Reference numbers: FS/2012/0001-5

PENSIONS REGULATOR – Financial support direction – procedure – whether Regulator and Trustee should be barred from pursuing parts of their pleaded cases on grounds that to do so would amount to an abuse of the Upper Tribunal's Procedure and breach of the Upper Tribunal Procedure Rules – no – whether disclosure of documents should be directed in relation to certain matters pleaded by the Targets in reply to the Regulator's Statement of Case – yes in part – whether the Regulator should disclose documents relating to its decision not to seek a financial support direction against Joint Venture Partner of one of the Targets – no

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and -

THE PENSIONS REGULATOR **Respondent**

- and -

BOX CLEVER TRUSTEES LIMITED **Interested Party**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Sitting in public in London on 25-26 September 2013

Michael Furness QC and Edward Sawyer, Counsel, instructed by Hogan Lovells International LLP, for the Applicants

Jonathan Hilliard and Ben Faulkner, Counsel, instructed by Eversheds LLP, for the Interested Party

Nicolas Stallworthy QC and James Walmsley, Counsel, instructed by the Pensions Regulator, for the Respondent

DECISION

Introduction

1. This decision relates to various applications for procedural directions involving a reference made under s 103 of the Pensions Act 2004 ("the Act"). The reference relates to a determination made on 21 December 2011 by the Determinations Panel ("DP") of the Respondent, the Pensions Regulator ("TPR") that the five companies from the corporate group of the well-known broadcasting company ITV should be the subject of a Financial Support Direction ("FSD") issued pursuant to s 43 of the Act so as to require them to provide funding to address an estimated deficit of £70 million in the Box Clever Group Pension Scheme ("the Scheme").

2. The companies which are the subject of the DP's determination are the Applicants in the reference and are referred to in this decision as "the Applicants" or the "Targets". Box Clever Trustees Limited, the Trustee of the Scheme ("the Trustee"), has been joined to the reference as an interested party. In the applications now made the Targets contend, *inter alia*, that in the light of the manner in which the subject matter of the reference was put to them and decided pursuant to the Respondent's administrative decision making process, the Respondent and the Trustee should be precluded from pursuing certain allegations before this Tribunal.

3. TPR's case for an FSD is based on the Targets' involvement in a Joint Venture known as "Box Clever" which existed between 1999 and 2003. Mr Furness helpfully set out in his skeleton argument the basic facts of the life of the Joint Venture, which are not in dispute, as follows:

(1) The Box Clever Joint Venture was established in 1999-2000 when the Granada group of companies (now part of the ITV group) agreed to combine its TV rental business with the TV rental business of its competitor, the Thorn group.

(2) Granada and Thorn each sold their respective rental businesses to the newly-created Box Clever group of companies, which was owned 50-50 by Granada and Thorn.

(3) The transaction was agreed in 1999 and completed in June 2000.

(4) The purchase price payable by Box Clever for the rental businesses it acquired was £980 million, of which £600 million was payable to Granada and £380 million was payable to Thorn.

(5) The purchase was funded by Box Clever borrowing £860 million from Westdeutsche Landesbank ("WestLB"); the loan was secured on the Box Clever group's assets. Using the loan monies, (simplifying somewhat) Box Clever paid approximately £530 million to Granada and the rest to Thorn in respect of the purchase price. The balance of the purchase price was left outstanding. Neither Granada nor Thorn was liable for the monies lent by WestLB, the borrower being Box Clever.

(6) From June 2000, Box Clever operated the combined rental business.

(7) In October 2001, Box Clever established the Scheme to provide pension benefits for its employees. The Box Clever companies (and not Granada or Thorn) were the employers of the Scheme and were liable to fund it.

(8) Unfortunately, the Box Clever business did not prosper; it fell behind with the repayments to WestLB and ended up deeply insolvent. During September-November 2003, WestLB appointed Administrative Receivers over the principal Box Clever operating companies.

(9) Thereafter, the Administrative Receivers took over the Box Clever business and sold it. All the proceeds of sale went to WestLB as secured lender.

(10) Neither Granada nor Thorn had anything further to do with the Box Clever business after the Administrative Receivers were appointed in 2003.

(11) According to figures provided by the Trustee, at the time of the Administrative Receiverships, the Scheme had a funding deficit of some £25 million on a gilts-matching basis, which Box Clever was unable to meet due to its insolvency. The reported deficit has since grown to around £70 million.

4. TPR and the Trustee contend that the Targets were "connected" with or an "associate" of the employer in relation to the Scheme pursuant to s 43(6) of the Act and that it is reasonable for an FSD to be issued to them, as permitted by s 43(5) of the Act, having regard in particular to the approximately £530 million which Granada received upon the transfer of its rental business to Box Clever in 1999-2000.

5. The Targets deny that they were "connected" or "associated" at any time within the two year time limit then provided for in s 43(9) of the Act and they also deny that it would be reasonable to issue an FSD to them in any event.

6. All the provisions of the Act to which I refer are set out in Appendix 1 to this decision.

Events after the failure of the Joint Venture

7. This brief summary is taken primarily from TPR's Statement of Case, which in this respect is not materially disputed.

8. Following the failure of the Joint Venture discussions and negotiations took place from 2004 onwards between the Trustee and the ITV Group as to whether ITV would be prepared for ex-Granada group members of the Scheme to be transferred back into what had been the Granada Pension Scheme (now the ITV Pension Scheme).

9. These proposals became conditional upon the Trustee withdrawing any request to TPR for the issue of an FSD and the Trustee supporting any application that ITV might make to TPR for a "clearance statement" under s 42 and s 46 of the Act in respect of the Joint Venture (explained below).

10. Negotiations as to the terms of any such transfer continued intermittently until December 2008, when ITV replaced previous offers with successive, diminishing offers instead to augment ex-Granada members' benefits that had been retained in the ITV Scheme. This was not accepted, and ITV withdrew from negotiations entirely in October 2009.

11. On 17 November 2009 ITV applied (on behalf of itself and many other companies within the ITV group, including all the Applicants) for clearance statements under ss 42 and 46 of the Act. If granted, such clearance statements would have bound TPR from exercising its powers under ss 38 or 43 of the Act. This clearance application by ITV was refused in March 2010. ITV's application for clearance was modelled on an application for clearance that had been made by Granada's Partner in the Joint Venture (by then called the Carmelite group) in 2008. That application for clearance had also not resulted in the grant of any clearance statement, but had resulted in a letter of comfort dated 25 February 2009 being issued by the Regulator to Carmelite that it would not pursue an FSD against them on the basis of a view as to the effect of the appointment of an administrative receiver which TPR subsequently concluded was incorrect. TPR has not pursued the Carmelite group for an FSD.

12. Further to the refusal of TPR to grant ITV and its subsidiaries clearance statements in respect of their involvement in the Box Clever Joint Venture, ITV made detailed representations to TPR as to why ITV considered that no FSD should be issued.

13. Nevertheless, TPR carried out an investigation which in due course led it to seek an FSD against the Targets. Pursuant to s43(2) of the Act it chose 31 December 2009 as the "relevant time" with the result that in accordance with the provisions of s43(9) of the Act and reg 5 of the Pensions Regulator (Financial Support etc) Regulations 2005 (S.I. 2005/2188) as amended by the Pensions Regulator (Miscellaneous Amendment) Regulations 2009 (S.I. 2009/617), reg 2(2), as then in force any determination to issue an FSD had to be made no later than 31 December 2011. Consequently the investigation, a Warning Notice and a determination by the DP all had to be completed by 31 December 2011 if the FSD was to be valid.

The regulatory proceedings

14. On 18 August 2011 TPR formally notified the Targets that a Warning Notice seeking the issue of an FSD against them would be issued. On 30 September 2011 TPR issued a Warning Notice pursuant to s 96 of the Act in respect of its proposal to issue an FSD in respect of the Scheme, which if that proposal were implemented, would require the Targets to put in place financial support for the Scheme.

15. Paragraphs 1 to 12 of the Warning Notice contained a summary of the grounds on which TPR was seeking an FSD. The parties accepted that this summary fairly reflects the essence of the case that the Targets answered when they made representations to the DP, namely TPR's contention that it was reasonable to issue an FSD to the Targets based on the structure and creation of the joint venture. The effect

of these arrangements was, TPR contended, to enable the Targets to receive a large immediate cash benefit whilst retaining the ability to benefit from the continued trading of the businesses hived down into the Joint Venture and insulating the Granada group from the debt taken on by the Box Clever group and any liability for future pension accrual by employees working in the businesses hived down.

16. It is helpful to set out in full this summary, as follows:

> "1. The Box Clever group of companies was formed as a joint venture between the Granada and Thorn groups in June 2000, to run the TV rental businesses of (from the Granada group) Granada UK Rental & Retail Limited ("Rental and Retail") and (from the Thorn group) Rental Holding Company Limited ("RHC"). Rental and Retail and RHC each subscribed 50% of the shares in BCT, which acted as the parent and ultimate holding company for the Box Clever group.
>
> 2. As part of the restructuring to create the joint venture, various Granada businesses were consolidated in or under Consumer Electronics; and staff previously employed by Rental & Retail, Granada Media Limited ("Media") and/or Granada Group Limited ("Group") had their employment transferred to Consumer Electronics. The businesses – with these employees – were then hived down into the Box Clever group where they were undertaken by the Employers.
>
> 3. The Granada group (and in particular Rental & Retail, Media, Group & Granada Limited ("Limited")) controlled the Box Clever group (and indirectly the Employers) through Rental & Retail's 50% shareholding in BCT and through Rental & Retail's appointment of directors to BCT.
>
> 4. Rental & Retail (and through it Media, Group & Limited) approved the establishment of the Scheme (and its unusually onerous defined benefit structure) to provide benefits for the Employers' employees after their accrual under the Granada group's pension scheme ceased.
>
> 5. Rental & Retail received a cash benefit of approximately £510 million on the hive down, funded by leveraging the businesses hived down into the Box Clever group with debt of over £860 million. Much of that cash was then paid up to Media, Group and Limited by way of dividends.
>
> 6. The Granada group (and in particular Rental & Retail, Media, Group & Limited) crystallised the value of the businesses hived down, and retained the ability to benefit from any continued trading of those businesses via Rental & Retail's 50% shareholding in BCT, while insulating the Granada group from (a) liability for the debt taken on by the Box Clever group (including the Employers), which exceeded £860 million; and (b) liability for future pension accrual by employees working in the businesses hived down. Around £41.167 million of the Scheme's deficit (i.e. about two-thirds) relates to accrual by members who transferred from the Granada group.
>
> 7. The hive down and the cash taken by leveraging these businesses also benefitted the Granada group by facilitating and helping to fund its strategic restructuring.
>
> 8. The Box Clever group was unable to service the debt of over £860 million assumed to finance the hive down of businesses from the Granada and Thorn

groups. The Employers all entered administrative receivership in September-November 2003 and no distributions will be available for unsecured creditors such as the Trustee.

9. ITV plc ("ITV") was formed on 2 February 2004 by the merger of Limited and Carlton Communications plc, with Limited and the Granada group receiving approximately 68% of ITV's shareholding upon its formation. ITV effectively stands in the shoes of Limited as the ultimate parent company of the group which benefitted from the hive down of the Granada businesses into the Box Clever group, and the release of cash into the Granada group to facilitate its restructuring between 2000 and 2004. ITV is successor to the position of Limited which, as ultimate parent company to the group, enjoyed 50% voting control of the employers at all material times during which the Scheme was established and defined benefit liabilities were accrued within the Scheme (and indeed thereafter, during the period in which the Employers have since remained insufficiently resourced). The hive down of businesses from the Granada group to the Box Clever group was not an arms-length sale to or investment in an unconnected third party; it was a joint venture for which the parent company of the Granada group – ultimately ITV – was 50% responsible.

10. The Targets were connected or associated with the employers up until the dissolution of an intermediate holding company within the Box Clever group on 16 March 2010; and, in particular, as at 31 December 2009, which has been selected by TPR as 'the relevant time' for the purposes of s 43 PA04.

11. As at that date, the Employers, which remain in administrative receivership, were all insufficiently resourced.

12. As set out in paragraphs 111 to 187 below, TPR considers that it would be reasonable to impose the requirements of an FSD on each of the Targets."

17. It is therefore clear that TPR did not seek to justify an FSD on the basis that the Granada group was at fault in any way in structuring the Joint Venture the way it did, it being accepted that the FSD jurisdiction was not fault based, nor did it seek to criticise the Targets for not having foreseen that the Joint Venture would fail, as it ultimately did, and that in particular, in these circumstances the Scheme would be likely to be underfunded without the Targets being under any obligation to support it.

The Targets' and the Trustee's representations on the Warning Notice

18. The Trustee, who as a directly affected party received the Warning Notice and was able to make representations on it pursuant to s 96(2) of the Act, as shown by its skeleton argument before the DP, contended that there were additional reasons beyond those put forward by TPR as to why it was reasonable to issue an FSD. In particular it referred to what it said were the significant risks in setting up the Joint Venture with the level of debt it carried, that being a risk which, the Trustee contended, the Joint Venture's shareholders, Granada and Thorn, were able to decide whether to take or not, in contrast to the Scheme's members who had no such choice. Another reason the Trustee put forward was the fact that there were close links between the Targets and the Joint Venture that they designed and created and the

same was the case with the Targets and the Scheme. The Trustee also submitted that the evidence showed that the risks concerned would have been and were appreciated by those who set up the Joint Venture.

19. As appears from the Targets' written representations and skeleton arguments that were before the DP, the Targets regarded the tone of the Warning Notice as being critical of the Targets' conduct. They sought to balance what they regarded as a one-sided incomplete account of the life of the Joint Venture with representations to the effect that the causes of the deficit were outside Granada's control, and no wrongful or improper conduct could plausibly be alleged against the Targets. In particular, they contended that the Joint Venture was a stand-alone business run by its board and not its shareholders, that because they did not receive an excessive price for the business (it being contended that the sale was at market value) then it cannot be said that they had received a benefit justifying the imposition of an FSD. They contended that the sale of the business and the WestLB loan were described in "pejorative" terms in the Warning Notice and by the Trustee in its representations, which they sought to counter by submissions to the effect that the sale was made at market value, that the parties genuinely believed that the Joint Venture would be a success and it was by no means clear that the debt burden was the sole or inevitable case of the business's failure.

20. TPR's position on these points was clearly stated in its skeleton argument before the DP as follows:

> "[DP] does not need to adjudicate on (a) whether or not the value placed on the businesses at hive down (and thus the cash paid to Granada) was culpably too high (although hindsight obviously suggests that the price paid was too high); (b) whether the level of debt imposed on the Box Clever JV was culpably onerous (although the fact that it ultimately proved excessive in practice is self-evident) … This simplifies the Panel's enquiry"

21. It is clear that the Trustee took a similar position.

22. It is clear that the Targets sought to convince the DP that this was insufficient to justify an FSD, hence their representations as to what it regarded as the positive features of the Joint Venture and how it was structured and a lack of culpable behaviour on the part of the Targets which in their view mitigated against the issue of an FSD.

23. The DP, having considered the various representations and submissions of the parties, issued its determination that the FSD should be issued on the following basis, as fairly summarised by Mr Furness in his skeleton argument:

(1) The DP accepted TPR's submission that there did not need to be evidence of fault or misconduct on the part of the Targets;

(2) The DP accepted TPR's and the Trustee's "structural" complaint. It concluded in paragraph 146 of its reasons that "one of the key advantages of the JV approach that was adopted was the possibility of extracting the

full value of the business at the time and creation and participating in future value", and that this "makes it appropriate for us to treat this situation differently from a simple sale of a business out of a corporate group". Thus, in line with what had been argued in the Warning Notice, this was the respect in which the DP considered that the transaction differed from an arm's length sale;

(3) The DP dealt with the Targets' submissions on market value in paragraphs 147 and 148 of its reasons as follows:

> "147. The Targets do not deny that they received financial benefit from the creation of the JV. However they assert that the sale was at market value, supported by sophisticated due diligence, and that as matters have turned out they have written off a significant investment in the Employers and borne the burden of certain pension benefits of Box Clever employees.
>
> 148. We accept those points, but consider they do not outweigh the very significant financial benefits referred to above. These are to us an important factor in deciding whether it is now reasonable to issue FSDs."

(4) The DP considered the Trustee's representations that the risks created by the structure of the Joint Venture must have been apparent to Granada, but found that the evidence of this was "inconclusive" (paragraph 149 of its reasons);

(5) The DP made "no findings" as to the causes of the failure of the Box Clever companies, and placed no reliance on such causes as a reason to issue an FSD (paragraph 156 of its reasons);

(6) The DP accepted that "the Targets were not seeking to escape any of their pre-existing pension liabilities when setting up the joint venture" (paragraph 160 of its reasons);

(7) The DP placed no reliance on any criticisms that had been made of the Targets' conduct (paragraphs 161-162 of its reasons); and

(8) Thus, having considered all the allegations made by TPR and the Trustee about the Targets' involvement in the Joint Venture, the DP concluded "We do not find misconduct on the part of the Targets" (paragraph 168 of its reasons).

24. It is therefore clear that the DP's conclusion that it was reasonable to issue an FSD was based on the "no fault" nature of the FSD jurisdiction, and whilst it made a positive finding that the sale had been made at market value, supported by sophisticated due diligence and that it found no misconduct on the part of the Targets, it made no findings as to the causes of the failure of the Joint Venture.

25. It can fairly be said that the essence of the matters dealt with in the DP's reasons for its determination were that TPR presented a case based upon the structural features of the Joint Venture, as summarised in paragraphs 1 to 12 of the Warning

Notice and set out in paragraph 16 above, and the DP accepted that case. Its overall conclusion on reasonableness was set out in paragraph 168 of its reasons as follows:

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

26. In coming to that conclusion the DP considered but rejected the Targets' submissions that the fact that the sale had been at market value after sophisticated due diligence and there had been no misconduct on the Targets part should alter the position. The DP also considered the criticisms made by the Trustee as to the Targets' conduct and whether the risks of the Joint Venture were apparent to Granada but either found the evidence relating to these matters "inconclusive" or made no findings on them. Nevertheless, it is clear that on the one hand representations seeking to enhance the case for an FSD beyond the case based on structure put by TPR were made by the Trustee and on the other hand representations seeking to diminish the strength of that case by referring to additional positive features of the arrangements were made by the Targets. All of these matters were therefore before the DP for consideration and were dealt with in its reasons for its determination as described above.

The proceedings before the Tribunal to date

27. The DP issued its determination that an FSD should be issued to the Targets on 21 December 2011 and its reasons for that determination on 12 January 2012.

28. On 17 January 2012 the Targets referred the DP's determination to the Tribunal. Its reference notice set out the issues covering the determination which it asked the Tribunal to consider. Specifically, the Targets stated that they wished the Tribunal to consider "whether the Respondent [TPR] should for the reasons given by its Determinations Panel on 13 January 2012 ("the Reasons") issue one or more Financial Support Directions to the Applicants …"

29. The Applicant sought to exclude from the reference consideration of various matters, which as described above, were canvassed before the DP but did not form the

basis of its decision on reasonableness, in paragraph 13 of its reasons for the reference as follows:

> " For the avoidance of doubt, the matters in paragraphs 156 and 162 of the Reasons upon which the Respondent placed no reliance (i.e. the causes of the failure of the joint venture and potential criticisms of the Applicants' conduct) do not form part of this Reference. Similarly, the Upper Tribunal is not asked to consider as issues matters which were or became common ground before the Respondent or which TPR and the Trustee decided not to dispute before the Determinations Panel (and which cannot now be reopened), such as:
>
> (1) the fact that the sale of Granada's rental business to the Box Clever joint venture was at market value and supported by sophisticated due diligence (as accepted by the Respondent at paragraph 147 and 148 of the Reasons);
>
> (2) the fact that there was nothing "non-standard" about the benefit received by the Applicants from the joint venture (transcript of proceedings before the Determination Panel, day 1, page 11, line 14);
>
> (3) the fact that nothing inappropriate was done in the joint venture – this was not suggested in the Warning Notice and was accepted by the Trustee (transcript of proceedings before the Determinations Panel, day 2, page 43, line 9);
>
> …"

30. Following the making of the reference, the Trustee also made a reference, on 6 February 2012, contending that it was entitled to do so by virtue of being a "Directly Affected Party" pursuant to s 96(2)(a) of the Act. At the same time, the Trustee applied to be joined to the Targets' reference as an "Interested Party" on the basis that it fell within the definition of such contained in rule 1(3) (a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules") namely a "person other than the applicant who could have referred the case to the Upper Tribunal …". The Trustee indicated in its application that it wished to be joined so that it could make submissions or lodge evidence additional to the case to be put forward by TPR, as it did so before the DP.

31. The application was contested by the Targets. On 29 March 2012, Judge Bishopp, having heard the application directed that the Trustee be joined as an Interested Party. His reasoning for doing so was that in his view, when the matter in issue is a financial support direction, the Trustee of a scheme is necessarily directly affected and accordingly has an interest of his own because of his duty to husband the fund in order to ensure that it is sufficient to meet the members' current and future entitlements.

32. By the time that Judge Bishopp made his direction joining the Trustee as an Interested Party TPR had (on 12 March 2012) served its Statement of Case, as required by paragraph 4 of Schedule 3 to the Rules. Accordingly, Judge Bishopp made a direction under the Tribunal's general case management powers for the filing and serving by the Trustee of a response to the Statement of Case, there being no provision in the Rules for the serving of any pleading by an Interested Party. This was directed to be served by 11 May 2012 and the Targets were directed to serve their reply by 20 July 2012. After the granting of various extensions of time, the Targets

filed and served their Reply on 15 October 2012. The Trustee's response, in the circumstances of this case, in effect amounted to a statement of case as to why an FSD was appropriate and is for convenience referred to in this decision as "the Trustee's Statement of Case".

33. Both TPR and the Trustee in their Statements of Case essentially relied on the case that was made before the DP, and accepted by the DP in paragraph 168 of its reasons, as set out in paragraph 25 above. In paragraph 41 of its Statement of Case TPR stated that it adopted paragraph 168 of the DP's reasons as a "fair summary of the heart" of its case. The Trustee also relied on what it described as the "obvious risk" of the leveraging of the Joint Venture and the Targets' close links with the Joint Venture.

34. In paragraph 12 of its Statement of Case TPR responded to paragraph 13 of the Targets' reference notice as follows:

> "… the Applicants seek unilaterally to limit the scope of the Upper Tribunal's jurisdiction on the reference to particular issues. That is not something which the Applicants can achieve. The Applicants have referred the determination to issue FSDs to the Applicants. Once that determination has been identified, it is open (as a matter of jurisdiction at least) for the Upper Tribunal to rely on any matters in the evidence before it (and as may have been filed and served pursuant to case management directions yet to be made) to support the regulatory action originally sought in the Warning Notice: *Bonas UK* [2011] PLR 109 at [84]. The Upper Tribunal does not sit as an appellate body and it is for the Upper Tribunal to determine, in the light of the arguments and evidence before it, the appropriate action for the Regulator to take: *Bonas UK* (above) at [38]-[39]."

35. This exchange provoked a dispute between the parties as to the extent to which the cases pleaded by TPR and the Trustee were bound to proceed on the basis that the matters referred to in paragraph 13 of the Applicants' reference notice were not in dispute before the Tribunal, having, as contended by the Applicants, become "common ground". It is that dispute that is at the heart of the Applicants' application to strike out parts of TPR's and the Trustee's pleadings to which this decision relates.

36. In paragraphs 9 and 10 of their Reply, which was 67 pages in length (TPR's Statement of Case extended to 40 pages and the Trustee's to 6 pages), the Applicants responded to paragraph 12 of TPR's Statement of Case, by reiterating their position that the Tribunal ought to regard as common ground the matters which TPR and the Trustee did not dispute before the DP and which are not disputed in their Statement of Case. The Reply also observed, in paragraph 17, that, in their view quite rightly, neither TPR nor the Trustee had alleged in their pleadings that the Applicants knew, or believed or suspected, or ought to have known, at any material time that the Joint Venture would or might fail or was at any material risk of failing or being unable to service its debt. They also observed that there were no allegations that the Applicants were in any way at fault or unreasonable in relation to the operation of the Joint Venture. They thus concluded that the absence of these factors was also common ground and stated that they had prepared their Reply accordingly.

37. As it became apparent in correspondence that neither TPR nor the Trustee accepted the position regarding what was alleged to be "common ground" the Applicants proposed that TPR and the Trustee should serve statements of case in response to the Applicants' Reply so as to refine the issues in the case. They submitted that in the light of TPR's and the Trustee's position on the "common ground" issue it was necessary to establish what issues were in fact disputed.

38. Again, there is no provision in the Rules for such responses, but in exercise of its case management powers on 11 March 2013 the Tribunal directed that TPR and the Trustee file and serve statements of case in response to the Applicants' Reply, setting out fully pleaded responses to the Applicants' Reply. The Tribunal was of the view that as a result the parties would be able to identify the issues which are in dispute and consequently what witness evidence will be required, it not having proved possible due to the commitments of the parties' advisers to arrange a case management hearing to resolve the issues.

39. TPR and the Trustee filed responses to the Targets' Reply on 10 and 24 June 2013 respectively ("the Responses"). In the Responses, which run to 71 and 73 pages respectively, TPR and the Trustee pleaded in detail to the points made in the Applicants' Reply. In so doing:

(1) They did not accept the matters described by the Targets in their Reply as "common ground" as being so characterised. In particular, whilst TPR admitted that its case was not dependent on whether there had been "misconduct" or anything had been done in relation to the Joint Venture that was "inappropriate", it stated that if the Targets considered it necessary as part of their case to establish their positive assertions that there was no misconduct or inappropriate behaviour then it was for the Targets to clarify and prove them;

(2) They did not accept the DP's findings that the sale was at market value and that there had been sophisticated due diligence;

(3) The Trustee, in particular, raised the issue as to whether the Targets were aware of the risks of the Joint Venture and that it was failing, maintaining that the risks would have been obvious to Granada and accordingly it ought reasonably to have been aware of them;

(4) The Trustee also specifically pleaded that the effect of the arrangements regarding the Joint Venture was that Granada was insulated from the future volatile pension liabilities of the Scheme;

(5) The Trustee rejected the Targets' criticism of its decision to agree to the arrangements concerning the Scheme, stating that Box Clever and its shareholders were aware of the risks involved and took no steps to alert the Trustee to them;

(6) Both TPR and the Trustee alleged that the Targets had sought to downplay the level of control exercised by the shareholders over the Joint Venture in their Reply; in particular the Trustee alleged that "the shareholders

effectively dictated numerous features of the way the Joint Venture would operate".

40. The Targets maintain that it is not open to plead to the matters described in paragraph 36 above as TPR and the Trustee seek to do in the Responses on the grounds that those matters amount to new claims which at a late stage in the regulatory proceedings seek dramatically to widen and systemically revise the scope of the regulatory claims against the Targets. Consequently, they seek directions barring TPR and the Trustee from pursuing parts of their pleaded cases.

The Applications

41. The following applications, all made on 13 September 2013, are before the Tribunal and are the subject of this decision:

(1) An application of the Targets to bar TPR and the Trustee from pursuing parts of their pleaded cases, namely the allegations set out in paragraph 16 of the application and described in more detail below ("the Targets' Strike Out Application");

(2) An application of TPR (supported by the Trustee) against the Targets for disclosure of certain documents, stated to be relevant, *inter alia*, to the fair characterisation of the risks associated with the Joint Venture, the relationship between the Applicants and the Joint Venture and the matters asserted by the Targets to be, but not accepted by TPR, to be "common ground". This is justified on the basis that the documents sought would be relevant to the issues before the Tribunal, as they have emerged following the pleading process, and in particular the positive allegations made by the Targets and in their Reply and which were responded to by TPR and the Trustee in the Responses ("TPR's Disclosure Application"); and

(3) An application of the Targets against TPR for disclosure of documents relating to TPR's consideration as to whether regulatory proceedings should be brought against Carmelite in respect of the Joint Venture together with an explanation of why TPR decided not to pursue Carmelite for an FSD ("The Carmelite Application").

The Targets' Strike Out Application

42. This application relies on the following powers of the Tribunal:

(1) Rule 7(2) of the Rules, which, so far as material, provides that:

> "If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Upper Tribunal may take such action as it considers just, which may include - … (c) exercising its power under rule 8 (striking out a party's case)";

(2) Rule 8(3) of the Rules (as modified by Rule 8(7) so that it applies to Respondents and Interested Parties), which, so far as material, provides that the Upper Tribunal may strike out or bar part of the proceedings if:

"(b) the [Respondent or Interested Party] has failed to co-operate with the Upper Tribunal to such an extent that the Upper Tribunal cannot deal with the proceedings fairly and justly; or

(c) … the Upper Tribunal considers there is no reasonable prospect of the [Respondent or Interested Party's] case, or part of it, succeeding", and

(3) The Upper Tribunal's inherent jurisdiction (which it possesses by virtue of being a superior court of record and pursuant to section 25(1) and (2) (c) of the Tribunals, Courts and Enforcement Act 2007 and rule 5(1) of the Upper Tribunal Rules) to restrain abuse of its process and prevent unfairness in the operation of its own procedure.

43. The disclosure applications rely on Rule 16(1) (b) of the Rules which gives the Tribunal power to order any person to produce any documents in that person's possession or control which relate to any issue in the proceedings.

44. By way of further detail Part 1 of Appendix 2 to this decision sets out various extracts from the Targets' Strike Out Application and in particular the specific allegations in the Responses that the Targets are requesting the Tribunal to strike out, which were contained in paragraph 16 of the application.

45. In summary, the reasons given in the application for the strike out are:

(1) TPR was under an obligation properly to investigate any claims against the Targets before starting proceedings, to provide the Targets with complete details of the claims made against them when it commenced proceedings, and fully to determine the claims, all within a strict statutory time limit;

(2) After years of investigation, TPR commenced regulatory proceedings and made a determination against the Targets in 2011. By that stage, the proceedings were already exceedingly stale, arising out of events in 1999-2003. But TPR did not make any of the claims which TPR and the Trustee are now seeking to add, nor did it even seek to add the new claims when the proceedings reached the Upper Tribunal in early 2012;

(3) Now, long after the statutory time limit expired, and long after they filed their Statement of Case before the Upper Tribunal, TPR and the Trustee are seeking radically to change and expand their regulatory claims. To make matters worse, they have sought to do so as of right by way of purported "responses" to the Targets' pleaded case, rather than seeking the Upper Tribunal's permission to amend their Statement of Case; such permission would not have been and should not be granted in any event. The new claims sought to be added would amount to a wholly different case; they would enormously expand the cost and complexity of this Reference and would indefinitely delay what is already a delayed and stale process;

(4) The new claims are also un-particularised and wholly unclear, being designed in an effort to justify "fishing" disclosure requests, so as to

enable TPR and the Trustee to investigate and (so they hope) construct a new case against the Targets; and

(5) The foregoing amounts to an abuse of the Upper Tribunal's procedure and a breach of the Upper Tribunal Rules; it also, and as a matter of wider public importance, amounts to a misuse of the regulatory procedure under the Act and an attempt to side-step the statutory time limit. It is in effect an improper and unworthy attempt by TPR to circumvent the statutory protections afforded by Parliament to those who are the targets of these very draconian statutory powers.

46. Consequently, the application seeks a direction to strike out those parts of TPRs and the Trustee's Responses that are set out in Part 1 of Appendix 2 to this decision.

TPR's Disclosure Application

47. Part 2 of Appendix 2 to this decision sets out the categories of disclosure that TPR is seeking from the Applicants, as set out in Schedule A to TPR's disclosure application which, as described in paragraph 41(2) above, are considered by TPR and the Trustee to be relevant to the issues before the Tribunal as they have emerged following the pleadings process. This application is closely connected to the Targets' Strike-Out Application in that were that to be successful, as the disclosure sought relates to matters dealt with in the Responses that the Applicants are challenging, then the case for disclosure would fall away. However, if the Targets' Strike Out Application fails it is still necessary to consider the extent to which further disclosure is appropriate.

The Carmelite Application

48. It is part of the Targets' case that one of the reasons why it is unreasonable to pursue them for an FSD is because TPR has decided not to pursue the other Joint Venture partner, Carmelite, for an FSD, which the Targets contend displays unreasonableness and inconsistency on TPR's part. They contend that this inconsistency is relevant to the question as to whether it is reasonable to issue an FSD against the Targets because the Targets are prejudiced by TPR's failure to pursue Carmelite since TPR seeks to hold them solely liable for the deficit rather than their being able to share any liability with Carmelite.

49. The reasons why the Targets say TPR has acted unreasonably and inconsistently are as follows:

(1) Carmelite's role in the Joint Venture was materially indistinguishable from that of Granada. In particular, Carmelite (then named Thorn) was Granada's 50-50 co-shareholder in the Joint Venture with a role at least equal to (if not greater than) Granada's in establishing the Joint Venture and in the subsequent affairs of the Joint Venture; and, like Granada, Carmelite was paid substantial amounts by the Joint Venture (£380 million) when Carmelite sold its rental business to the Joint Venture. No party has pleaded that there was any material difference between what Granada and Thorn actually did in the Joint Venture.

(2) A large part of the deficit in the Box Clever Scheme is attributable to Carmelite.

(3) TPR seeks to show that the Targets fall within the FSD jurisdiction by relying on their "association" with one company, which was a Carmelite (Thorn) entity whose pension liabilities are wholly attributable to Thorn employees.

(4) TPR gave a comfort letter to Carmelite dated 25 February 2009 indicating that TPR would not pursue Carmelite for an FSD. The reason given by TPR at that time was that, as a result of the Administrative Receivership of the Box Clever companies, the shareholders in the Joint Venture (including Carmelite) were no longer "connected" or associated" with the pension scheme employers and were therefore outside the scope of the FSD jurisdiction, which is only available against "connected" or associated" persons. This reason was equally applicable to both Granada and Carmelite. But when TPR retracted that reason in 2010 (so that in TPR's eyes it ceased to be applicable to either Granada or Carmelite), it only pursued Granada and failed to withdraw the comfort letter it had issued to Carmelite or take any action against Carmelite.

50. Part 3 of Appendix 2 to this decision sets out the documents and information in respect of which disclosure is sought on the grounds that they are relevant to the Targets' contentions described in paragraph 49 above.

51. I shall deal with each of the applications in turn.

The Targets' Strike Out Application

52. The issues that fall to be determined in respect of this application can be summarised as follows:

(1) Whether, as a matter of jurisdiction, the Tribunal has power to permit TPR or the Trustee to depart from or expand the case it asked the Targets to answer in the Warning Notice or to depart from or expand the reasons given by the DP for its determination to issue an FSD. This involves considering the scope of s96(3) of the Act, that is what is "the subject-matter of the determination notice" which may, pursuant to that provision, be referred to the Tribunal; and

(2) Whether the Tribunal should as a matter of discretion and in exercise of its case management powers in the circumstances of this case, restrict TPR and the Trustee from pursuing the allegations identified in Part 1 of Appendix 2 to this decision and if so, on what basis. In that context, it will be necessary to have regard to the following matters identified by the Targets:

(i) the investigation prior to the Warning Notice of the matters regarded as having become common ground;

(ii) the purpose and scope of the Warning Notice;

(iii) the proceedings before the DP;

(iv) the reasons the DP gave for its determination to issue an FSD against the Targets;

(v) TPR's and the Trustee's original Statements of Case served in these proceedings; and

(vi) The time limit within which the determination had to be made.

53. It is relatively easy to deal with the first issue as all parties accepted that in the light of this Tribunal's decision in Re *Bonas Group Pension Scheme* [2011] Pens. L.R. 109 ("*Bonas*") the Tribunal does have jurisdiction to consider the matters in dispute. Mr Furness did however make it clear that the Targets may wish to challenge the findings in *Bonas* should this matter go further.

54. The boundaries of the Tribunal's jurisdiction as found by Warren J in *Bonas* can be analysed as follows.

55. In paragraph 37 of his decision Warren J made it clear that the basis of the Tribunal's jurisdiction was that it considered the matters in dispute *de novo* rather than as an appeal. Referring to s 103 of the Act, which gives the Tribunal power to determine what "is the appropriate action for the Regulator to take in relation to the matters referred to it" he stated:

> "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. 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."

56. Warren J, by way of reinforcement of this principle, referred to s 103(3) of the Act in paragraph 39 in the following terms:

> "The second issue is the extent of the Tribunal's powers to receive further evidence. In my view, it is implicit in section 103(3) that the Tribunal is entitled to take account of evidence which was not available to the Regulator or produced to the Panel."

57. In terms of where the boundaries of the *de novo* jurisdiction lie the starting point is s 96 of the Act, which deals with the "standard procedure" that TPR must follow when exercising its regulatory functions, including the issue of an FSD. In particular s 96(2) (a) provides that the process is started by the giving of a Warning Notice "to such persons as it appears to the Regulator to be directly affected by the regulatory action under consideration". After receiving and considering representations TPR (acting through the DP) must determine "whether to take the regulatory action under consideration" (s 96(2) (c)) and if it determines to do so it must issue a determination notice to those who appear to TPR to be directly affected by it (s 96(2) (d)).

58. It is clear that Warren J considered that the scope of the regulatory process that TPR was bound to follow under section 96 set the boundaries of the Tribunal's jurisdiction which is provided for in s 96(3) as follows:

> "Where the standard procedure applies, the determination which is the subject matter of the determination may be referred to the Tribunal …"

59. This led Warren J to conclude in paragraph 55 of *Bonas*

> "… the "determination" within the meaning of section 96 is the determination whether to take the regulatory action under consideration … The reasons for the determination are not part of the determination itself …"

60. He reinforced this in paragraph 61 as follows:

> "The matter referred to the Tribunal is, so far as relevant to the present case, the determination which may be referred pursuant to section 96(3). In other words it is the determination which directly affects the person making the reference."

61. This analysis had the following consequences, as explained in paragraph 70 of the decision.

> "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."

62. It is clear from this passage that Warren J draws attention to the "relief sought in the warning notice" as possibly marking the limits of the Tribunal's jurisdiction. This was stated in more unequivocal terms in paragraph 84 of the decision as follows:

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

63. This clearly links the Tribunal's jurisdiction back to the regulatory action specified in the warning notice that must be given pursuant to s 96(2)(a) of the Act. Mr Stallworthy submits, and I accept that submission, that in this case the outer limit

of the Tribunal's jurisdiction is therefore the consideration of the determination to issue an FSD to the Targets, so that neither the grounds on which such regulatory action is sought, nor the basis on which the proposal was put before the DP to make its determination mark the limits of the Tribunal's jurisdiction.

64. Consequently, as Mr Stallworthy submitted, the starting point for the Tribunal in terms of jurisdiction is TPR's Statement of Case. The only limitation on the scope of this document is that it may only seek an FSD against the five Targets specified, being the only Targets specified in the Warning Notice, and ask for no other regulatory action.

65. This issue was also considered by this Tribunal in *Trustees of the Lehman Brothers Pension Scheme v Pensions Regulator* [2012] Pens. LR. 435, in relation to one of the issues in dispute which was not appealed to the Court of Appeal. The question was whether on a reference the Trustees of the Scheme could ask the Tribunal to consider whether it was appropriate to include within the scope of the FSD certain targets who were named in the warning notice but whom the DP determined not to include amongst the subjects of its determination. The Tribunal said at paragraph 88 of its decision:

> "In our view the issue of the warning notice, giving details of the Targets against whom regulatory action is proposed, is critical in establishing both the permitted boundaries of the DP's determination and of what can be regarded as the "subject matter of the determination" that, pursuant to s 96(3), is capable of being referred to the Tribunal."

66. The Tribunal went on to consider the breadth of s 96(3) in the light of its analysis of the relevant passages in *Bonas* and stated in paragraph 94 of its decision:

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

67. As mentioned above, Mr Furness has flagged that the position may not be as clear cut as suggested by this analysis, and that the boundary may be narrower than merely the regulatory action proposed and those who are the Targets of it. He reserves the right to argue, if this matter goes further, that certain passages in *Bonas* can be construed as indicating that the Tribunal's jurisdiction is limited by the facts and matters relied on in the warning notice. Nevertheless, for the purpose of this application he is content to argue that the Tribunal should limit the scope of the pleadings not by reference to the question of jurisdiction but as a matter of discretion, exercising its case management powers.

68. There is some support for Mr Furness's suggestion within *Bonas* itself in that the specific issues in *Bonas* that Warren J was required to determine included the question as to whether certain matters in TPR's statement of case on which it wished

to rely were outside the scope of the warning notice, not in the sense that they sought regulatory action of a different character to that proposed in the warning notice, but in support of the regulatory action proposed they relied on facts and matters not canvassed in the warning notice. Warren J determined that the matters concerned were either sufficiently identified in the warning notice or sufficiently foreshadowed so as to be seen as a development of acts and arguments previously identified: see paragraph 200 of the decision.

69. I can therefore turn to the question as to the extent of the Tribunal's discretion to limit the scope of the pleadings on the basis contended by the Applicants.

70. The question as to when it is appropriate in a reference before the Tribunal to adduce evidence on new arguments not considered by the DP, or to depart from the findings of the DP was considered at some length in *Bonas*. In light of the discussion on jurisdiction above I proceed on the basis that Warren J considered the circumstances in which such departure may occur as involving the exercise of discretion on the part of the Tribunal rather than as a question of the scope of its jurisdiction.

71. In the passage from paragraph 37 of the decision (referred to in paragraph 55 above) Warren J observed that the Tribunal will usually be slow to depart from the DP's decision if made after an oral hearing if there has been full evidence and argument. Nevertheless, in paragraph 38 of the decision Warren J makes it clear that it is for the Tribunal to make its own decision, so I see nothing in this passage that suggests that the Tribunal is in any way bound by the DP's findings.

72. The question as to the extent of the Tribunal's powers to receive further evidence was dealt with in paragraphs 39 to 42 as follows:

> "39. In my view, it is implicit in section 103(3) that the Tribunal is entitled to take account of evidence which was not available to the Regulator or produced to the Panel.
>
> 40. That is not to say that the parties have the right to start all over again as if the matter had never been before the Panel, although in an appropriate case it could no doubt take that course. There may be some reluctance on the part of the Tribunal to hear oral evidence and cross-examination if that has already taken place in front of the Panel whose findings of fact it may consider there is no need to review. The Tribunal is not obliged to hear oral evidence all over again just because one side or the other hopes that the Tribunal will take a different view of the witnesses from the Panel. Receipt of new evidence (or indeed, evidence from witnesses who have already been cross-examined) is a matter for the Tribunal. Each case will be heavily dependent on its own facts. No doubt the Tribunal will be very cautious about allowing further cross examination of a witness, but there may be cases where this is appropriate, for instance where new material shows that a witness has lied to the Panel.
>
> 41. There will be cases where new material should be admitted. For instance, if the applicant were to produce evidence which he had been unable, for

some reason, to make available to the Panel but which, had it been available, might well have resulted in a different decision from the Panel, he should be entitled to make use of it. Indeed, the Regulator must reveal any further documentation which might undermine the decision to take regulatory action (see paragraph 4(3)(b) Schedule 3 Upper Tribunal Rules) and the applicant must send with his reply a list of all the documents on which he relies in support of his case. Equally, the applicant cannot be allowed to spring new material at the last moment; he is subject to the rules of procedural fairness (as is the Regulator). It will be for the Tribunal to decide how to deal with late evidence, for instance by adjourning to allow the Regulator time to consider it or by refusing to admit it.

42. It might be thought that the Regulator should be treated in the same way and should be allowed to adduce further evidence to support the decision which the Panel had reached. For instance, suppose that clear evidence of fraud on the part of the applicant had emerged after the Panel's decision. It would, at first sight be odd if the Regulator could not bring that evidence to the Tribunal in order to support the Panel's decision. I consider that the Tribunal can allow the Regulator to adduce further evidence to support the Panel's decision."

73. At first sight, the statement in paragraph 40 that the parties should not have to start all over again as if the matter had never been before the Panel might be thought to be at odds with the position that the Tribunal proceedings were *de novo*, but as Mr Furness put it, this is simply an alert to the principle that the Tribunal should have regard to the way that the case was put before the DP. This point is discussed in more detail below when I consider the extent to which TPR and the Trustee should be constrained in their pleadings to the case that was put before the DP.

74. The principle identified by Warren J in paragraphs 39 to 41 of his decision, namely that there is a power to take account of new evidence but whether the Tribunal should do so is dependent on the particular facts of the case, was dealt with in more detail in paragraphs 67 to 72 of the decision as follows:

"67. … I consider that, although the Tribunal is only able to deal with the matters referred to it, it is open to the Tribunal to receive additional evidence in relation to those matters, not only from the person making the reference, but also from other persons directly affected or from the Regulator itself. The Tribunal is entitled to receive further evidence in order to put itself in the position properly to exercise the regulatory function which has been referred to it. It must, of course, act fairly and in particular must act with procedural fairness. But subject to that, I see no reason why the Regulator alone should be unable to adduce further evidence to support regulatory action, especially when it has to disclose evidence in favour of the target under paragraph 4 Schedule 3 to the Upper Tribunal Rules.

68. Suppose, for instance, that the target refers a determination of the Regulator (whether made by the Regulator itself or by the Panel on behalf of the Regulator) and is allowed by the Tribunal to adduce further

evidence. It would be unfair if the Regulator was not allowed to adduce evidence in rebuttal. Or suppose that new facts come to the notice of the Regulator after the Panel has made a determination and the matter has already been referred to the Tribunal by the target. It would be wrong if the Regulator were not able to support the Panel's determination by reference to the new facts.

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 the determination. By referring the matter of 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.

71. I do not consider that paragraphs 4(1) (c) and 4(3) (a) Schedule 3 of the Upper Tribunal Rules lead to a different conclusion. It is true that those provisions appear to be drafted on the basis that the respondent will support the decision referred to the Tribunal: they require the respondent's statement of case to set out all matters, and to provide all documents, relied on, to support the 'referred action', that is to say the act or proposed act on the part of the respondent giving rise to the reference. But those provisions cannot be read as preventing the Tribunal, in the exercise of its duty under section 103, from addressing arguments and material which it considers relevant and which, in accordance with the requirements of procedural fairness, are brought before it. The Upper Tribunal rules are not to be read as prohibiting altogether receipt of new arguments and material which go beyond merely supporting the determination of the Panel in a case referred to it from the Panel. Indeed, the Upper Tribunal Rules are rules of procedure; they cannot cut down the statutory jurisdiction under section 103 but only prescribe how those powers are to be exercised.

72. 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."

75. I also observe from these passages that Warren J states that TPR should be permitted to adduce evidence in rebuttal to new evidence produced by the applicant (see paragraph 68 of the decision). That issue is highly relevant in relation to TPR's disclosure application in this case. He also states in paragraph 70 that once the decision of the DP has been challenged, there is no reason why TPR should be bound by that determination. That issue is, of course, highly relevant to the Targets' contention in its application that TPR should be bound by certain of the DP's findings, particularly with regard to market value and due diligence.

76. Similar issues to those canvassed in *Bonas* have been considered in cases in this Tribunal and its predecessor Tribunal, the Financial Services and Markets Tribunal ("FSMT") in relation to references made under the Financial Services and Markets Act 2000 ("FSMA").

77. The scheme of the legislation under the Financial Services and Markets Act (FSMA) in relation to decision making by the Financial Services Authority (FSA) and its successor bodies, in particular the Financial Conduct Authority (FCA), and references to the tribunal (which since 2010 have been to this Tribunal after it took over the functions of the FSMT) are similar in many respects to that provided under the Act. Under FSMA if the relevant regulator wishes to exercise its disciplinary functions it must first set out its proposals in a warning notice on which the subject has the right to make representations to the FCA's separate decision-making body, the Regulatory Decisions Committee (RDC), following which a decision of the RDC that regulatory action should be taken gives rise to the right of the subject to refer the matter to the Tribunal.

78. An analysis of the FSMA cases shows that the starting position is that the matter referred (which constitutes the Tribunal's jurisdiction) is the circumstances on which the RDC's decision is based that fall to be considered and evaluated. This is obviously founding the jurisdiction on a narrower basis than that found in *Bonas*, putting a wide interpretation on what Warren J found to be the Tribunal's jurisdiction in that case.

79. The issue was first considered by the FSMT in *Jabre v Financial Services Authority* [2006] UKFSM 035.

80. At the relevant time, s 133(4) of FSMA contained provisions (which were very similar in effect to those contained in s 103(4) of the Act which were examined earlier) as follows:

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

In that particular case the warning notice issued to Mr Jabre proposed to impose a penalty on him for market abuse and also to withdraw the approval given to him by the FSA under s 59 of FSMA that allowed him to perform certain functions for his

employer, a firm regulated by the FSA, on the basis that his actions meant that he was not fit and proper to perform those functions.

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

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

83. The reasoning of FSMT was set out by Stephen Oliver QC (as he then was) in paragraphs 28 and 29 of its decision as follows:

> "28. The meaning of the expressions "the matter referred" or "the subject-matter of the reference" in section 133 has to be derived from their context. The first point relevant to this is the Tribunal's function. It provides a stage in the regulatory process to "determine" what is the appropriate action for the Authority to take having considered any evidence relating to the subject-matter of the reference. As the Tribunal's role is not to adjudicate on the rightness or otherwise of the decision as expressed in the decision notice, the decision itself is not strictly a relevant consideration for the Tribunal to take into account. Instead it is the allegations made in the decision notice and the circumstances on which these are based that fall to be considered and evaluated. They comprise the matter referred. It is in relation to those circumstances and any further relevant evidence that was not available to the Regulatory Decisions Committee that the Tribunal's function is to determine the appropriate action for the Authority to take. The indications, so far, are that the circumstances, the evidence and the allegations before the Regulatory Decisions committee, and not the decision, are "the subject-matter of the reference".
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> 29. The second point is that in the present case the facts and circumstances on which the Authority relies in its statement of case were before the Regulatory Decisions Committee. They are either set out within the decision notice or are recorded in the decision notice as matters on which the Regulatory Decisions Committee did not reach a concluded factual finding. In this respect it can be said that the facts and matters before the Regulatory Decisions Committee are the facts and matters relied upon by the Authority for the purposes of the present reference. This is not a case such as that considered in *Parker v FSA* (an unreported decision on a preliminary issue) which a new allegation unconnected with the factual context that gave rise to the original decision was sought to be raised. Nor is the present situation comparable to that found in *Ryder (No.2)* (2006), a

> Pensions Regulator Tribunal reference. There the matter that Mr Ryder had sought to raise related to factual issues that had not been in front of the Determinations Panel of the Pensions Regulator and therefore formed no part of the body of facts to which the determination notice related."

84. FSMT also considered whether the request to ask the Tribunal to look afresh at the withdrawal of approval issue amounted to an abuse of process. It dealt with this in paragraphs 36 and 37 of its decision as follows:

> "36. Could there, on some more general principle, be an abuse of process on the part of the Authority? We think not. Any suggestion that there could be is based on a confusion as to the respective roles of the Regulatory Decisions Committee and of the Tribunal. Once the formal process governing the making of decisions as released in the warning and decision notices has been completed and the relevant matter has been referred, that formal process gives way to the Tribunal's statutory "determination" function and the Tribunal's rules of engagement take over. The Tribunal Rules reflect its different function and its different procedure, at least so far as concerns the evaluation of evidence. The prescribed steps in the process leading to the hearing, i.e. the reference notice, the statement of case and the reply, coupled with the rules of natural justice, are there to enable the Tribunal to determine what is the appropriate action in a fair and just manner.
>
> 37. It follows, we think, that the points taken by the Authority in their statement of case do not constitute an abuse of process in relation to the reference to the Tribunal. The action amounts to a statement of what the Authority sees to be the appropriate action for the Tribunal to take. The matters raised in the statement of case are consistent with the Tribunal's rules of procedure and with the Tribunal's statutory function. Mr Jabre has the opportunity to respond to those points and to confront them with his own evidence."

85. The Court of Appeal has also considered the issue in the recent case of *Financial Conduct Authority v Hobbs* [2013] EWCA Civ 918. In this case the FCA proposed to make a prohibition order on Mr Hobbs pursuant to sections 56 and 57 of FSMA on the grounds that he was not a fit and proper person to work in the financial services industry on the basis that he had engaged in market abuse. FCA had also contended, in the warning notice issued to Mr Hobbs, that he had lied to his employer and the FCA during the course of the investigation into his conduct and these allegations also formed part of the basis of the RDC's decision to prohibit Mr Hobbs. Mr Hobbs referred the matter to the Upper Tribunal which allowed his reference as it decided that Mr Hobbs' trading did not amount to market abuse. The Upper Tribunal found that Mr Hobbs had lied to the Tribunal about why he had undertaken the trades in question, but decided that since the FCA's case had rested on a consideration of Mr Hobbs' alleged conduct in committing market abuse and then lying about it, it was not satisfied that FCA had made its case that Mr Hobbs was not a fit and proper person.

86. The Court of Appeal gave two reasons why it was incumbent upon the Upper Tribunal to have considered the issue of Mr Hobbs' lies and whether that justified a

prohibition order. The first reason centred on a question of statutory construction. In paragraph 32 of his judgment Sir Stanley Burnton stated:

> "The issue of statutory construction concerns the meaning of "the matter" which a person subject to a decision notice is entitled to refer to the Tribunal under section 57. Happily, Mr Jaffey and Mr Hunter were agreed that that expression should be given a wide meaning. "The matter" includes the facts and evidence referred to in the decision notice on the basis of which the Authority concluded that the person in question was not a fit and proper person and that a prohibition order was appropriate."

87. Consequently, in the Court of Appeal's view as Mr Hobbs' lying was part of the case before the RDC and Mr Hobbs' lying was one of the bases for the FCA's conclusion that Mr Hobbs was not fit and proper, it was incumbent on the Upper Tribunal to address the issue.

88. The second reason was more of a point of principle as to the nature of the proceedings before the Tribunal. This was expressed in paragraph 38 of Sir Stanley Burnton's judgment as follows:

> 'Furthermore, in my judgment it is important for the Tribunal to consider all the facts and evidence put before it on a reference under section 57. There are two reasons for this. The first is that its consideration of a reference is not ordinary civil litigation. There is a public interest in ensuring, so far as possible, that persons who are not fit and proper persons to perform functions in relation to a regulated activity are precluded from doing so. A narrowing of the inquiry by the Tribunal that excludes relevant material from its assessment of an application is to be avoided, provided, of course, that the applicant is given a fair opportunity to address the Authority's case. In Mr Hobbs' case, it could not be suggested, and was not suggested, that he did not have a fair opportunity to address the allegations that he had been guilty of repeated and persistent lying. The second reason is that if the Tribunal incorrectly restricts its determination, it may be difficult for the Authority to rely on the excluded facts in future in assessing, for example, whether the Applicant is a fit and proper person, or should be granted an authorisation he seeks to engage in a regulated activity. To take the present case as an example I can see that it might be arguable that on *Henderson v Henderson* grounds the Authority should not be permitted to rely on allegations that it put before the Tribunal but which the Tribunal did not accept demonstrated that Mr Hobbs was not a fit and proper person. Such a situation should be avoided."

89. I observe that the Court of Appeal, recognising that there is a wider public interest in regulatory proceedings than is the case with ordinary civil litigation, was of the view that the Tribunal should avoid any narrowing of the inquiry and any potential prejudice to the applicant could be addressed by giving him a fair opportunity to address the case.

90. Finally, on the cases in the financial services jurisdiction, the decision of the Upper Tribunal in *Allen v Financial Services Authority* (2012) FS/2012/0019 shows that the Upper Tribunal may, exercising its case management powers, permit the

respondent in a financial services case to amend its statement of case to enable account to be taken of facts and matters not relied on in the Warning Notice.

91. The Authority was seeking an order to prohibit Mr Allen from working in the financial services industry under section 56 FSMA. In its Decision Notice, the RDC had based its decision on Mr Allen's conduct during a period when he worked on a consultancy basis for an insurance broker and where it is alleged that he had, *inter alia*, overcharged a client and misappropriated money belonging to his employer and the client. The Authority had based its conclusions on the evidence of a witness who worked for the client in question, but the Authority had now come to the conclusion that it could not rely on that witness as a witness of truth after a judge in litigation brought in the High Court by Mr Allen found that the witness had made untrue statements in his evidence as a consequence of which the judge found that the witness's evidence was unreliable. Mr Allen relied on the judge's findings in relation to this witness to undermine the Authority's case on his reference to the Tribunal and provided the Authority with a redacted excerpt from the transcript of the judge's comments.

92. In the same proceedings, the judge found that Mr Allen was guilty of serious misconduct in his conduct of the proceedings in that, *inter alia*, he had forged a signature on a document, produced false evidence to bolster his case and repeatedly lied to the Court. These matters had been redacted from the transcript Mr Allen provided to the Authority.

93. In the light of this, the Authority applied for permission to amend its statement of case to remove the reference to the evidence of the witness on which it previously relied and to rely on other evidence to prove that Mr Allen was not fit and proper and should be prohibited. In particular, the Authority now sought to rely on Mr Allen's conduct in the court proceedings and his attempts to hide the full details from the Authority. Mr Allen objected to the Authority's application on the grounds that it introduced separate and distinct allegations from the allegations that were made in the Decision Notice and pointed out that the matters had never been investigated.

94. Judge Sinfield in his decision on the application referred to *Jabre*, and in addition to the earlier decision of the FSMT in *Legal & General Assurance Society Limited v The Financial Services Authority* (2005) where the Tribunal stated at paragraph 15:

> "The parties are permitted to raise matters not directly brought before the RDC. … As a matter of common sense and fairness we would generally expect FSA with the wide powers open to it, having taken time to evaluate matters, and having carefully reviewed and carried forward charges to the RDC, to bring much the same case when taken to this Tribunal. Of course important new evidence may unexpectedly come to light or there may be in other cases special circumstances which change that general expectation. Similarly it seems to us that FSA, having set out its position in the Statement of Case, should usually be confined to the charges contained in it, perhaps refined as the case moves forward."

95. Judge Sinfield adopted a very wide definition of the scope of "the matter referred" similar to the approach taken by Warren J in *Bonas*. In paragraph 19 of the decision he stated:

> "As the Tribunal in *Legal & General Assurance Society* observed, the FSA should usually be confined to the charges set out in the Statement of Case but that may not always be the case where important new evidence unexpectedly comes to light or there are other special circumstances. In this case, I do not consider that the charge made against Mr Allen has changed. My view is that, as recognised by the Tribunal in *Parker*, there is a distinction between an allegation or charge and the evidence relating to it. I consider that the allegation in this case is that Mr Allen is not fit and proper to perform any function in relation to regulated activities because he lacks honesty and integrity. It follows that the "matter referred" or 'subject-matter of the reference' in this case is whether Mr Allen is a fit and proper person. I regard the circumstances pleaded in the original and amended Statement of Case as evidence that relates to that allegation. The Authority no longer relies on the evidence contained in the original Statement of Case for the reasons set out above. The Authority has not, however, withdrawn its allegation that Mr Allen is not a fit and proper person. The Authority now relies on other evidence which, it says, shows that Mr Allen is not a fit and proper person but the allegation is the same. The factual situation in *Parker* was, in my view, different. In that case, the allegation was of market abuse relating to specific dealings in shares. Market abuse in relation to other share transactions would be a new allegation involving separate misconduct, albeit of the same type. In the case of Mr Allen, the allegation is general rather than specific. The allegation is not that Mr Allen was not fit and proper in relation to a specific transaction or transactions. As the Tribunal held in *Jabre*, it is the allegation made in the Decision Notice and the circumstances on which these are based that comprise the matter referred. The allegation in the Decision Notice was that Mr Allen is not a fit and proper person to perform any function in relation to regulated activities generally because he lacks honesty and integrity. Any evidence that relates to Mr Allen's honesty and integrity, whether or not it was available to the Authority at the time of the Decision Notice, may be considered by the Upper Tribunal."

96. Having therefore found that the Tribunal had jurisdiction to consider the new evidence Judge Sinfield then considered whether it was consistent with the overriding objective of the Rules to enable the Upper Tribunal to deal with cases fairly and justly, to exercise its discretion in favour of amending the Statement of Case. Judge Sinfield identified that the key consideration was whether in the absence of a new process of investigation, Warning and Decision Notices, Mr Allen would know the charges he had to face and would not be unfairly taken by surprise. He concluded in paragraph 23 of his decision that this would be the case because of the length of time that had elapsed before the reference could be heard so that Mr Allen would have plenty of time to make representations and provide any further evidence in response to the new evidence.

97. It can be seen that Judge Sinfield's decision to allow consideration of new evidence relating to facts and matters not relied on in the original Warning Notice is consistent with the observations of Warren J in paragraphs 40 to 42 of *Bonas* referred

to in paragraph 72 above, and in particular where the admission of the new material will not result in any procedural unfairness.

98. Mr Furness relies on a decision in another administrative decision-making sphere, namely decisions of the Director General of Fair Trading in relation to competition proceedings which were capable of being appealed to the Competition Commission Appeal Tribunal.

99. The case in question was *Napp Pharmaceutical Holdings Limited v The Director General of Fair Trading*, and there are two reported decisions, *Napp 3* and *Napp 4*, which are relevant, reported at [2002] ECC 3 and [2002] ECC 13 respectively.

100. The case involved a decision made by the Director General of Fair Trading (DGFT) that found an infringement of the Competition Act 1998. Under the statutory framework for such decisions, before making such a decision an administrative decision-making process must be followed. This involves at the first stage a written notice to the person alleged to have committed the infringement stating the facts on which the DGFT relies, the matters to which he has taken objection, the action he proposes and the reasons for it.

101. On receipt of a written notice, the subject may make written and oral representations on it following which the DGFT makes a decision. An appeal against a decision by the DGFT lies to the Competition Commission Appeal Tribunal. It is clear that it is a full merits appeal. Paragraph 3 of Schedule 8 to the Competition Act 1998 provided:

> "3.-(1) The tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.
> (2) The tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may -
> (a) remit the matter to the Director,
> (b) impose or revoke, or vary the amount of penalty,
> (c) grant or cancel an individual exemption or vary any conditions or obligations imposed in relation to the exemption by the Director,
> (d) give such directions, or take such other steps, as the Director could himself have given or taken, or
> (e) make any other decision which the Director could himself have made.
> (3) Any decision of the tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the Director.
> (4) If the tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based."

102. Under the tribunal's rules, it is for the appellant to set out a fully pleaded case in its notice of appeal, following which the DGFT must serve a defence. It can therefore be seen immediately that there are significant differences between this procedure and that of the Upper Tribunal in financial services cases in that the matter proceeds by way of an appeal rather than a *de novo* reference, and although it is a full merits appeal it is for the appellant to put forward his grounds of appeal and for the DGFT to

defend it rather than, as is the case in this tribunal, for the regulator to make its statement of case and for the applicant to reply. It is therefore clear that the focus is on the merits of the DGFT's decision rather than the facts and circumstances on which he based his decision.

103. In the *Napp* case, at the case management stage, Napp took exception to the fact, as it saw it, that the DGFT was relying on new evidence, taking a different position in respect of key questions of fact and adopting different reasoning in support of his findings on infringement, by comparison with the position taken in the original infringement decision. It therefore sought to apply to the tribunal to disallow those parts of the defence which depart from or enlarge upon the original infringement decision.

104. The tribunal dealt with the question in paragraphs 78 to 80 of its decision in *Napp 3* as follows:

> "78. In that connection we note that the appellant is not limited to placing before this tribunal the evidence he has placed before the Director but may expand, enlarge upon or indeed abandon that evidence and present a new case. Since there is no right to test the evidence of witnesses before the Director, it is at this judicial stage of the proceedings that the applicant may apply to test by cross-examination the evidence of all relevant witnesses against him.
>
> 79. We doubt, however, whether exactly the same liberal approach to the submission of new evidence can be applied to the Director. In our view the exercise of the discretion to allow new evidence by the Director at the appeal stage should take strongly into account the principle the Director should normally be prepared to defend the decision on the basis of the material before him when he took that decision. It is particularly important that the Director's decision should not be seen as something that can be elaborated on, embroidered or adapted at will once the matter reaches the Tribunal. It is a final administrative act, with important legal consequences, which in principle fixes the Director's position. In our view further investigations after the decision of primary facts, in an attempt to strengthen by better evidence a decision already taken, should not in general be countenanced.
>
> 80. Were it otherwise, the important procedural safeguards envisaged by Rule 14 of the Director's Rules would be much diminished or even circumvented altogether. There would be a risk that appellants could be faced with a "moving target". The Tribunal itself would be in difficulties if, instead of determining the appeal essentially by reference to the merits of the decision in the light of the material relied on by the Director at the time, the Tribunal was effectively adjudicating on a "bolstered" version of the decision. The Director himself concedes that he cannot "make a new case" before the Tribunal."

Similarly, in *Napp 4* the Tribunal held at paragraph 133 of its decision:

> "On this point, for the same reasons that we consider that our discretion to allow the Director to submit further evidence should be exercised only sparingly, we accept Napp's basic submission that, in principle, the Directors should not be permitted to advance a wholly new case at the judicial stage, nor rely on new

> reasons. To decide otherwise would make the administrative procedure, and the safeguards it provides, largely devoid of purpose; the function of this Tribunal is not to try a wholly new case. If the Director wishes to make a new case, the proper course is for the Director to withdraw the decision and adopt a new decision, or for this Tribunal to remit."

105. This clearly demonstrates a different approach to new evidence and new arguments, at least where advanced by the administrative decision-maker, than is apparent from the financial services cases. I also observe that the administrative decision-making process of the DGFT did not involve a separation of decision-making from investigation which is a feature of the financial services regulators; this feature may also reinforce the argument that the DGFT should be prepared to defend his own decision.

106. It should be noted that in *Napp 4* it was envisaged that fairness would dictate the admission of fresh evidence in response to matters referred to in the notice of appeal. In paragraphs 114 and 119 of its decision the tribunal stated:

> "114. … While indicating that, in general, the discretion to take account of new evidence relied on by the Director should be exercised sparingly, we held that the interests of fairness may well indicate that such new evidence should be allowed, particularly where it consists, in essence, of matters going to rebut allegations made by an applicant in the notice of appeal. We therefore declined to exclude at that stage the evidence of five of the Director's witnesses, although we excluded one statement, and a further statement was withdrawn by the Director.
>
> 119. As we have already said on our judgment of 8 August 2001, if, at the judicial stage, an applicant launches an attack which places under close scrutiny particular aspects of the decision, in principle we do not think that the Director should be denied a reasonable opportunity to rely by adducing rebuttal evidence in support of the points already made in the decision. Thus we do not accept Napp's principal submission that nothing may be relied on before the Tribunal unless it was relied on in the administrative procedure."

107. I should at this point deal with the position of the Trustee as an Interested Party and whether the principles derived from the cases apply any differently to the Trustee where it is alleged that in its pleadings it is seeking to expand the case beyond the scope of the Warning Notice. As I have already observed, the Rules make no specific provision for the role of the Interested Party in the proceedings before the Tribunal. As Judge Bishopp observed in his decision of 29 March 2012, the question of whether to join the Trustee as an Interested Party is a question of discretion. Judge Bishopp decided to exercise that discretion in this case for the following reasons, as set out in paragraphs 27 and 29 of his decision:

> "27. … In my judgment, when the matter in issue is financial support for a scheme in deficit, whether by way of a financial support direction or contribution notice, the trustee of that scheme is necessarily directly affected. His task is not confined, as the Targets' argument implies, to administering the scheme, but (as the Trustee correctly submitted) extends to husbanding the fund in order to ensure that it is sufficient to meet the members' current and future entitlements. A trustee who failed to take steps to

> preserve, if not maximise, the fund's resources would be failing in his duty. Against that background the only reasonable conclusion is that a trustee has an interest of his own, and not merely as a representative of the members, in the making of a financial support direction or contribution notice, and in its implementation and enforcement, and is thus "directly affected".
>
> 29. I am not persuaded that the added cost, in time and money, to which it will lead militates against joinder. I recognise that there will be some but, as the Targets themselves accept, the PR and the Trustee minimised the duplication, by the one adopting the arguments of the other, in the proceedings before the DP and I see no reason why that approach should not be maintained in the course of this reference, and if necessary enforced by judicial case management."

108. It is clear from paragraph 29 of his decision that in directing that the Trustee should be joined as an Interested Party Judge Bishopp contemplated that the Trustee should work in tandem with TPR; his directions with regard to the service of pleadings also reflected that, with the Trustee being directed to serve a response to TPR's statement of case and the Targets then serving a response to both TPR's and the Trustee's pleadings.

109. Mr Hilliard submitted that the Trustee as an Interested Party was not limited to advancing arguments relating to matters that were within the scope of the Warning Notice. This is because the Interested Party may wish to make representations in a variety of situations. For example where it sought to oppose proposed regulatory action by TPR, such as proposals to appoint independent trustees or to wind up a scheme, or where the Trustee believes that a proposed target is financially sound and an FSD is unnecessary. Mr Hilliard submitted that it should be open to the Trustee to make any representations it wants consonant with the requirements of natural justice.

110. I agree that the scope of the Interested Party's representations may vary from case to case depending on the regulatory action under consideration. I also accept another of Mr Hilliard's submissions to the effect that where in defending a reference the Target seeks to deflect blame on to the Trustee for the circumstances that have led to regulatory action being proposed, or otherwise criticises its conduct then the Trustee should be able to reply.

111. Nevertheless, when as in a case such as this the Trustee is essentially taking a role of support to the regulatory action proposed then it should work within the same boundaries as TPR. So if the boundary in this case is held to be the scope of the matters within the scope of the Warning Notice then the Trustee's pleadings should be limited to matters falling within that boundary. Sight should not be lost of the fact that the subject matter of the reference is whether it is appropriate to issue an FSD and the powers to do so fall upon TPR. The prime responsibility for making that case falls upon TPR. It may be supported in that quest by the Trustee, who may be able to bring its own perspective and deal with matters that are more properly within its own knowledge than TPR, but ultimately it is TPR who has to justify the proposal and it should do so within clearly defined boundaries. The Interested Party is just that, someone who is interested in the structure of the proceedings and should be able to make representations accordingly, but does not have prime responsibility for making

the case for an FSD. That role falls to TPR. It is a recipe for chaos if the Trustee is free to advance entirely different arguments of its own that fall outside these boundaries at the tribunal stage. That is not to say that it should not be permitted to advance arguments that do fall within the scope of the matters referred, even if they are not advanced by TPR.

112. This position is in my view fully consistent with the basis on which Judge Bishopp directed that the Trustee be joined as an Interested Party. It is against that background that I turn to Mr Furness's submissions on the exercise of discretion in relation to the pleadings in this case.

113. Mr Furness's case for limiting the pleadings in this case in the manner sought in the Targets' Strike Out Application can be summarised in terms of the following primary submissions:

(1) TPR and the Trustee should be confined to the justification it advanced before the DP at the conclusion of its investigation and should not be permitted to commence without good reason a substantially new case which it could have investigated previously but formed no part of TPR's or the DP's justification for the regulatory action in the first place. The matters summarised in Part 1 of Appendix 2 to this decision referred to as the "Propriety Matters" fall into that category. Mr Furness relies primarily on *Napp 3* and *Napp 4* for this submission supported by the passage in *Legal and General* quoted by Judge Sinfield in *Allen*, as set out in paragraph 94 above;

(2) Consequently, except in exceptional circumstances TPR's and the Trustee's pleadings should be confined to matters falling within the scope of the Warning Notice. The scope of the Warning Notice is summarised in its first twelve paragraphs, as set out in paragraph 16 above, and amounts to a complaint about the "structure" of the Joint Venture, i.e. that Granada had disposed of its rental business in return for cash, while retaining the ability to benefit from the upside if the Joint Venture performed well (via its 50% shareholding) but also was insulated from the Joint Venture's liabilities, in particular the liability to pay WestLB for the borrowing used to pay Granada. None of the Propriety Matters fell within the scope of the Warning Notice as referred to above and Mr Furness relies on *Bonas* for this proposition;

(3) Where the DP made specific findings with regard to the Propriety Matters which indicate no findings of fault on the part of the Targets, it is not open to TPR or the Trustee to re-open those matters before the Tribunal and account should be taken of the reasons DP gave for determining that an FSD should be issued. Mr Furness submits that TPR should ordinarily be expected to support the DP's reasons in the Tribunal. Mr Furness made detailed submissions on why the Propriety Matters could not properly form part of the dispute before the Tribunal and why the allegations made by TPR and the Trustee in their Responses (referred to as the "New Allegations") should be struck out. In that regard, I will need to consider

whether, as submitted by Mr Furness, the Responses went beyond legitimate points in response to the Reply and should be struck out on that basis. Mr Furness's principal complaint in this regard is that through the Responses TPR and the Trustee in effect seek in a roundabout and equivocal way to plead a substantially different case based on fault and misconduct on the part of the Targets, a case which was not the basis of the Warning Notice, the DP's reasons for its determination or TPR's and the Trustee's Statements of Case.

114. In my view the analysis of the financial services cases heard before this Tribunal and its predecessors as reviewed above demonstrates the following principles:

(1) The absolute limit of the boundaries of the Tribunal's jurisdiction is the nature of the regulatory action sought in the Warning Notice, so in *Bonas* it was expressed as the proposal to issue a contribution notice to a particular person for a specified sum and in *Allen* it was expressed as the proposal to seek a prohibition order against Mr Allen on the grounds he was not a fit and proper person. So, as Mr Stallworthy accepted, it would not be open in this case for TPR to seek an FSD in the Tribunal in relation to a wholly different joint venture, and it would not have been open to the FCA in *Allen* to seek a financial penalty against Mr Allen in the Tribunal in substitution for or in addition to the prohibition order.

(2) Within the absolute outer limit identified in (1) above, there is a narrower limit which the regulator cannot go beyond without the leave of the Tribunal. That limit is best expressed, as it was in *Jabre*, as the facts and circumstances before the regulator's decision-maker and recorded in the regulator's decision notice (see paragraphs 28 and 29 of the Decision) or, as it was expressed in *Hobbs* "the facts and evidence referred to in the decision notice". Although in these cases the reasoning was focussed on the decision notices, it is clear that the facts and circumstances that were before the decision-maker can be ascertained by examining the case that was put in the Warning Notice, as the decision notice would record the decision-maker's decision in the light of the case put in the Warning Notice and the evidence and representations that were put before the decision-maker in the course of the decision-making process. This is consistent with the approach taken in *Bonas* and *Lehman Brothers*: see paragraph 200 of *Bonas*, as referred to in paragraph 68 above and paragraphs 88 and 94 of *Lehman Brothers* as referred to in paragraphs 65 and 66 above.

(3) Should a party wish to rely on facts and circumstances that go beyond those canvassed in relation to the Warning Notice then permission to do so must be sought from the Tribunal. In *Allen* leave was sought on this basis after the statement of case had been filed and Judge Sinfield concluded that amendment of the statement of case was consistent with the overriding objective in Rule 2(2) of the Rules and the power to amend documents in Rule 5(3) (b) of the Rules. In my view it is consistent with

Rule 2(2) (b), that is the requirement to avoid unnecessary formality and to seek flexibility in the proceedings, that the Tribunal be empowered to grant leave to file a statement of case that goes beyond the facts and circumstances canvassed in relation to the Warning Notice where it is appropriate to do so, as it was held to be so in the circumstances of *Allen.*

(4) It follows that the starting position is that TPR, and by analogy the Trustee, should be free to present its case in reliance on any facts and circumstances that were within the scope of the allegations made in the Warning Notice and which were canvassed before the DP and in doing so may rely on any evidence relevant to these facts and circumstances, whether or not that evidence was available to the DP. This follows from the *de novo* nature of the Tribunal's jurisdiction and the specific provisions of s 103(2) of the Act which allow the Tribunal to consider any evidence relating to the subject matter of the reference whether or not it was available to TPR at the relevant time. Although s 103(2) suggests that the Tribunal has a discretion whether to admit such evidence (provided of course it is relevant to the issues in dispute), in my view it should not normally refuse to do so in circumstances where it relates to the facts and circumstances within the scope of the matter referred. I see nothing in paragraphs 39 to 41 or 67 to 72 of *Bonas* referred to in paragraphs 72 and 74 above which casts any doubt on this and these passages should not be construed as requiring permission where the evidence concerned is relevant to the facts and circumstances within the scope of the Warning Notice. The first sentence of paragraph 40 should be read as an indication that in its statement of case TPR should be prevented from presenting a case which does not respect the boundaries of the Warning Notice, which would have been the basis on which it went before the DP.

115. It is therefore necessary to consider the extent to which what the Targets characterise as the New Allegations relating to the Propriety Matters should be regarded as being outside the scope of the Warning Notice. It follows from the analysis set out above that in making that assessment it is necessary to have regard not only to the terms of the Warning Notice itself, but also the facts and circumstances that were before the DP when it considered the Targets' representations.

116. As I observed in paragraph 15 above, the parties accepted the first twelve paragraphs of the Warning Notice as a fair summary of the essence of the case that the Targets were asked to answer, and as I have found in paragraph 17 the case was put on a "non-fault" basis.

117. Nevertheless, as I have found in paragraph 19 above, the Targets regarded the tone of the Warning Notice as being critical of the Targets' conduct. The Targets therefore brought into play before the DP the matters which they now contend are "common ground". In summary, the Targets sought to convince the DP that the features of the Joint Venture as summarised in the first twelve paragraphs of the Warning Notice were insufficient in themselves to justify an FSD when either there were positive features (such as its submission that the sale to Box Clever was at market value) or the absence of any misconduct or wrongdoing.

118. As is apparent from paragraphs 22 to 26 above, the matters which the Targets now assert are common ground therefore form part of the facts and circumstances that were before the DP and which it considered in making its decision. In those circumstances in my view they form part of the subject matter of the reference and it was therefore open to TPR to deal with such matters in its statement of case if it chose to do so. The facts and circumstances discussed did not generally form the basis of the DP's decision but the Targets clearly regarded them as being highly relevant to the question as to whether it was appropriate to issue an FSD. If it were proper that they should be aired before the DP then in my view it is equally proper that they are capable of being aired again before the Tribunal. As Sir Stanley Burnton stated in *Hobbs* (see paragraph 88 above), as the consideration of a financial services reference is not ordinary civil litigation, because of the public interest element involved, a narrowing of the inquiry by the Tribunal is to be avoided. This applies equally to the Targets, who wish to rely on the Propriety Matters in support of its contention that no FSD should be issued, and to TPR and the Trustee who, as a matter of principle should be free to dispute the contentions of the Targets as to the Propriety Matters if they choose to do so in their Statements of Case. This result is an inevitable consequence of the fact that the hearing before the Tribunal is *de novo*, subject to the scope of the matters referred.

119. In my view the passages in *Napp* and *Legal and General* relied on by Mr Furness do not cast any doubt on this analysis. Certainly as far as the Statements of Case are concerned as I have found in paragraph 33 above, TPR and the Trustee presented much the same case as was argued before the DP. I consider below the extent to which the Responses can be said to alter that position. *Legal and General* preceded *Jabre* and so did not contain any analysis in relation to the question as to what constituted "the matter referred" but the passage quoted holds good in relation to the principle that the regulatory action sought by the regulator should be of the same nature as that sought before the administrative decision-maker, and it was in that context that it was relied on by Judge Sinfield in *Allen.*

120. As far as *Napp* is concerned in my view it offers little assistance in relation to the jurisdiction of this Tribunal in financial services cases. The jurisdiction of the Competition Appeal Tribunal is of a different character to that of this Tribunal as is apparent from my analysis of this case above. In particular, the fact that there is no separate decision-maker and therefore the Director is expected to defend his decision on the basis of the case he put in the administrative proceedings and also the fact that the nature of the process before the Competition Appeal Tribunal is in the nature of an appeal rather than a *de novo* process are crucial differences. The basis of the Competition Appeal Tribunal's observations in paragraph 133 of its decision in *Napp 4* that the Director should not be permitted to advance a wholly new case was based on the fact that it was not the function of the Tribunal to look at the matter wholly afresh. In the Competition Appeal Tribunal the discipline of keeping the case within bounds is imposed through a structure which envisages the Director defending his decision against a fully pleaded notice of appeal; in the financial services jurisdiction of this Tribunal, that discipline is imposed through the regulator being confined to the scope of the Warning Notice, which gives greater latitude in the context of a *de novo* hearing.

121. However, as Mr Furness pointed out, there is a danger if TPR is able to modify its case before the Tribunal that the administrative process before the DP becomes devalued. TPR is under a strict statutory timetable to complete its investigation and complete the regulatory proceedings; although the period is more generous now, in relation to this matter the DP's determination had to be made within 2 years of the relevant time which led to an accelerated timetable for the hearing of representations on the Warning Notice and the issue of the DP's determination. In those circumstances, the real concern that the Targets have is that TPR cuts corners on its investigation, puts forward a limited basis for the issue of the FSD in the Warning Notice and limits its arguments before the DP, on the basis that it can keep its powder dry for when the case ultimately ends up in the Tribunal, where it can do a more comprehensive job and look afresh at its case. Indeed, one of the grounds on which the Targets resist the FSD is the unfairness of the regulatory process in this case.

122. This is a legitimate concern, and it may be that in appropriate cases the Tribunal may need to use its case management powers to prevent what would otherwise be an abuse of the process. Although not specifically delineated in the Act, it is clear to me that the policy behind the structure of the investigating and decision-making process is that there is a clear divide between the two so that ordinarily TPR would have been expected to have completed its investigation before putting forward its case in its Warning Notice. The Targets have a legitimate expectation that when the case comes to the Warning Notice stage TPR has a clear and settled idea as to the basis on which it is asking for the regulatory action in question. The Targets are entitled to expect a meaningful process before the DP based on that case. Clearly if there are new developments after the administrative decision-making process has concluded TPR must be expected to take account of that when it presents its case to the Tribunal. It must also be able to respond to the way that the Targets defend the regulatory action and if necessary, carry out further investigations to the extent necessary to do that. The Tribunal can assist in keeping that within bounds, for instance by declining requests for further disclosure of documents that TPR might reasonably have been expected to have obtained during the course of its investigation.

123. However, the limitations of the administrative decision-making process must be recognised. Parliament did not intend the Tribunal process to duplicate the process before the DP and vice versa. The DP process is an internal administrative process and many of the judicial trappings such as compulsion of witnesses, power to order disclosure and independent decision-makers do not apply. The DP only has the power to determine the matter on the basis of the evidence that is put before it by those who appear and the representations that are made to it. The Tribunal process needs to be compliant with the right to a fair trial under Article 6 of the European Convention on Human Rights, in the way that the DP process does not, and does not, it appears, seek to be.

124. Consequently, meetings with the DP at which oral representations are made are much shorter than the proceedings expected in the Tribunal and not all the issues are explored in great detail, but the important feature is that all the issues that are capable of forming the subject matter of the reference are aired, even if not all of them form the basis of the DP's decision. If the DP is able to dispose of the matter to the

satisfaction of the Targets then the regulatory process will have been completed in a relatively swift and efficient manner, but the Targets know they have the protection of a full judicial process which can correct any perceived deficiencies that have resulted from the inability to deal with all the issues that are considered relevant. That is another reason why the Tribunal should not be given a narrow remit.

125. Taking all of these factors into account, I see no reason in principle in this case to limit the scope of the matters before the Tribunal on the grounds of an abuse of process, but when examining the scope of the Responses and whether any part should be struck out and TPR's disclosure application I will bear the principles outlined above in mind.

126. I therefore conclude, contrary to Mr Furness's first and second primary submissions, that it was open to both TPR and the Trustee, in their Statements of Case to plead as to the Propriety Matters as these matters fell within the scope of the Warning Notice and formed part of the facts and circumstances before the DP and which it considered in making its decision. As a consequence those facts and circumstances form part of the subject matter of the reference.

127. The Targets take no issue with what was pleaded by TPR and the Trustee in the Statements of Case regarding the Propriety Matters, as I observed in paragraph 33 above, these pleadings essentially relied on the case based on the structure of the joint venture, as set out in the Warning Notice and accepted by the DP.

128. However, there was some argument before me as to whether TPR had accepted the DP's findings as set out in paragraph 147 and 148 of its reasons, as quoted in paragraph 23 above, that the sale was at market value supported by sophisticated due diligence. TPR said in paragraph 123 of its Statement of Case :

> "As the Panel accepted (paragraph 147 of the Reasons), the consideration paid to the Granada group reflected a market value exercise that had been the subject of due diligence".

Mr Furness submitted that this passage, taken with an earlier passage in paragraph 118 of the Statement of Case indicating that TPR relied on paragraph 141 to 149 of the DP's reasons, indicated that TPR had accepted the DP's findings on market value and due diligence. Mr Stallworthy submitted that the wording of paragraph 123 of the Statement of Case had been carefully chosen, indicating that although it was accepted that there had been some kind of market valuation and due diligence exercise it did not explicitly accept that the sale had been at market value or that such due diligence had been "sophisticated". Mr Stallworthy accepted in discussion that this wording did not indicate very strongly that in fact TPR were differing from the DP's findings, and also accepted that they could have gone further and said that no admissions were made about the quality of the exercises undertaken. Mr Stallworthy said it was not accepted that such due diligence as was undertaken was adequate to protect the purchaser, Box Clever, in the way that would apply if it was a completely arm's length transaction by third parties.

129. In my view the wording in paragraph 123 of the Statement of Case as a whole is not as clear as it should have been if it was indicating disagreement with the Panel's findings but I find that its effect is to be neutral on the question of market value and the quality of the due diligence. That position is consistent with the way that the case was argued before the DP on the basis that these issues were not determinative as to whether it was appropriate to issue an FSD. In other words, the Targets have maintained that because the sale was at market value following the carrying out of sophisticated due diligence, this was a factor tending against the issue of an FSD, whereas TPR are saying they do not accept that was the case and even if it was, it did not matter.

130. This leads on to the issues which are the subject of Mr Furness's third primary submission, namely the extent to which it is open to TPR and the Trustee to dispute findings made by the DP in relation to the Propriety Matters before the Tribunal. In effect for Mr Furness to succeed on this submission he would need to satisfy me that notwithstanding, as I have found to be the case, that the Propriety Matters fall within the scope of the subject matter of the reference, TPR and the Trustee are not entitled to dispute those matters before the Tribunal where the DP has made findings on them in the Targets' favour.

131. Mr Furness submits that TPR should ordinarily be expected to support the DP's reasons because:

(1) The DP is TPR's own decision-making committee in cases such as the present, and it would be inconsistent if TPR could readily depart from its own decisions; and

(2) The fact that the Act does not permit TPR to refer the DP's Determination to the Tribunal (see s 96(3) of the Act) indicates that Parliament did not expect that TPR would ordinarily wish to disagree with its own committee's reasons, and effectively to seek to reverse them.

132. The following findings of the DP, referred to in paragraph 23 to 25 above, which, following the Responses are sought to be kept in play, are:

(1) That the sale of Box Clever was at market value, supported by sophisticated due diligence;

(2) That the Targets were not seeking to escape any of their pre-existing pension liabilities when setting up the joint venture; and

(3) That they did not find any misconduct on the part of the Targets.

133. In the light of the authorities analysed above it is clear that Mr Furness's submissions must be rejected. The clear weight of authority supports the principle that in strict terms once a party exercises its right to refer the subject matter of a determination by the DP to the Tribunal the only relevance of the DP's decision is in determining the scope of the subject matter of that reference, as the matter will proceed not by way of appeal but by a rehearing. Once that principle is fully appreciated it is apparent that there is no inconsistency in TPR taking a different position in the Tribunal from the findings of the DP. As the matter is not an appeal

and TPR is obliged to set out its case afresh, there is no question of it appealing its own decision, once all of the facts and circumstances which form the subject matter of the reference have been brought into play by the making of the reference by the Targets. The fact that there may be a divergence of view between the DP and the executive arm of TPR is an inevitable consequence of the separation of investigation from decision-making.

134. This conclusion is clearly borne out by the passage from *Jabre* quoted in paragraph 83 above and in particular the statement that the decision itself is not strictly a relevant consideration for the Tribunal to take into account. As is clear from paragraph 36 of *Jabre*, quoted in paragraph 84 above, once the matter is referred the administrative process gives way to the Tribunal's statutory determination function. It is also consistent with the reasoning in *Hobbs* that all relevant issues should be aired before the Tribunal and what I see to be the general principle in financial services cases that the jurisdiction of the Tribunal should be no narrower than that of the relevant administrative decision-maker.

135. I accept that some of the passages in *Bonas* suggest that despite Warren J's recognition of the principle set out above in paragraph 70 of his decision, some regard should be had to the DP's decision: see paragraph 51 of his decision where he observed that the Tribunal "will pay due respect to the decision of the Panel" and paragraph 72 of the decision where he observes that the Tribunal will be slow to allow either the Target or TPR to re-open the Panel's findings of fact. Nevertheless, he concludes in the same paragraph that it is clear that the Tribunal has jurisdiction to do so in an appropriate case. In my view it is perfectly proper for a party to ask the Tribunal to have regard to the findings of the DP but it is not strictly necessary that the case should be pleaded or defended by reference to the findings of the DP. The FSMA cases seek to put more emphasis on the division between the regulatory and judicial proceedings and the remarks of Warren J, which were *obiter*, should be read in that context.

136. As a consequence of the nature of the Tribunal's process and its relationship with administrative process, I observed at the hearing that TPR's Statement of Case, in a manner which was not strictly necessary, sought to rely on the DP's reasons and made reference to them. It seems to me that it would give greater clarity to the pleadings if the Statement of Case was a standalone document and was seen to plead the matter afresh without reference to the reasons of the DP. This is not to say that TPR should be precluded from using the DP's reasons for its justification for the regulatory action sought but in doing so it does not need specifically to attribute the points concerned to the DP or specifically adopt them. Of course if there is any issue as to whether what is being pleaded goes beyond the scope of what properly should be the subject matter of the reference, the proceedings before the DP may need to be brought into play in greater detail.

137. I can therefore conclude on consideration of the issue as to whether TPR and the Trustee may bring within the scope of the reference the Propriety Matters that it is clearly open for them to do so, notwithstanding the fact that in doing so they might wish to depart from the findings of the DP.

138. I can now turn to the question as to whether in exercising its case management powers the Tribunal should seek to strike out any of the Responses on the basis that they go beyond what is proper as a response to the Targets' Reply. Mr Furness's general complaint is that the effect of the Responses is to result in the Targets having to answer an entirely different case to that set out in the Statements of Case and that new case is one based on the allegation that there has been misconduct or fault on the part of the Targets in the manner in which the Joint Venture was structured and managed.

139. I shall deal with this question by reference to the extracts from the Targets' strike out application set out in Part 1 of Appendix 2 to this Decision.

> *(a) and (f) Matters which the Targets contend that TPR and the Trustee are not entitled to dispute (the Propriety Matters) and allegations to the effect that the Joint Venture was designed to insulate Granada from various existing risks.*

140. I approach this issue from the starting position that, as I have already decided, the Propriety Matters fall within the scope of the subject matter of the reference and the facts and circumstances falling within that scope included the Propriety Matters. As we have seen, TPR, in paragraph 41 of its Statement of Case, essentially relied on the same case as it put before the DP but took a neutral position on the market value and due diligence issues. The Trustee, in its Statement of Case, did make reference to some of the other Propriety Matters and in particular pleaded the following:

(1) Significantly leveraging the Joint Venture without allowing the lenders recourse to the Granada and Thorn groups carried obvious risk;

(2) Within 3 years the leveraged Joint Venture failed under the weight of the debt leaving the pension scheme extremely underfunded; and

(3) The Targets naturally had a close link with the JV, its employers who participated in the Scheme and the Scheme itself.

141. Paragraph 10 of the Targets' Reply moved the ground away from this essentially neutral position as regards the conduct of the Targets to make the following positive assertions regarding the Propriety Matters:

(1) That there was no misconduct on the part of the Targets (as reflected in paragraph 168 of the DP's reasons and adopted in paragraph 41 of TPR's Statement of Case);

(2) That the sale of Granada's rental business to the Joint Venture was at market value and supported by sophisticated due diligence (as accepted by the DP at paragraph 147-148 of its reasons, and adopted in paragraph 123 of TPR's Statement of Case);

(3) That the price paid for the businesses on their hive-down to the Joint Venture was not improperly or negligently derived (as accepted at paragraph 123 of the Statement of Case);

(4) That there was nothing "non-standard" about the benefit received by the Applicants from the Joint Venture; (this was a reference to an

acknowledgement to that effect made by TPR's counsel during the proceedings before the DP).

(5) That nothing inappropriate was done in the Joint Venture – this was not suggested in the Warning Notice and was accepted by the Trustee (and in support of this references were made to statements made in the proceedings before the DP);

(6) That the Targets were not seeking to escape any of their pre-existing pension liabilities when setting up the Joint Venture (as accepted by DP at paragraph 160 of its Reasons and not disputed in the Statement of Case);

142. It appears to me that in essence paragraph 10 of the Reply was not responding to TPR's Statement of Case at all because the essence of TPR's case, as expressed in paragraph 41 of its Statement of Case, was not based on any positive assertion that the Propriety Matters were not established. It is therefore clear to me that these matters were brought into play by paragraph 10 of the Reply and TPR and the Trustee were perfectly entitled to respond to them. In my view the essence of TPR's Response, on the question of "misconduct" or whether anything "inappropriate" had been done in the Joint Venture or whether the Targets were seeking to escape any of their pre-existing pension liabilities when setting up the Joint Venture as set out in paragraph 7 of its Response, was that these issues had not been determined by the DP as they did not form the basis of its decision, and since TPR was adopting the reasons given by the DP as its justification for the issue of an FSD, TPR had not advanced its case on that basis. TPR then observed that where the DP said in paragraph 168 of its reasons that "we do not find misconduct on the part of the Targets", that did not amount to a positive finding that there was no misconduct.

143. It seems to me that nothing in this approach indicates that TPR was now seeking to rely on misconduct or inappropriate behaviour on the part of the Targets.

144. I reach the same conclusion in relation to the question of market value; TPR sets out in paragraph 7 of its Response (rather more clearly than it did in paragraph 123 of its Statement of Case) that it did not accept the positive assertion of the Targets that the sale was at market value after sophisticated due diligence. If the Targets consider that establishing that the sale was at market value after sophisticated due diligence will help to defeat a claim based on the structural features of the Joint Venture then it is for the Targets to refer to evidence that establishes that to be the case, and in those circumstances in my view it is fair and appropriate that TPR should be able to challenge that evidence. Paragraph 7(h) of TPR's Response in my view does no more than indicate the areas relating to the Targets' contentions on market value which in my view it would be perfectly proper to canvass before the Tribunal. The same theme emerges in relation to the issue as to whether the benefit received was "non standard" and whether the Targets were seeking to escape their pre-existing pension liabilities when setting up the Joint Venture. In relation to the "non-standard" issue, TPR sought to put its position on that in the context of its general position that although the structure was not illegitimate, it created inherent risks to the Scheme and provided a significant benefit for the employers. Again, it seems to me that it is perfectly legitimate for that position to be explored before the Tribunal.

145. The Trustee's Response was more assertive in that it specifically denied that the benefit received was standard, denied that the price paid represented market value, and it did not accept that nothing inappropriate was done. It also asserted that the Targets became aware as time went on that the Joint Venture was going wrong and that the Joint Venture had the effect and/or intention of insulating Granada from part of the liabilities and risks associated with the business that was transferred and in particular pensions liabilities. Nevertheless, all of these points are made in response to the positive assertions to the contrary made by the Targets in their Reply. It seems to me that once the Targets have asserted that the absence of the Propriety Matters is a key factor which tends against the issue of an FSD then they are properly brought into play, and in so far as the Trustee contends in response that the true position, on the evidence that was before the DP and therefore formed part of the facts and circumstances forming part of the subject matter of the reference, that the true position may be contrary to that asserted by the Targets then it is appropriate that the issue is explored before the Tribunal.

(b) and (c) specific allegations regarding market value and the extent of the due diligence carried out.

146. Aside from the issue as to whether TPR had accepted the DP's findings that the sale had been at market value, which I have dealt with above, TPR pleaded in paragraphs 24 and 30 of its Statement of Case that the transaction which created the Joint Venture was aimed to extract value from the businesses transferred but leave the Joint Venture parties able to share in any future profit and was not an arm's length sale to or investment in an unconnected third party. In paragraph 52 of its Statement of Case it referred to the fact that Granada received £528 million from the formation of the Joint Venture. The Trustee pleaded nothing specific in its Statement of Case.

147. In their Reply, the Targets took issue with this characterisation of the transaction and in particular countered the allegation that the purpose of the transaction had been to "extract value" by emphasising the fact that the sale had been at a market price. The Targets supported this by referring to the role of WestLB as lender, asserting that it is to be presumed that WestLB would not have permitted a sale in excess of market value and would not have lent had there been any material doubts as to the ability of the Joint Venture to service the borrowing. It therefore denied that it was not an arm's length transaction (paragraph 30 of the Targets Reply).

148. In paragraphs 51 and 58 of its Reply the Targets supported its case on market value by reference to a valuation by its financial advisers, Lazard Brothers, and the fact that Granada had received an indicative offer of £450 million without the synergies to be obtained through the merger, and also a detailed review carried out by Price Waterhouse Coopers ("PWC").

149. Both TPR and the Trustee responded to these points at some length in their Responses (paragraphs 25 and 35 of TPR's Response and paragraphs 9, 10, 13, 32 to 37 and 42 to 48 of the Trustee's Response). The essence of these Responses is as follows:

(1) They denied that WestLB's role operated so as to ensure that the sale was at market value on the basis that WestLB's concern was whether the debt could be serviced and the purchaser (Box Clever) was in no position to assess whether the sale was at market value.

(2) The due diligence carried out by PWC and others was limited and Box Clever itself was not a beneficiary of it.

(3) The indications were that if Granada were to have sold to a third party it would not have achieved the same price.

(4) The indicative offer was only a loose indicator of market value.

(5) The Joint Venture was established with the Joint Venture partners' interests firmly in mind which were very different to those of the transferee vehicle, Box Clever, and Box Clever had no material say in whether the merger should proceed or on what terms.

(6) The only limit on what cash could be extracted from the Joint Venture was the amount that WestLB were willing to lend.

150. Although TPR and the Trustee flagged the fact that they were seeking further disclosure to support these contentions (which I will deal with later in the context of TPR's Disclosure Application), it is clear to me that the focus of these responses is to engage with one of the primary factors relied on by the Targets, namely that in the case of a sale on an arm's length basis following a process of sophisticated due diligence, there should be no case for an FSD simply on the basis of the amount of value "extracted" by the Joint Venture parties. Although it is TPR's and the Trustee's primary case that the structural features alone justify an FSD it is in my view perfectly legitimate for them to respond to the Targets' positive assertions that the sale was at market value after a process of sophisticated due diligence on the basis that if that were shown to be the case, it may be a factor that the Tribunal believes to be of significance.

151. It is therefore consistent with the principle I identified earlier, namely that the Tribunal should not narrow the nature of the enquiry before it and should be able to consider all the facts and circumstances that were before the DP if they are brought into play through the proceedings, that TPR's and the Trustee's Responses on this issue should be allowed to stand. In my view Mr Furness was wrong to characterise these Responses as creating a case of a different character that the Targets have to answer; it is clear standing back and looking at the pleadings as a whole on this issue, that the focus of the case for an FSD remains the structural features of the Joint Venture, but on the assumption that the Tribunal might consider, as the Targets clearly wish to be the case, that the question of market value and the quality of the due diligence is a significant issue, then the Tribunal should be able to hear argument from both sides on that issue once it has been brought into play by the Targets.

(d) and (e): specific allegations regarding

(i) Granada's knowledge of the risks of the Joint Venture and as to what the parties intended or believed

(ii) the reasons the Joint Venture's business turned out to be unable to support its debt burden; and

(iii) Granada's alleged awareness of the Joint Venture's difficulties

152. In paragraph 32 of its Statement of Case TPR pleaded that the Granada Group was involved in the inception and development of the Scheme "approving its (unusually onerous) defined benefit structure in order to further the commercial interests of shareholders by managing and maintaining employee relations". In paragraph 45 of its Statement of Case, TPR referred to the fact that the structure of the Scheme was altered following agreement in 2002. It had been envisaged originally that in respect of all employees who transferred from Granada to Box Clever they would leave the Granada Scheme and there would be a bulk transfer of the assets supporting their entitlements to the new Box Clever Scheme. This was changed so that the employees left the Granada scheme but left the benefits behind, with the result that the employees had two pensions, one from Granada in respect of their past service and one from Box Clever in respect of their service from the time they joined that Scheme. Nevertheless, there was a "top-up element" in that an employee leaving Box Clever had his benefits computed by reference to the whole of his combined service in both Granada and Box Clever, that is his final salary in Box Clever was multiplied out by his total service with Granada, and there was then a set-off of the deferred pension to which he was entitled from the Granada Scheme. I was told it is this structure which in essence has created the deficit in the Scheme today: hence its description as "onerous".

153. TPR also stated (in paragraph 76 of its Statement of Case) that Box Clever recorded a drop of revenues of over 20% in the year to 30 September 2002 which resulted in a substantial loss, and (in paragraph 121 of its statement of case) that the effect of finance leveraged from the business without recourse to the Joint Venture parties inherently left the Joint Venture vulnerable to the risk that the Joint Venture might not be able to service its debt.

154. It is therefore apparent that these risks were referred to in neutral terms.

155. The Trustee referred to its own role in agreeing to the top-up arrangements for the Scheme, which it contends involved less risk than if the Scheme had become liable for the entirety of the benefits in respect of service in Granada by accepting the bulk transfers proposed, and pleaded that the description of the structure as "onerous" should be read in that light.

156. In supporting TPR's observations that the Joint Venture was vulnerable as a result of the leveraged structure, the Trustee referred, *inter alia*, to the decline in the video and rental market in the years leading up to the Joint Venture.

157. In summary, the Applicants countered these points in their Reply in the following terms:

(1) The Trustee agreed the "top-up structure" with Box Clever's management and should not have done so if it did not think the "unusually onerous"

benefits were capable of being adequately funded; (paragraph 37 of the Reply).

(2) Nobody appreciated the true cost of implementing the "top-up structure" and the Trustee decided to proceed with it and issue communications to members without any actuarial evidence as to cost;

(3) Box Clever took the strain of providing final salary linkage for past service without any funding in the form of a past service transfer which put a disproportionately large funding requirement on Box Clever at a time when it was already in serious financial difficulties (paragraph 77 of the Reply);

(4) Whilst it is accepted that the Box Clever business was in increasing difficulty, in financial years 2001 and 2002 Box Clever generated sufficient operating cash flow to service its interest costs (paragraph 89 of the Reply; and

(5) At the time of its formation, it appeared that the Box Clever business could support its borrowing and had a real future. And since the Targets were not at fault in establishing the Joint Venture the fact that there was a risk the debt could not be serviced did not support the case for an FSD. In the absence of allegations in the Statements of Case that the Targets knew, believed or suspected, or ought to have known, at any material time that the Joint Venture would or might fail or was at any material risk of failing or being unable to service its debt, it was not reasonable to impose an FSD (paragraph 197 of the Reply).

158. These points were responded to at some length by TPR and the Trustee in their Responses, and this is particularly so in the case of the Trustee. These Responses can be summarised as follows:

(1) TPR indicated that it intended to rely on expert accounting/corporate finance evidence and further disclosure to show

(2) the risks associated with the Joint Venture and what must have been known by the Applicants about the risks to the business;

(3) In paragraph 197 of their Reply the Targets have sought to downplay the risks inherent in the Joint Venture, and TPR stated that after disclosure it may wish to make allegations as to the extent of the Applicants' knowledge of these risks which fed through to the pension funding risks;

(4) The Trustee reserved its position regarding the Targets contention that WestLB remained satisfied with Box Clever as a borrower pending disclosure, and referred to passages from the transcript in the High Court action in *Ixis Corporate and Investment Bank v WestLB and others* which in its view indicated that WestLB was not entirely satisfied;

(5) The Trustee specifically pleaded that Granada knew or ought to have known that the Joint Venture was objectively risky not least because it was loaded with debt in a way it was not when it was part of Granada and that the risks would have been entirely obvious in the light of Granada's

knowledge and past experience of the rental business and Granada accordingly ought reasonably to have been aware of them;

(6) The Trustee reasonably did not appreciate that there was a material risk that Box Clever would not be able to pay for the top-up benefits in full and it was wrong to criticise the Trustee when Box Clever and its shareholders who were aware of the risks took no steps to alert the Trustee to them.

159. In relation to the risks and the question of Granada's knowledge in relation to them, as referred to in paragraph 26 above these matters were canvassed before the DP and it found the evidence "inconclusive". These issues therefore formed part of the facts and circumstances which are within the scope of the subject matter of the reference. The issues have been brought into play through paragraph 197 of the Targets' Reply and therefore it is legitimate for the Trustee and TPR to respond to that paragraph in the manner which they have, which will enable the Tribunal to consider the issues in the round and the extent to which knowledge of the risks is a relevant factor in deciding whether an FSD is appropriate.

160. Even without the specific pleadings made by TPR and the Trustee, it seems to me that it is open to the Tribunal to draw inferences from the evidence before it on the question of the extent of knowledge and decide whether if it finds Granada's knowledge to be limited what impact, if any, that has on the question of the issue of an FSD. As with the market value and due diligence issues to leave the question out of account would in my view amount to a narrowing of the enquiry of the Tribunal from the issues canvassed before the DP without justification, when that issue has been brought into play by nature of the Targets' Reply. Again in my view to take this course does not elevate the Responses into a different case that the Targets need to answer; the focus remains on the structural features of the Joint Venture, but as the Targets contend that the absence of knowledge of the risks is a key factor in deciding whether an FSD is relevant the matter should be aired before the Tribunal.

161. With regard to the issues concerning the top-up arrangements, the essence of the Targets' Reply is to regard the Trustee as having a degree of culpability in agreeing to them thus weakening its own responsibility in relation to the implementation of these arrangements. In those circumstances it is clearly right that the Trustee should be able to respond to that criticism and the whole question be considered by the Tribunal.

162. I therefore conclude that TPR's and the Trustee's responses identified in paragraphs (d) and (e) of Part 1 of Appendix 2 to this decision should be allowed to stand.

(g) Specific allegations as to whether Granada dictated how the Joint Venture would operate

163. In paragraph 31 of its Statement of Case TPR pleaded that Granada "plainly had ongoing influence over the running of the Joint Venture" as a 50% shareholder with significant rights under the Shareholders Agreement relating to the Joint Venture. TPR accepted the DP's conclusion that the shareholders were "very much hands on as

shareholders and joint venture partners". In any event, TPR contended that Granada's rights under the Shareholders Agreement were sufficient in themselves to support the issue of an FSD. TPR also disputed the Targets' contention in their reference notice that the Joint Venture was a "standalone business with which the Applicants had an arm's length relationship".

164. In their Reply, the Targets accepted that they had ongoing influence and were hands on as shareholders but contended that it did not follow that they usurped the role of Box Clever's executive management or directed day-to-day management of the business in all respects and they contended that the Joint Venture partners wanted Box Clever to be a "standalone business". They contended that Box Clever had its own executive management who decided how to run the business (albeit in consultation with the shareholders). Their position was that the shareholders did no more than take a natural and responsible interest in their shareholding, and this relationship was not such as justifying the issue of an FSD (paragraphs 36 and 201 of the Reply).

165. It is clear from this summary, that TPR and the Trustee were taking the position that the shareholding relationship and powers under the Shareholders Agreement were sufficient in themselves to support the imposition of an FSD, whereas the Targets contended that in reality there was an arm's length relationship with the separate management of the Joint Venture and in those circumstances an FSD could not be justified. The Reply therefore brought into play the question of whether the fact that the shareholders were distanced from the day-to-day running of the business was a relevant factor tending against the imposition of an FSD.

166. As was the case with the other issues discussed above, the bringing into play of this issue gave rise to responses on the part of TPR and the Trustee. TPR in its Response, similar to the position it took in its Statement of Case, pleaded that all key decisions were taken only after consultation with the shareholders and it made no admissions as to the Targets' contentions as to how the business was run, but that the extent of Granada's involvement remained a matter for disclosure, particularly in relation to the creation of the top-up structure of the Scheme.

167. The Trustee went further in its Response and stated that paragraph 36 of the Reply sought to downplay the importance and level of control the shareholders had over the Joint Venture. It also went on to say, and this is the statement to which the Targets take particular exception, that by virtue of the structure of the Joint Venture the shareholders "effectively dictated numerous features of the way the Joint Venture would operate", and that their level of interest was far removed from that that would be exhibited by a vendor of a business to an unconnected third party after a sale.

168. I approach this issue on the same basis as the other issues raised by the Targets' strike-out application; the Targets have contended that the fact that they were distanced from the management of the Joint Venture lessens the case for an FSD. In those circumstances, it is perfectly proper that the question as to the extent of their control over the Joint Venture's business should be fully explored before the Tribunal. Again, the issue as to the shareholders' relationship with the Joint Venture was

canvassed before the DP, it therefore formed part of the facts and circumstances that fell within the scope of the subject matter of the reference and whilst the language used by the Trustee may be colourful, the question as to the extent of the Targets involvement in the management of the Joint Venture may properly be considered by the Tribunal and TPR's and the Trustee's Responses are appropriate as a response to the issue having been put in play by the Targets.

169. Again, standing back and looking at the pleadings as a whole in relation to this issue, the primary case of TPR and the Trustee remains that the shareholding relationship and the powers under the Shareholders Agreement are sufficient to justify and FSD, but in the light of the Targets' Reply it is appropriate that the Tribunal consider the extent to which the level of control exercised by the Targets has any impact on that position, and in those circumstances it is appropriate that the issue be explored to the extent contended by the Trustee.

170. Before concluding on the Targets' Strike Out Application I should deal briefly with the question as to whether the fact that what Mr Furness submits are new allegations are being made some years after the statutory time limit in s 43(9) of the Act for the making of a determination by the DP has expired, and so are made very late in the history of this matter, has a bearing on the issue. In my view it does not; as Mr Stallworthy submitted it was established in *Lehman Brothers* that s 43(9) does not create a limitation period as such but it provides a period within which TPR must in the context of the administrative decision making process conclude its deliberations, but not a cut-off date by which all facts or matters to be relied on in support of an FSD must be identified in advance. As the Tribunal found in *Lehmans*, the look-back period ceases to be of relevance once the Tribunal is seised of the subject matter of the reference and Mr Stallworthy is right to remind me that in procedural terms this reference is at an early stage as the pleadings are only now being closed. That being so there is ample opportunity for the Targets to deal with the points now being made by TPR and the Trustee in their Responses as they prepare for the substantive hearing of the references.

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

TPR's Disclosure Application

172. I turn now to TPR's Disclosure Application. In considering this application I make the following observations as to the approach to be taken to the disclosure sought.

173. First, as I alluded to in paragraph 122 above, in my view there is presumption that there should be a clear divide between the investigation and decision-making process where TPR is considering the use of its regulatory powers and that ordinarily TPR would have been expected to have completed its investigation before putting forward its case in a Warning Notice. As I have found, the scope of the case set out in the Warning Notice and the facts and circumstances relating to that which were considered by the DP are important in prescribing the ambit of the case that the targets of the proposed regulatory action have to answer. These targets are entitled to assume that ordinarily TPR will have gathered the evidence, through the use of its extensive investigatory powers on which it wishes to found its case.

174. Clearly, there must be some flexibility around this principle where there are new developments such as following the conclusion of the investigation or where new evidence comes to light which might lead TPR to have to use its investigatory powers or to seek disclosure. This was explicitly recognised by Warren J in *Bonas*: see paragraphs 41, 42 and 68 of the decision. The case of *Allen* is another example where new evidence not available at the time of the regulatory proceedings was held to be capable of being relied on in the subsequent Tribunal proceedings.

175. Similarly, as recognised in paragraph 68 of *Bonas*, where a target adduces new evidence itself it would be unfair if TPR (and in this case the Trustee as well) were not allowed to adduce evidence in rebuttal. The same point was made in *Napp 4*: see paragraphs 114 and 119 of the Decision quoted in paragraph 106 above.

176. Aside from these instances, the Tribunal should be slow to order disclosure of documents which could properly have been obtained during the investigation and which would then have formed part of the documents relied on in TPR's Statement of Case and listed when it filed that document, as required by the Rules. In my view disclosure should only be ordered where the Tribunal is of the view that the new material sought is clearly going to assist the Tribunal to come to the appropriate decision with regard to the question as to whether it is reasonable to issue an FSD, so that the Tribunal will have a complete picture of the circumstances relating to the issues in question. I therefore accept Mr Furness's submission to that effect, whilst obviously in the light of my findings on the question of the scope of the pleadings rejecting his submission that disclosure should be refused for the reasons he advanced as to why the Targets' Strike Out Application should be refused.

177. Disclosure should also only be directed at this stage in the overall process where the disclosure sought is closely confined in terms of the categories of documents sought, the period of time to which the request relates and the clear relevance of the documents to the matters in question, rather than the fact that they might be of relevance. Because of the lapse of time since the events in question and the fact that

they might have been requested at an earlier stage, they should be readily accessible by the Targets and not require a disproportionate effort on their part to locate them.

178. Finally, I should not order disclosure where it appears that the purpose may be to assist TPR or the Trustee in founding new fault or misconduct based claims, which is of course the prime concern that the Targets have raised in relation to the disclosure request. The purpose of disclosure is, as TPR and the Trustee confirmed during argument, confined primarily to assist in assessing the strength of the positive assertions made by the Targets with regard to the Propriety Matters.

179. Bearing in mind those principles I turn to the specific disclosure requests made, which are set out in full in Part 2 of the Appendix 2 of this Decision. I refer to the specific paragraphs and sub-paragraphs of that part of Appendix 2 when giving my decision on the specific disclosures sought.

180. In relation to categories (i) to (iii), which relate to board minutes, board papers and another relatively narrow class of evaluation reports it was accepted in argument that what was sought in (i) was such documents generated by or for the benefit of the Applicants. I accept Mr Stallworthy's submission that on any view these documents will assist the Tribunal in painting a full picture of the process that led to the establishment of the Joint Venture, and in particular, insofar as they relate to the question of the extent to which the risks attaching to the Joint Venture were considered by the Targets are clearly relevant to the question of their knowledge of the risks, an issue which as I have found was brought into play by the Reply. The documents also meet the requirements I identified as being confined in scope and time period, are likely to be easily accessible and limited in number. The documents of course should be redacted so as to disclose only those matters that relate to the Joint Venture. In addition, they mirror a disclosure that I have already directed to be made in respect of similar documents relating to the Trustee and the minutes of its meetings.

181. Therefore, subject to the amendments I have indicated, I shall direct that these documents are disclosed. In order not to extend an already long decision, I shall make the directions that arise out of this decision in a separate document which will set out further detail regarding the time of disclosure.

182. In relation to category (iv):

(a): As Mr Stallworthy correctly submits, the work performed by Lazards is specifically pleaded by the Targets in paragraph 51(b) of their Reply and relied on in support of their market value arguments. The same goes for the question of the indicative offer, which is pleaded in paragraph 51(c) of the Reply. On this basis, the documents sought are clearly directly relevant to the positive assertions made by the Targets with regard to the market value issue and they will assist the Tribunal in considering that issue. These documents should therefore be disclosed.

(b): The Targets rely in their Reply on the quality of the due diligence performed as a factor tending against the imposition of the FSD. The

documents sought should therefore, for the same reasons as given in relation to the market value issue, be disclosed.

(c): Any presentations or reports prepared in connection with the development of the Joint Venture are closely allied to the documents referred to in category (i) above and on that basis and for the same reasons they should be disclosed.

(d) and (e): I regard the documents requested with regard to the selection of the management team and their incentive arrangements as being less obviously connected to the issues under consideration. Mr Stallworthy was only able to say that they might go to the characterisation of the risk and the nature of the transaction. Bearing in mind this factor, and at this late stage in the process, I am not persuaded that any further disclosure on this issue is justified at this stage.

(f) and (g): I accept Mr Stallworthy's submissions, and this was recognised by Mr Furness in his Reply, that these documents relate clearly to the characterisation of the risks in the transaction, and the pleadings raise the issue as to whether the business plan was overly optimistic. As the question of the risks inherent in the Joint Venture is a key issue in this reference in my view it is important that the Tribunal has a full picture of how these issues were dealt with at the time of the formation of the Joint Venture and during its operation and on that basis the documents requested should be disclosed.

(h): As Mr Stallworthy submits, paragraph 54 of the Targets' Reply puts clearly into play the attitude of the rating agencies to the securitisation in 2002 in the context of the Targets' contention that the Joint Venture would support its borrowings. For that reason, the correspondence requested should be disclosed.

(i): The documents requested relate to Box Clever itself, so are likely to be limited in scope and extent although broadly expressed. They are closely related to the documents in categories (i) and (ii) and for the reasons given in relation to those documents should be disclosed.

(j): I am not persuaded that at this stage the question as to whether WestLB might have proceeded with equity participation in the Joint Venture will materially assist the Tribunal. Mr Stallworthy was only able to say that it might be relevant and I therefore refuse the disclosure requested.

(k): This refers to a specific statement in paragraph 59 of the Targets Reply. As Mr Furness recognised, it is a request that is easy to deal with. On that basis the documents, if any, should be disclosed.

183. In relation to category (v) which are documents requested by the Trustee:

(a): These documents and the extent of the Targets' knowledge in respect of these risks clearly relate to the risks issue, which as I have identified has been brought clearly into play as a result of the Targets' Reply and the responses thereto. For the reasons given above the documents should be disclosed, subject to the concession that Mr Hilliard made during his submissions that the documents in sub-paragraph (2) should be limited to documents from 2002 that were either produced by Granada or came to their attention.

(b): The document referred to in sub-paragraph (1) is clearly relevant to the question of Market Value, is very specific and should be easy to locate. Therefore, for the reasons set out above it should be disclosed. With regard to sub-paragraph (2) the request is widely drawn and relates to Granada's joint venture partner, Thorn rather than Granada itself. In those circumstances and at this late stage the request appears to be speculative and I am not persuaded that the disclosure of this category of documents should be directed.

(c): The issue of the responsibility for the agreement of the top up structure has clearly been brought into play through the Targets' Reply. On this basis, the documents requested, which are specific and limited in scope should be disclosed.

184. It follows from the scope of the disclosure that I have directed, that I am not of the view that the Targets should have a well founded fear that the material will enable TPR and the Trustee to found new fault -based allegations. If it appears to the Targets that such is happening then it will be open to the Tribunal to deal with the situation through its case management powers.

The Carmelite Application

185. Finally, I now turn to the Carmelite Application. I have set out in paragraphs 48 and 49 above the Targets' basis for this application.

186. The Targets' basis for disclosure of documents relating to TPR's decision not to pursue Carmelite for an FSD is that the decision not to do so is inconsistent with its decision to pursue the Targets. They contend that this alleged inconsistency is relevant as to whether it is reasonable to issue an FSD against the Targets, because as a result of TPR not doing so potentially the Targets could be held to be solely liable for the deficit rather than being able to share any liability with Carmelite.

187. Mr Furness submits that it is fundamentally unfair for the Targets to be pursued and for Carmelite not to be pursued and this should be taken into account in deciding whether it is reasonable to impose an FSD on the Targets. He submits that the Targets are entitled to know as a matter of fairness why it was Carmelite was not pursued.

188. TPR has indicated that there are good reasons not to pursue Carmelite. In particular, Mr Stallworthy refers to correspondence between the Targets and TPR on this issue where TPR has referred to the publicly available information from all but one of the Carmelite entities that their financial circumstances are such as to render it obviously unreasonable and indeed entirely pointless to seek an FSD against them. Mr Furness responds by contending that the Targets wish to know and understand what TPR's reasons for not pursuing Carmelite are, and in particular receive a full account of why TPR says there is a difference between the position of Carmelite and the position of the Targets. In relation to the financial issue, Mr Furness submits that the Targets are entitled to know whether or not it would have made a difference if TPR had pursued maters more quickly.

189. In my view this application is misconceived. First, it would be invidious to ask the Tribunal in effect to conduct an enquiry as to whether the regulatory judgment of TPR in deciding not to pursue another entity, even one which potentially had joint and several liability in respect of the deficit in the Scheme, was right. The Tribunal has a statutory jurisdiction which is limited to determining what is the appropriate action to take in relation to the references that are made to it. If a party to a reference is of the view that TPR has failed in its duty by not pursuing a different entity, or not pursuing it quickly enough, then that is a matter that it may be able to test through an application for judicial review in the administrative court, although it was recognised by Mr Furness that the time to take that course had long since passed.

190. Even if it were appropriate for the Tribunal to carry out such an enquiry, it is hard to see how the outcome of that enquiry should inform the question as to whether it was appropriate to issue an FSD against the Targets. As Mr Stallworthy put it, if TPR was right not to pursue Carmelite, it did not make it wrong to pursue the Targets. All this means is that TPR was not justified in pursuing the other party to the Joint Venture. If TPR was wrong not to go after Carmelite it should not compound the error by not pursuing the Targets.

191. This latter point is an illustration of the fundamental point, which is sufficient to defeat the Carmelite application. This is, as Mr Stallworthy submits, that the question as to whether Carmelite should have been pursued or not is irrelevant to the issue as to whether in relation to the facts and circumstances that relate specifically to the Targets, it is reasonable to impose an FSD on them. No comparison with the position of Carmelite should influence that stand alone decision. It follows that I reject Mr Furness's submission that in assessing whether it was reasonable to impose an FSD on the Targets a relevant factor is whether it was unfair to the Targets that Carmelite was not pursued.

192. Consequently I must dismiss the Carmelite Application.

Conclusion and next steps

193. The outcome of the applications made is that the Targets' Strike Out Application and the Carmelite Application are dismissed and TPR's Disclosure Application is allowed in part.

194. I have released directions simultaneously with this decision to implement my decision on TPR's Disclosure Application together with an indication of the directions I envisage, subject to any application made by the parties, in order to bring the reference to a substantive hearing as soon as is practicable.

TIMOTHY HERRINGTON
JUDGE OF THE UPPER TRIBUNAL
RELEASE DATE: 13 DECEMBER 2013

APPENDIX 1

Relevant provisions of the Pensions Act 2004

43 Financial support directions

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

(1) a money purchase scheme, or

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

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

(1) is a service company, or

(2) is insufficiently resourced,

at a time determined by the Regulator which falls within subsection (9) ("the relevant time").

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

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

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

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

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

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

(1) the person is at the relevant time a person falling within subsection (5), and

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

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

(1) the employer in relation to the scheme,

(2) an individual who –

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

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

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

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

(1) 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 (1)) of that section).

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

(3) Any connection or involvement which the person has or has had with the scheme,

(4) The financial circumstances of the person, and

(5) Such other matters as may be prescribed.

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

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

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

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

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

44 **Meaning of "service company" and "insufficiency resourced"**

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

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

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

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

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

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

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

(b) Condition A or B is met.

(3A) Condition A is met if –

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

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

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

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

(3B) Condition B is met if –

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

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

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

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

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

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

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

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

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

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

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

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

45. **Meaning of "financial support"**

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

(2) The arrangements falling within this subsection are –

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

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

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

(d) such other arrangements as may be prescribed.

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

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

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

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

46. **Financial support directions: clearance statements**

(1) An application may be made to the Regulator under this section for the issue of a clearance statement within paragraph (a), (b) or (c) of subsection (2) in relation to circumstances described in the application and relating to an occupational pension scheme.

(2) A clearance statement is a statement, made by the Regulator, that in its opinion in the circumstances described in the application –

(a) the employer in relation to the scheme would not be a service company for the purposes of section 43,

(b) the employer in relation to the scheme would not be insufficiently resourced for the purposes of that section, or

(c) it would not be reasonable to impose the requirements of a financial support direction, in relation to the scheme, on the applicant.

(3) Where an application is made under this section, the Regulator –

(c) may request further information from the applicant;

(d) may invite the applicant to amend the application to modify the circumstances described.

(4) Where an application is made under this section, the Regulator must as soon as reasonably practicable –

(a) determine whether to issue the clearance statement, and

(b) where it determines to do so, issue the statement.

(5) A clearance statement issued under this section binds the Regulator in relation to the exercise of the power to issue a financial support direction under section 43 in relation to the scheme to the applicant unless –

(a) the circumstances in relation to which the exercise of the power under that section arises are not the same as the circumstances described in the application, and

(b) the difference in those circumstances is material to the exercise of the power.

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

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

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

…

(e) the power to issue a notice under section 45(7) approving the details of arrangements

…

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

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

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

(4) The procedure determined under this section –

(a) must provide for the procedure required under –

(i) section 96 (standard procedure), and

(ii) section 98 (special procedure), and

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

(5) This section is subject to -

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

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

96. **Standard procedure**

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

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

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

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

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

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

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

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

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

(3) Where the standard procedure applies, the determination which is the subject-matter of the determination notice may be referred to the Tribunal by –

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

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

103. **References in relation to decisions of Regulator**

(2A) This section applies to references to a tribunal in relation to a decision of the Regulator.

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

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

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

(6) Those directions may include direction to the Regulator –

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

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

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

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

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

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

(9) An order of the tribunal concerned may be enforced –

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

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

APPENDIX 2

PART 1

EXTRACTS FROM THE TARGETS' STRIKE OUT APPLICATON

Allegations in the Responses which the Targets apply to strike out

(a) allegations to the effect that the Regulator and the Trustee are now entitled to controvert the hitherto undisputed Propriety Matters identified in paragraphs 10 and 17 of the Targets' Reply and that the onus is on the Targets to prove such matters;

> (see eg the contentions contained with the Regulator's Response paragraphs 5 to 7(f), and within the Trustee's Response paragraphs 8, 9, 13, 15 and 31.2 etc);

and without prejudice to the generality of the foregoing:

(b) allegations to the effect that the price paid to Granada by the Box Clever group in 2000 for Granada's rental business was or may have been in excess of market value, and/or that there is cause for concern that the price paid was unduly favourable to Granada;

> "see eg the contentions contained within the Regulator's Response paragraphs 7(b), 21(d), 25 and 35, and within the Trustee's Response paragraphs 13, 22 and 41-48 etc).

(c) related to (b), allegations to the effect that the due diligence performed in 1999-2000 was inadequate to protect the interests of the purchaser, Box Clever;

> (see eg the contentions contained within the Regulator's Response paragraphs 25(b) (iv) and 35, and within the Trustee's Response at paragraphs 9, 12, 22 and 32-37 etc)

(d) allegations to the effect that Granada knew that the proposed Joint Venture was subject to a high degree of risk, such that there is now an issue as to what Granada and Thorn intended/believed as to the prospects of the Joint Venture when it was established.

> (see eg the contentions contained within the Regulator's Response paragraphs 26(c) and 117, and within the Trustee's Response paragraphs 49-68 and 78 etc).

(e) related to (d), allegations that seek to put in issue the reasons why the Joint Venture's business turned out to be unable to support the debt burden placed on it, and Granada's alleged awareness of the Joint Venture's growing difficulties after it was established.

(see eg the contentions contained within the Regulator's Response paragraphs 34(d)(iii) (last sentence), 59(b)-(c) and 117(f)-(i), and within the Trustee's Response paragraphs 39-40, 49-68, 75.5 to 76 and 117.1 etc)

(f) allegations to the effect that the Joint Venture was designed to insulate Granada from various existing risks within its own business and pension scheme;

(see eg the contentions contained within the Regulator's Response paragraph 7(f), and within the Trustee's Response paragraph 23.3, and 29-31 etc)

(g) allegations to the effect that Granada dictated how the Joint Venture would operate;

(see eg the contentions contained within the Trustee's Response paragraphs 75 and 79.2; see also the Regulator's Response paragraph 121(a)).

PART 2

Disclosure sought by TPR and the Trustee

(i) Any board minutes, board papers, internal evaluation reports and external adviser reports prior to 28 June 2000 relating to and/or informing the decision to pursue the Joint Venture, including any such documents that include an evaluation of (1) the risks of entering into the Joint Venture and/or (2) the risks that the Joint Venture might fail.

(ii) Any BCT board minutes and board papers during the period 28 June 2000 to 31 December 2003.

(iii) Any board minutes of any of the Applicants during the period 28 June 2000 and 31 December 2003 which include reference to the Joint Venture and/or the Scheme and where applicable board papers relevant to the items relating to the Joint Venture and/or the Scheme.

(iv) To the extent not covered by the above (i) to (iii), the following:

(a) Any report, advice or analysis by Lazard Brothers in connection with the advice and valuation work done by them in advance of the Joint Venture, including any documentation relating to (1) the discounted cash flow valuation referred to in the Board Paper of November 1999, (2) the indicative offer of £450m referred to in the same Board Paper as well as any other indicative offers that were obtained and (3) the process by which that indicative offer or any other indicative offers were obtained.

(b) Any documents evidencing due diligence prior to 28 June 2000 performed for Granada (and other parties if relevant) considering the UK consumer rental market and commercial prospects for the Box Clever business.

(c) Any presentations or reports prepared in connection with the development of the intended strategy for the Joint Venture.

(d) Any documents relating to the decision regarding the selection of the senior management team of Box Clever and the process of their appointment.

(e) Any documents relating to the management incentive scheme available for the executives of the Box Clever group and any advice about that structure.

(f) The business plan ultimately adopted for Box Clever and any management representations and warranties in relation to that business plan.

(g) Any report prepared for Granada projecting the headroom analysis for Box Clever's financial covenants.

(h) Any correspondence between Granada and the rating agencies in connection with the subsequent securitisation.

(i) Any documents evidencing consideration given by Box Clever to the decision to proceed with the acquisition of the rental businesses from Granada and Thorn and to enter into the debt facilities provided by WestLB.

(j) Any documents relating to WestLB's not having proceeded with equity participation in the Joint Venture.

(k) If the Applicants maintain there was a delegation to directors (the possibility being referred to at paragraph 59 of the Reply, as pleaded to at paragraph 41 of the Regulator's Response), any documents evidencing such delegation.

(v) The documents requested by the Trustee in the letter of Eversheds dated 14 August 2013, being:

(a) Any communications after the establishment of the Joint Venture between Box Clever and Granada evidencing Granada's appreciation of the risks that Box Clever might fail, including:

(1) All documents prepared by BCT and passed to Granada at any of the executive briefings referred to at paragraph 76.1 of the Trustee's Response, which relate to the risks that Box Clever might fail;

(2) Any documents relating to the error in the business model referred to at paragraph 76.2 of the Trustee's Response, including the paper dated 28 August 2002 (referred to at paragraph 76.2.1 of the Trustee's Response);

(3) Any documents relating to Granada's decision to investigate any issues with the business model on 12 September 2002 (referred to at paragraphs 76.2.3 of the Trustee's Response);

(b) The email between Oren Peleg and Fraser Duncan dated 8 January 2001 (referred to in the Trustee's Response at paragraph 47), as well as:

(1) the email's complete email chain (including any replies to the email and any emails forwarding or attaching the email to other persons); and

(2) any documents evidencing Thorn holding the view that Granada had been overpaid by around £200m for the Granada Division, and its grounds for holding such a view.

(c) Any documents and communications relating to Granada's involvement in the drafting of, and Granada's agreement to, the wording of the letters sent to members around March and April 2003, referred to at paragraph 126 of the Trustee's Response.

PART 3

Disclosure sought by the Targets

(a) Disclosure of all correspondence between TPR and Carmelite, and between the Regulator and the Trustee, regarding or in connection with the possibility of regulatory proceedings being brought against Carmelite in respect of the Joint Venture.

(b) Any information which TPR has obtained from Carmelite about the background to the setting up of the Joint Venture and the Box Clever Pension Scheme (including for the avoidance of doubt disclosure of any documents containing or referring to that information).

(c) An explanation of:

(i) what TPR's investigations revealed about where the proceeds of sale arising from the transactions which set up the Joint Venture ended up within Carmelite; and

(ii) why, on each of the occasions when it considered the position of Carmelite, TPR decided not to pursue the Carmelite entities that ultimately received such proceeds of sale.

(including for the avoidance of doubt disclosure of any documents contained or referred to that information).