially detrimental act, at the time that it was made.

144. Putting the point more broadly, Mr Uberoi is not clear why any use of employer funds in order to purchase its own shares is automatically a materially detrimental act. He submits that required expert evidence in order to explain why material detriment is automatically invoked by that act.

145. In any event, if there was an act which caused material detriment, AP was not a party to it. A more structured approach than just looking at dictionary definitions is necessary if the word is to have any real meaning. Referring to someone being "involved" in something opens the door (as has happened here) to an individual being held to be a "party" simply because they were an ultimate beneficiary of a transaction, but being an ultimate beneficiary should not be enough.

146. There should be a hierarchy of factual scenarios: being a decision-maker or procuring an act would be likely to make one a party. Being the ultimate beneficiary of an act (as AP arguably was, in the sense that she sold her shareholding, for value) should not be enough to make one a party.

147. Apart from being an ultimate beneficiary, there is nothing else upon which to base a finding that AP was a "party", save for a single strand of analysis which suggests that (i) being copied into emails (which emails did not make AP feel for a moment anything was awry, and

which included professional advisers) and (ii) it not crossing one's mind that (as the Regulator would have it now) legal advice should be obtained, is enough to make one a "party". She was not a decision-maker. The offer to buy her shares came -- this is a quote from her first statement -- "out of the blue". AP in no sense procured the act in question here either. She didn't say to CW, "I want to be bought out, you find a way to do it." Not only did the offer come out of the blue, she considered it very carefully for some time. She ultimately agreed to sell her shares for what she felt was a fair value.

148. Assistance with the proper construction of "party" can be found with paragraph (b) of subsection 38(3). AP was "connected" with DFL because she was a director. The fact that one must be connected to the employer (as in, by being a director) in order for a contribution notice to be issued (as well as being a party to the act) supports the construction that one should be playing a decision making role in matters in order for a contribution notice to be issued (the first category, decision-maker, above, or involved in procuring the act).

149. AP played no role in the relevant decisions, which were taken by CW, and there is therefore nothing surprising at all about the approach recommended here. Being copied into emails and not objecting to what appeared to her to be a transparent and "above board" way of proceeding cannot make her a "party" on the true meaning of that term. At no stage did it occur to her that Ashgates weren't proper professional advisers and she should do something differently.

150. AP's directorship does not assist in pointing to her being a party. She was a paper-only director, to use her phrase. She has explained in convincing evidence how that came to be the case and that this was really for CW's convenience and she had little or no involvement in the companies with the exception of Tressanda. As to Mr Robinson's company law cases he says that *Re Park* simply tells us that, if you are a director who is asleep at the wheel, you can be disqualified pursuant to the Directors' Disqualification Act 1986 ("DDA 1986"), but DDA 1986 does not help with the construction of "party to" in section 38. The language is completely different; it asks whether the target was a party to an act. Similarly with *Re Barings*, thinking about directors' duties does not help you decide whether someone was party to an act.

151. As to the reasonableness test, Mr Uberoi says that in reality AP is being exposed to a quasi-penal regime as a result of being an ultimate beneficiary (above). Even if she were found to have been a "party", upon the same analysis it is not reasonable to impose a CN upon an ultimate beneficiary who is simply copied in on emails and does not suspect anything is amiss.

152. AP was a "paper only" director for reasons of family history, unintentionally caught up in the machinations of her brother. She was an individual earning approximately £48,000 per year for her separate role at Tressanda and played no role in the actions of DFL. She did not seek or propose the buying out of her shareholding, it was CW's idea which was put to her. AP was in a situation where what she saw described a loan and it did not dawn on her at any point that there was a problem with it. She had no way of predicting the loan would not be repaid. This is not a case of any alleged corporate misfeasance by AP. No case has been advanced that she did in fact think something was amiss and didn't follow through with a suspicion. She is not a sophisticated businesswoman organising an extraction of value. Her sole motivation throughout was simply to sell her shareholding for what she was being told was a reasonable price, partly motivated by the chance to extricate herself from further distressing dealings with CW. If a CN is imposed upon her, she will be divested of her shareholding for no (or little) consideration and subjected to enormous financial consequences as she approaches retirement. All in circumstances where the money in question would at no stage have been used for the benefit of the Scheme in any event (CW would not have drawn down the money in order to

pay it to the Scheme – that is clear). AP is an obvious (and just) candidate for the application of the "reasonableness" handbrake.

153. As a result of the Regulator's settlement with CW, the Tribunal is in no position to assess reasonableness in the round, because no evidence has been heard from the main driver of events. The Tribunal cannot hear from him and AP is not able to cross-examine him (for example as to his intentions with regard to the loan, why it was not repaid, whether the money might have been used for the Scheme, or how the loan featured in the sale discussions with Pack34). The Regulator is also in a position where it may receive greater than 100% of what it was originally asking for. The Tribunal simply cannot know as the Regulator has not revealed the amount which it settled its case against CW for.

154. Overall, it is not reasonable for any CN to be imposed upon AP, at all. If any sum is to be imposed, then the starting point should be that the approach of the Panel at [126] of the Determination Notice is correct on this point. This (correct) analysis should only serve as the ceiling / starting point of the analysis, however. Thereafter, and considering the section 38(7) matters (and as stated by the Upper Tribunal in *Shah*, the first three criteria should receive the most weight):

(1) AP's involvement was merely that of an ultimate beneficiary (in that she sold her shares), who (on the Regulator's case) failed to ask herself the correct questions in response to the emails she was copied into (section 38(7)(a) – degree of involvement in the act);

(2) AP was a "paper only' director who played no actual decision making role within the employer, and received no salary from the employer as a result. She resigned from even this role from 16 March 2016 (section 38(7)(b) – the relationship which the person had or has had with the employer);

(3) Crucially, AP's involvement with the Scheme was nil. She was not a trustee and not involved with it in any way. Her knowledge of it was limited to the simple fact of some form of deficit (hardly unusual). Ashgates' valuation referred to the uncertainty around the pension scheme deficit, but 10 years on it has not crystallised (section 38(7)(c) – any connection or involvement with the Scheme);

(4) Section 38(7)(d) is not applicable at all (any failure in respect of a notifiable event);

(5) In respect of section 38(7)(e) and section 38(7)(ea), this was (as far as AP was aware) a simple sale of her shareholding. In fact she suspected her brother would come out the better from the deal. It should be remembered at all times, this was AP's shareholding. It had a value and she received it. The net effect of the CN is that AP will have been divested of what was an asset of hers for nothing in exchange. But in terms of whether it was a benefit which was directly or indirectly received, she received the value of her shareholding which is a benefit, but the value of what she gave up cannot be ignored;

(6) In respect of section 38(7)(ec) (the effect of the act on the value of the assets or the liabilities of the scheme) - there is no realistic counter-factual in which the money received by AP would have been made available to the Scheme itself. The loan was also recorded in the relevant accounts right up until December 2023, when Mr Urqhuart suddenly decided to write it off;

(7) 'the financial circumstances of the person" (section 38(7)(f)) are highly relevant to the assessment of reasonableness in this case. AP's financial circumstances are modest. Her entire plan for retirement, and future peace of mind, will be altered hugely by a CN, which clearly has a quasi-penal effect upon her, and which is not being levied at a

corporate but rather at a hard-working individual of modest means approaching retirement.

155. It was pre-arranged that significant sums would be paid to AP's children (which they were), and she has paid £36,048 in capital gains tax. AP accepts that there is no rule of law which states those two sums must be excluded. But where an assessment of reasonableness is called for, they should be.

156. Starting from a ceiling of £180,281.50, and applying the matters set out in section 38(7) and the deductions above, any CN should be in a range of £0 - £50,000, at its uppermost.

157. Turning to the other two alleged acts, until AP referred the Determination to this Tribunal, these formed a peripheral part of the Regulator's case. Indeed, they were barely argued in front of the Panel at all. In its own words, the Panel considered these acts to have been "only very lightly referred to" (Determination Notice [142]) and that was, no doubt, why they and the Regulator's "series" argument were not addressed in the Determination Notice.

158. Absent the "series" argument, the Regulator does not say how these acts are to be assessed as constituting a material detriment.

159. The Regulator can only issue AP with a CN if she was party to an Act which occurred during the six years ending with the issuing of the Warning Notice. On any view, that must require that the conduct which the Regulator relies on to say that AP is a "party" bears some proximity to the act. If not, the limitation provisions set out in in section 38(5) would be hollowed out entirely (as would the party test) because individuals could find themselves the subject of a CN on the basis of conduct which (i) vastly pre-dates the limitation period and which, (ii) the individual could not have known may lay the basis for a material detriment at the time the conduct was performed.

160. As far as the monthly extractions of cash for CW and his wife are concerned, Mr Uberoi says:

(1) In front of the Panel the Regulator asserted that "these [payments] were neither true charges for management services nor true dividends, but simply a route for regular extractions of money". That assertion (as to which there is no evidence) has now been abandoned and Mr Uberoi says that the legitimate remuneration of a Group CEO could not form the basis of a CN.

(2) The alleged conduct took place in November 2011 and so is time barred. Although the contract could be terminated by DFL or Ash 160, Mr Uberoi submits that the relevant act (if that is what it was) was signing the contract in 2011;

(3) AP did not cause these payments to be made. They had started (without her involvement) in 2008. They were merely regularised (at Ashgates' behest) in 2011;

(4) The Regulator says that AP was a party to this act by signing contracts in 2011 and approving CW's remuneration in 2011. Insofar as the Regulator identifies the period of the acts to be September 2015 to February 2019, it is entirely unclear how AP can be said to be a party to those acts on the basis of conduct taking place four years earlier;

(5) The Regulator appears to value the material detriment which results from these acts at £848,000, but that sum far outstrips the value of the renumeration received by CW during the six-year period preceding the issue of the Warning Notice and during the period during which AP was a Director of DFL. Payments before the beginning of the six-year period are time barred and AP cannot be a party to payments after she ceased to be a director. That leaves payments amounting to £140,000 and the Regulator has failed altogether to set out how that satisfies the material detriment test.

(6) It has not been established that these payments were not legitimate remuneration for someone who was very busy as the CEO of a large group of companies. People are being asked to infer or imply that there was something improper about it but there is no evidential basis for that.

161. As to the final act (now formulated as using DFL's assets since 2014 to support another group company of which AP was also a director, leading DFL to write-off £224,481 in 2018), Mr Uberoi says:

(1) The loan was made by DFL to AFR in 2014, over a year prior to 16 September 2015, that being the period six years prior to the issuing of the Warning Notice. As such, the act is time barred;

(2) The Regulator says AP was a party to this act because: (i) she was copied into emails (ii) she was a Director of both DFL and AFR and (iii) she did not object to the use of DFL's money. But Mr Uberoi says the Regulator has not specified which emails it is relying on; in fact there was only one (which had Mr Newborough of Ashgates copied in) and in it there is no mention of AFR's financial position or the loan or any involvement with DFL. It is a straightforward notification that bonuses which have been agreed as part of CW and others' remuneration are to be paid to them. He also says that directorship alone cannot satisfy the party test, and on the facts of this case AP was a "paper-only" director, with no role in actual decision-making; a "failure to object" should not satisfy the party test, not least when there is no proper evidence as to what the objectionable arrangement was.

(3) There is no evidence as to why this is an act which is causing material detriment. Bonuses are being paid to people who are running a group of companies. There is no evidence to support an inference that those bonuses were somehow improper.

(4) The write-off of the loan post-dated AP's directorship and to that extent, she was not a party to the act which might have caused material detriment.

162. On the Regulator's "series" argument, Mr Uberoi says that, for "series" to have any sensible meaning at all (and as a matter of ordinary English language), there must be a comprehensible and close interconnection between the acts said to make up the series. But no such interconnection exists here. All there is here is a chronological succession of acts/allegations with no link between them.

163. Turning to the time value of money, Mr Uberoi accepts that in many cases an increase for time value will be reasonable. However, this would more normally be the case where there is a far clearer link between monies no longer theoretically available to a scheme, and the act causing material detriment. In this case, there is simply no realistic counterfactual in which the monies drawn down and used at CW's instigation would have been made available to the Scheme. He accepts that a time value increase may well be appropriate where there is a coherent case of in effect corporate misfeasance diverting money from the pension scheme, but that simply is not this case here. This is therefore a case where no time value increase is appropriate.

DISCUSSION

164. We will analyse each of the three acts cited against AP by the Regulator and ask ourselves what acts (or failures to act) she was a party to and whether those acts or failures satisfied the material detriment test. Finally, we will ask ourselves the question what, if any, CN it is reasonable for the Regulator to issue.

Sale of shares in DFHL: was AP a party to an act or a deliberate failure to act?

165. The first question we need to ask is whether AP was a party to any act or failure to act and to do that we first need to decide what is meant by being a party to an act or a failure to act.

166. We have seen that Mr Uberoi submitted that "party" should be construed in the light of the connection test and, as a result, a person should only be regarded as a party to a transaction if they procured or were a decision maker in relation to it. A person who plays no role in the decision making around an act and simply benefits from it is not, in his submission, a party to it. We are not with Mr Uberoi on this point. As Mr Robinson pointed out, the test of connection is very broad. A person with a very small shareholding in a company could be treated as connected with that company simply by being a member of a family which, taking all the members of the family together, has a 30% interest in that company. Such a person would not, by virtue of their shareholding, be in a position to play any major part in decision-making. Secondly, the legislation itself provides that a party to an act or failure includes a person who knowingly assists in it. Thirdly, the legislation refers to a person being a party to a failure to act, and we do not easily see concepts such as procurement or decision-making being as easily applicable to a failure to act as they are to an act. Finally, there is no articulation of any concept of hierarchy in the legislation.

167. For all of these reasons, we consider that "party to" should bear its ordinary meaning. In the words of the Oxford English Dictionary ("OED"), this is:

> "With to (formerly also in): a person who is concerned in an action or affair; a participant; an accessory."

That is all that is required to make a person a party to something.

168. Much of the discussion before us focused on the alleged failure of AP to discharge her duties as a director, and Mr Uberoi submitted that it was wrong to ask whether AP was a party to an act through the lens of directors' duties alone. Put like that, we would agree with him.

169. We do not, however, need to come to a view on the question whether AP's failings as a director meant that she was a party to a deliberate failure to act within section 38, and the reason is that, as Mr Robinson submitted, it is very clear that AP was an active party to the sale of her shares in DFHL and the associated financing. Although she did not personally approve or effect the drawdown from RBS or deal with the internal cash movements or book entries, it is clear beyond any doubt that, when she agreed to sell her shares in DFHL, she knew that the finance for that transaction would come from DFL's own resources. That had been made clear from the time of CW's first offer and she was party to several communications where that point was made abundantly clear. We consider that AP was a party to the sale of her shares in DFHL and as a result she was knowingly concerned in the associated financing arrangements, which she knew were a precondition for the sale of her shares. DFL's facility with RBS was, as CW had explained from the outset, where the purchase price was going to come from.

Did that act or deliberate failure to act meet the material detriment test?

170. The next question we need to ask is whether those acts met the material detriment test. They will do this if they "detrimentally affected in a material way the likelihood of accrued scheme benefits being received". We pause to note that it is not necessary to show that the acts in question have impacted on the ability of the Scheme to satisfy accrued benefits; what is necessary is that the acts have detrimentally affected in a material way the <u>likelihood</u> of those benefits being received.

171. We agree with Mr Robinson's observation that, when we look at the list of factors the statute draws our attention to (e.g. the reference in section 38A(4)(d) to the territory where obligations would be enforced), this is as much a qualitative as a quantitative test.

172. The factors the statute points to are:

> "(a) the value of the assets or liabilities of the scheme or of any relevant transferee scheme,
>
> (b) the effect of the act or failure on the value of those assets or liabilities,
>
> (c) the scheme obligations of any person,
>
> (d) the effect of the act or failure on any of those obligations (including whether the act or failure causes the country or territory in which any of those obligations would fall to be enforced to be different),
>
> (e) the extent to which any person is likely to be able to discharge any scheme obligation in any circumstances (including in the event of insolvency or bankruptcy),
>
> (f) the extent to which the act or failure has affected, or might affect, the extent to which any person is likely to be able to do as mentioned in paragraph (e), and
>
> (g) such other matters as may be prescribed."

173. Clearly, the most relevant statutory factors here are (e) and (f), the question whether these arrangements negatively impacted on the likelihood of DFL being able to meet its Scheme obligations. As we have seen, DFL drew down £800,000 on its facility with RBS. That money was advanced initially to Pink to finance Pink's purchase of shares in DFHL. In fact, DFG purchased those shares and the loan to Pink was repaid through a series of book entries and replaced with a loan to DFG. Looking at the accounts of DFL, the increased indebtedness would be balanced by the asset the borrowed money was used to acquire (the receivable from Pink/DFG). The question, however, is not whether DFL's accounts balanced, but what impact these arrangements had (or might have) on the likelihood of DFL being able to meet its obligations to the Scheme. To some extent that turns on the answers to the quantitative question, whether the loans DFL made with that money were likely to be repaid and provide a return equal to the cost of borrowing from RBS, and the qualitative question, whether the loans were as liquid as the RBS facility (Could DFL expect to be repaid as quickly as it could borrow from RBS).

174. Neither Pink nor DFG had substantial assets of their own. Their ability to repay the loan turned entirely, therefore, on the fortunes and value of DFL. AP suggested that the loan could be repaid by dividends from DFL or by the proceeds of Pink/DFG selling DFHL shares. That, as the Panel noted, was entirely speculative. At the time the loan was made, DFL was loss making. It would be very unlikely, therefore, that it would be in a position, certainly not in the near future, to pay dividends which would enable Pink/DFG to repay the loan.

175. Similarly, whilst it was always possible that DFG could sell DFHL and then be in a position to repay the loan out of the sale proceeds, the value of DFL was, at its highest, £1.2 million and, depending on the view a purchaser took about future pension scheme liabilities, it could (as Ashgates had observed) be worth significantly less than that, possibly even nothing at all. DFHL was, of course, the parent company of an entirely private group the shares in which were not liquid. DFG's ability to repay the loan turned entirely, therefore, on DFL's fortunes increasing, so that it could pay dividends which could be used to repay the loan, or on finding a purchaser for an illiquid asset who would be prepared to pay at least £800,000 for

shares with an uncertain (potentially negligible) value. In the meantime, the loan was not providing a yield.

176. On the other hand, if this transaction had not taken place, DFL might have been able to draw down £800,000 from RBS (on what was, despite its name, a working capital facility) and use some or all of that money to discharge its obligations to the Scheme or to invest in the business, thus increasing the chances of being able to generate future profits out of which it could discharge some of its obligations to the Scheme. We say "might have been able" to draw down on the facility because CW had suggested that, once RBS saw the September 2015 results, they might not be willing to let DFL draw down further funds.

177. Whatever the position as regards possible future draw downs, the immediate result of these transactions was that DFL had increased its indebtedness by £800,000 and paid that money away without acquiring any real new source to fund the repayment. Although DFL had a receivable in its accounts, DFL would be the source of money to repay that loan. The reality was that, at a time when its finance and future viability were uncertain, DFL had borrowed £800,000 from RBS and indirectly distributed that money to two of its shareholders (AP and PW) by funding the purchase of their shares in DFHL.

178. We have seen how the initial form of the transaction considered was an own share purchase by DFHL, but that had been rejected for tax reasons. This transaction was a synthetic own share purchase financed in exactly the same way by the target company out of its own resources.

179. It is hard to see how a transaction like this does not materially impact on the likelihood of DFL being able to meet obligations to the Scheme and others. At a time when its financial position was already uncertain, it increased its indebtedness by £800,000 and transferred the money it borrowed to its shareholders. At a time when the company was valued at no greater than £1.2 million and potentially significantly less than that and its assets (ignoring the deferred tax asset) were £2.4m, it increased its indebtedness by £800,000. This transaction would, therefore, have a material negative impact on the financial position of the Scheme, because it greatly increased the risk of DFL not repaying the PPF levies and expenses the Scheme had already paid on its behalf or meeting its commitments to satisfy the shortfall contributions, which were already significantly "back end loaded".

Sale of shares in DFHL: is it reasonable to issue a CN to AP and, if it is, in what amount?

180. Having decided that AP was a party to the financing arrangements for the sale of her shares in DFHL and that this act met the material detriment test, we now need to go on to consider whether it is reasonable for a CN to be issued to AP and, if it is, what amount should be specified.

181. The statute gives some guidance in this area, by identifying certain factors to be considered. The Regulator is directed to consider "the extent to which, in all the circumstances of the case, it was reasonable for the person to act, or fail to act, in the way that the person did" and "such other matters as the Regulator considers relevant, including (where relevant) the matters falling within subsection (7)"; see section 38(3)(d) PA 2004.

182. We need to keep in mind that a CN is not a financial penalty regime (*Shah* at [300]), but rather a means for the Regulator to support its statutory objective. As the Upper Tribunal explained in *Shah* (at [278]):

> "The section supports the statutory objective of the Regulator to protect the benefits of members under occupational pension schemes and to reduce the risk of situations arising which may lead to compensation being payable from the PPF. Section 38 seeks to provide this support by imposing liability on

> those with a close connection with the scheme and its employer and who have been party to acts or failures to act which have caused material detriment to the scheme. Where those circumstances exist, the case for a CN will become stronger where the person concerned has also benefited as a result of the acts or failures which have caused material detriment to the scheme."

183. The CN regime is also not a compensation regime, it is not designed to compensate a scheme for loss it has suffered. The Upper Tribunal made this point in *Shah* at [320], albeit adding the caveat that this was the case "at least when applying the material detriment test". We can see from the way the material detriment test works (looking at the impact of an act or failure on the likelihood of obligations to a scheme being met and the inclusion of qualitative as well as quantitative factors) that detriment sufficient to trigger a CN can arise where the likelihood of obligations to a scheme being met is impacted and there has not been (and may never be) any loss to a scheme that can be traced back to the act or failure in question. If that is sufficient detriment to justify the issue of a CN, it must be the case that it may be reasonable to require a compensation payment in the absence of realised loss that can be traced back to the act or failure in question.

184. The CN regime is also not (or not primarily) a disgorgement regime, one designed to make the target disgorge all the benefit (if any) they obtained in connection with their act or default. As the passage from *Shah* just quoted indicates, a CN may be appropriate in the absence of personal benefit, albeit that the presence of personal benefit makes the case for a CN stronger.

185. To a degree, there is a measure of tension between these different considerations. The CN regime not being a penalty regime might suggest that a CN should only be issued to the extent that the target has received and retained a measurable benefit, but the passage we have just quoted (at [182] above) from *Shah* makes it clear that, whilst the receipt of a benefit makes the case for a CN stronger, the receipt of a benefit is not a prerequisite. One of the factors the statute directs us to consider is "**the extent to which**, in all the circumstances of the case, it was reasonable for the person to act, or fail to act, in the way that the person did" (our emphasis), which indicates that (although this is not a penalty regime) the degree of blameworthiness of a target is a relevant factor. Whilst the primary object of the CN regime is to protect pension schemes and reduce the risk of calls on the PPF, a CN may be appropriate where the target's acts have no measurable impact on a scheme's ability to provide benefits.

186. The resolution of this tension can be found in the observation of the Upper Tribunal in *Shah* (at [278]-[279]) that the statutory factors (and equally the non-statutory considerations we have just discussed) will not necessarily all have the same weight in every case, and that our task is to undertake a multifactorial assessment, balancing all the relevant circumstances together to reach an assessment or evaluation in the case before us, using our expertise as a specialist tribunal.

187. Looking at the factors identified in subsection (7), we start with the degree of AP's involvement in the act or failure in question. We have already identified AP as being a willing seller of her shares in circumstances where she knew that the purchase price would be financed by DFL from its own resources. She therefore had a significant level of involvement. If she had not been willing to sell her shares, DFL would not have borrowed from RBS to fund her or PW's sale price.

188. Turning to her relationship with the employer, AP was a director of DFL. We have already explained that we have found AP to be a party to a relevant deliberate act without regard to the level to which she discharged (or failed to discharge) her duties as a director. However, it was her responsibility as a director of DFL, whether she was aware of that or not,

to act in the best interests of the company and she clearly failed to do that. She knew that the Scheme was in deficit, and she knew, because she was copied in on the monthly financial information, that DFL's financial position was not good. She had been told, in quite graphic terms, by CW that DFL's financial position was bad and that, if the bank had one more month's financial information, it might not be allowed to draw down on the facility and that was why DFL drew down from RBS in September. Despite all of this, she went ahead without taking any professional advice (beyond Ashgates' advice which was focused on the tax position of the participants) and played a pivotal part in a transaction where the company increased its indebtedness in order to benefit her and other family members. She was a director of DFL and she owed duties to that company. There is nothing to suggest that, to the extent she thought about the impact of the proposed drawdown and loan to Pink at all, AP gave any consideration to any of the matters listed in section 172 of the Companies Act 2006 ("CA 2006"), exercised independent judgment (section 173 CA 2006) or reasonable care, skill and diligence (section 174 CA 2006). Whether deliberately or not, she singularly failed to discharge her duties as a director. Although the act we are concerned with (AP's sale of DFHL shares) is her act as a shareholder in a different company, her direct relationship with DFL (as a director) is an important factor to take into account.

189. This links back to the factor identified in section 38(3)(d)(i) ("the extent to which, in all the circumstances of the case, it was reasonable for the person to act, or fail to act, in the way that the person did"). It was not at all reasonable for AP to act in the way that she did. She was a director of DFL, and she should not have allowed the employer company to weaken its resources in the way it did without making sure that the interests of all stakeholders in the company were protected. She did not ask any questions or take any advice with a view to even beginning to discharge that responsibility.

190. As to her connection or involvement with the Scheme, AP had no connection with the Scheme beyond her position as one of two directors in the employer. That was, however, a position of some importance. As one of two directors of the employer, she could have used her position to make sure that the employer maximised its assets and used them to benefit the Scheme to the greatest extent possible.

191. As far as the value of benefits she received is concerned, we know that AP received just over £360,000 by way of payment for her shares in DFHL. Clearly, to obtain that money, she had to give up her shareholding in DFHL. At one level she simply swapped one asset for another, and that might be thought not to be a benefit (at least if the assets were of equal value). It is, however, common ground that "benefit" here does not mean "net benefit". In any event, the effect of this transaction is that AP exchanged an illiquid minority stake in a private company of questionable value for a significant amount of cash.

192. AP had a slightly under 25% stake in DFHL and it is hard to see how she could have sold those shares in the open market, even if the constitutional documents of DFHL allowed this. In practice, she would be restricted to selling alongside all the other shareholders or to one of them, which is what happened. CW came along with an offer to purchase her shares, which he did not need to finance as DFL was going to do that out of its borrowings.

193. We have seen from the Ashgates' valuation that there was significant doubt over the valuation of the company. The figure which was used to justify the price paid to AP was at the very top end of the range they thought was supportable (more than double the figure they said they would be comfortable defending to HMRC), and even that required a very bullish view to be taken on the likelihood of the pension deficit presenting itself. It is far from clear to us that this figure represents an open market value of the shares in DFHL. We would have expected an open market value to be calculated by looking at what a third-party purchaser (if one could

be found) would require as a discount or price reduction on account of the pension deficit risk, whereas the £1.2m valuation ignores the deficit and assumes a third-party purchaser would not reflect the deficit in the price they would offer. On one view, DFHL was valueless.

194. Turning to AP's financial circumstances, these are (as the Upper Tribunal noted in *Shah*) of limited relevance in the absence of cogent evidence of straightened circumstances. It was not suggested to us that AP's circumstances were straightened in any way at all. In fact, AP is relatively well off.

195. As well as the factors listed in subsection (7), we are directed to take into account such other matters as we consider relevant. The only issue, in addition to those identified in subsection (7), we discussed is the impact of CW and his wife settling with the Regulator before the Panel meeting. The Regulator had sought a CN sum of £360,000 from AP on a joint and several basis with CW. As a result of CW settling, the Panel determined that the correct, reasonable figure for the CN on a sole liability basis would be £180,000 for each of AP and PW.

196. Mr Robinson made substantial submissions to us on the effect of joint and several liability, pointing out, of course, that a joint and several award enables a claimant to proceed for the full amount and then leaves it to those held jointly and severally liable to claim contributions from each other as appropriate. In effect, the Panel was answering the question what was a reasonable figure for the CN by looking at the financial cost AP would have ended up bearing on a joint and several CN and assuming she was able to recover a contribution from CW. What the Panel should have done, in his submission, was focus on the perspective of the Scheme.

197. The real point it seems to us, however, is that the Panel used this shift from joint and several liability to sole liability as a framework within which to discuss what they thought was the appropriate figure to put in AP's CN. As they put the point at [126](viii) "[T]he Case Panel has considered it helpful to ask itself, if [CW] were still involved in this process, but the Case Panel considered it appropriate to impose liability on a sole liability rather than joint and several basis, what would have been the reasonable (sole) liability to impose?" Broadly speaking, they considered that she shared responsibility with CW for the money drawn down by DFL and paid to her. Expressing that in terms of subsection (7), the degree of her involvement was a shared involvement with CW.

198. In addition, as the Panel pointed out, we are not faced, as it often the case, with an insolvent employer and a scheme which is failing to provide benefits. Currently, the Scheme has paid out all the benefits it is obliged to, although it remains significantly in deficit.

199. However, as Mr Robinson pointed out, in the past DFL has not been able to repay the expenses and PPF levy that the Scheme has paid on its behalf. Putting the point colloquially, as he did, it is not the case that all is well with the world so far as the Scheme is concerned.

200. Mr Robinson says that, as AP was jointly responsible with CW for DFL drawing down £800,000, one might say that her 50% responsibility should equate with £400,000, albeit that the Regulator would cap this at the value of her benefits, not half the benefit she received.

201. Although we should pay due regard to the Panel's decision, we are required to develop a reasoned analysis of our own as to whether it is reasonable to issue a CN to AP and, if it is, what amount would be reasonable.

202. Our starting point is that AP shares responsibility with CW for DFL drawing down £800,000 from RBS in circumstances unconnected with any business need and driven only by the shareholders' desire to finance the proposed transaction. Given DFL's financial position

and the position of the Scheme, it was not appropriate for DFL to draw down such a large sum of money and effectively distribute it to its indirect shareholders.

203. A figure of £400,000, therefore, reflects her involvement in and shared responsibility for the detrimental act, which was significant (both as a shareholder in DFHL and a director of DFL) and, for all the reasons we have discussed, wholly unreasonable.

204. The value of the benefits AP received is relevant given that the CN regime is not a penalty regime. The Regulator itself has accepted that it is appropriate to cap the figure in AP's CN by reference to the value of the benefits she received, and we would agree with that approach in this case, given that it has not been possible to put a financial value (let alone one in excess of the benefits AP received) on the loss caused to the Scheme by AP's act.

205. Given the difficulty AP would have in selling her illiquid minority stake in DFHL and the potentially very low value of DFL, we consider that she has obtained a very substantial benefit by selling her shares for cash.

206. Unlike the Regulator, however, we would take tax and the amounts AP paid to her children out of the proceeds of selling the shares her parents gave her into account in valuing the benefits she received. We absolutely agree with Mr Robinson when he says that targets should not be able to escape from the full rigours of a CN by dissipating proceeds or contriving schemes to distance themselves from such amounts, and nothing we say here should be taken as suggesting anything different. However, that is not what we are confronted with here. Although legally AP could do whatever she liked with the proceeds of selling the DFHL shares her parents gave her immediately before this transaction (that had to be the case to make Ashgates' tax planning work), the reality is that she received those shares and the proceeds of selling them subject to a moral obligation (which she could not and did not ignore) to use the proceeds of selling those shares to make significant provision for her children. In the event, she gave her children £78,640 out of proceeds of £87,379. Effectively, the proceeds of those shares were absorbed by tax on the gain arising on their sale and the gifts to her children.

207. Similarly with tax, although we would not go as far as saying that the value of a benefit can never exceed its after tax benefit, we agree with Mr Uberoi that the impact of taxation is not something we should automatically ignore. Certainly, in a case where a significant financial value can be put on the loss to a scheme by the act complained of, we can see why tax should be ignored, particularly if the amount of tax (say income tax plus national insurance contributions) would otherwise have a material adverse impact on the amount in the CN. In the circumstances of this case (a target against whom there is no allegation of dishonesty, no "diversion" of funds from the Scheme, no financial value on the loss to the Scheme and a relatively modest (10%) tax burden), we consider that it would be reasonable to take tax into account.

208. Looking at all the relevant factors in the round, we note:

(1) AP's involvement in the detrimental act was significant (it was not her idea, but she could have stopped it in its tracks) and, given her position as a director, she behaved wholly unreasonably, but not (at least so far as the Regulator has alleged) dishonestly.

(2) This is not a case where the sums received by AP can be equated in a straightforward way with sums that ought to have been paid into the Scheme.

(3) Nor is this a case where it has been possible to put a financial value on the loss caused to the Scheme by AP's act.

(4) However, at the relevant time the Scheme was (and it remains) materially in deficit (on any measure) and over the period September 2015 to February 2019 inclusive the total PPF levy and employer expenses borne by the Scheme exceeded £1.2m.

(5) AP has received a significant benefit.

209. We do not consider that the shift in award from joint and several to sole liability justified the reduction in the figure claimed from AP. Had CW not settled with the Regulator, it would appear that a joint and several award of £360,437 would have been made against AP and CW, but there can be no guarantee that AP would have been able to recover half of that liability from CW, just as, we understand, he has so far only paid half of his settlement figure to the Regulator. The "effective regulatory burden" (to use the Panel's expression) could easily have ended up being £360,437, which would have far exceeded the benefits she retained from behaviour which, whilst unreasonable, was not dishonest. More importantly, focusing on the net cost to AP ignores the primary purpose of the CN regime as identified by the Upper Tribunal in *Shah.*

210. For all these reasons, we consider that it is reasonable to issue a CN to AP and that the amount which it would be reasonable to issue the CN for would be the full value of the benefits received and retained by her, in other words the proceeds of her share sale (£360,437) less the amounts she paid to her children (£78,640) and the tax payable on account of the sale of her DFHL shares (£36,048), which gives a CN figure of £245,749.

211. There is another route which leads to a CN figure which is close to the figure we have just arrived at. When the sale of DFHL shares was originally proposed by CW, he said that Pink had £400k and, if that was added to the £800k that could be drawn down from DFL, Pink could pay each of the shareholders (PW, AP and their parents) £400k for their shares. As we have seen, the proposal evolved to one where the parents gave their shares to their three children and CW, PW and AP then sold their DFHL shares for cash. In due course, following the dialogue with HMRC, the proposal evolved further, and CW disposed of his shares in both DFHL and Pink in return for an issue of shares by the acquirer. However, if we look at the amount of cash required for the original transaction and the transaction originally put to HMRC (which valued the consideration given for DFHL at £1.125m), we can see that the cash paid out by the acquiring company and received by the selling shareholders would be greater than the £800k funded by DFL using the drawdown on the RBS facility. We accept that, while she may have been aware in broad terms of what was being discussed, AP was not intimately involved in these structuring discussions. It would be fair to say that she would have been aware in broad terms of the larger transaction involving DFHL where up to 2/3 (£800k) of the required finance (£1.2m) came from DFL and the remaining 1/3 from an associated company, which had common owners and directors but had no responsibility towards the Scheme. Although the economics of the transaction changed, the fact that 2/3 of the sum AP received (2/3 x 360,437 = 240,291) is close to the figure for the CN we have arrived at by a different route gives us significant comfort that the conclusion we reached by a different, more analytical route (that £245,749 is a reasonable figure for the CN) is correct.

212. This figure needs to be adjusted to reflect the passage of time. The starting point for the calculation of this uplift should be the date on which AP sold her DFHL shares (not the date when she was paid the sale price) as that is the date when the detrimental act was "locked in" (until then, as CW repeatedly told AP and others, the drawdown could have been reversed). As we are not looking at identified financial loss to the Scheme (just what a reasonable contribution would be in the light of all the factors we have discussed), this adjustment needs simply to reflect the time value of money, and we consider that simple interest at a rate of 2% above the Bank of England Base Rate from time to time is sufficient to achieve this.

Should we adjust our conclusion on the figure to be included in the CN by reference to the other acts asserted against AP by the Regulator

213. Our short answer to this question is "No" and our main reason for coming to this conclusion is that, despite being invited to do so, the Regulator has not explained how the detriment said to be linked to these acts should be calculated or factored into the calculation of the CN figure.

214. Leaving that point to one side, so far as the monthly extractions of cash for CW and his wife are concerned, AP was clearly a party to these payments (as she signed the contracts under which they were paid). However, there is no evidence before us to suggest that these payments (which resulted from what appears to have been a robust discussion between CW and the other shareholders covering a number of issues, where CW was not always successful) were anything other than what CW was seeking, appropriate market-level compensation for the significant role he said he was playing in the business and which the other shareholders appeared to agree with.

215. The means of delivering this compensation appears less than straightforward and was questioned by CW's father, who was reassured by Ashgates, but that is beside the point. If CW was simply being paid the "going rate" for the work he was doing (and there is no evidence or assertion that he was not), there is no detriment in the arrangements, however roundabout the way of delivering CW's compensation. That means that, looked at on its own, this act would fail the "material detriment" test. Even if the "material detriment" test were applied by looking at all three acts taken together (on the basis that they comprise a series), the act we are looking at would not increase the level of detriment as the cash outflows would be matched by the value of what was obtained for them (CW's services) and we cannot see how it would be reasonable to increase the figure in AP's CN on account of amounts paid under an arm's length employment/services arrangement from which she obtained no benefit.

216. Turning to the final act asserted against AP, use of DFL's resources to support associated companies leading to a loan write-off, her involvement here is said to be her failure to stop these arrangements when she knew that the company being supported was in a difficult financial position. AP's unchallenged evidence is that she thought that the business being supported performed important functions for DFL and therefore this support was commercially necessary. Putting the point broadly, it does not seem to us that it would be reasonable to increase the figure in AP's CN on account of her failing to intervene to stop a payment which appeared commercially appropriate and from which she obtained no benefit.

217. Our conclusions at [215] and [216] mean that it has not been necessary for us to come to a conclusion on whether the three acts complained of constitute a "series" or the limitation point in relation to the monthly extractions of cash.

CONCLUSION AND DIRECTIONS

218. The Reference is dismissed.

219. In accordance with the relevant provisions of section 103 PA 2004:

(1) We determine that the appropriate action for the Regulator to take in relation to the matter referred to us is to issue a CN to AP in the sum of £245,749 plus an uplift on account of time to be calculated as set out in [212] above.

(2) We therefore vary the Regulator's determination to that extent.

(3) We remit the Reference to the Regulator with a direction that effect be given to our determination and there be liberty for the Regulator to apply to the Tribunal for further directions if required.

MARK BALDWIN
UPPER TRIBUNAL JUDGE

Release date: 01 August 2025