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Case No: A3/2018/1629

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
Mrs Justice Rose, Judge Timothy Herrington and Mr Ian Abrams
[2018] UKUT 0164 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 June 2019

Before :

LORD JUSTICE PATTEN
LORD JUSTICE NEWEY
and
LORD JUSTICE MALES

Between :

- (1) GRANADA UK RENTAL & RETAIL LIMITED
(2) GRANADA MEDIA LIMITED
(3) GRANADA GROUP LIMITED
(4) GRANADA LIMITED
(5) ITV plc

Appellants

- and -

THE PENSIONS REGULATOR

Respondent

- and -

BOX CLEVER TRUSTEES LIMITED

**Interested
Party**

Lord Pannick QC, David Railton QC, Brian Green QC, Edward Sawyer and James McCreath (instructed
by Hogan Lovells International LLP) for the **Appellants**
Nicholas Stallworthy QC, Mark Arnold QC, Martin Chamberlain QC and James Walmsley (instructed by
The Pensions Regulator) for the **Respondent**
The Interested Party did not appear and was not represented

Hearing dates : 13-17 May 2019

Approved Judgment

Lord Justice Patten :

Introduction

1. This is the judgment of the Court to which we have all contributed.
2. The appellants are five companies within what is now the ITV group. We shall refer to them collectively as “the Targets”. The Granada companies are subsidiaries of ITV plc which was formed and became their parent company on 2 April 2004. On 21 December 2011 the Determination Panel (“the DP”) of the Pensions Regulator (“the Regulator”) decided to issue a Financial Support Direction (“FSD”) to the Targets (strictly a number of FSDs were determined to be issued, but we shall refer to them as one) pursuant to s.43 of the Pensions Act 2004 (“PA 2004”). The FSD would require the Targets to provide financial support for the Box Clever Group Pension Scheme (“the Scheme”) which has an estimated deficit of some £115m. The Targets exercised their right under s.96(3) PA 2004 to refer the determination to the Upper Tribunal (“the Tribunal”). In a decision released on 18 May 2018 the Tribunal (Rose J, Judge Timothy Herrington and Ian Abrams) confirmed that the Regulator had power to issue the FSD in this case and that it was reasonable to impose the requirements of the FSD on the Targets: see [2018] UKUT 0164 (TCC). The Targets now appeal to this Court against that decision with the leave of the Tribunal.
3. The Scheme was established with effect from 1 October 2001 under the terms of an Interim Trust Deed which was intended to be replaced in due course by a Definitive Trust Deed in circumstances we will come to later, but in fact never was. It provided benefits for employees of the Box Clever group of companies which was established between 1999 and 2000 as a joint venture (“the Joint Venture”) between the Granada group of companies and the Thorn group to take over their respective TV rental businesses.
4. The Joint Venture was formed against a background of a decline in the market for rented televisions which had been ongoing for many years by the late 1990s. With the benefit of hindsight, it can be seen that the continuation of this decline to the point where, within a few years, the market would no longer exist was inevitable. Even at the time, however, the decline was viewed as likely to continue, and both Granada and Thorn were implementing strategies to cope with it. Granada had also explored the sale of its rental business and had received offers or indicative offers of £400 million and £450 million.
5. Discussions between Granada and Thorn began in early 1999. The commercial rationale for the Joint Venture was to bring together the two largest businesses in the declining market for the rental of consumer electronics, thereby achieving economies of scale and a benefit from cost synergies through, for example, a rationalisation of stores, service infrastructure and staff. A valuation prepared for Granada by Lazard Brothers in March 1999 showed that, with the benefit of these cost synergies, the Granada business could be valued at £600 million. This was the figure ultimately adopted as the amount to be paid to Granada in consideration of the transfer of its rental business to the Joint Venture.
6. Eventually, it was agreed between Granada and Thorn that the appropriate enterprise value of the merged businesses was £1 billion and that they would participate equally

in the Joint Venture. Granada, as the owner of the larger business, would receive the greater “share of the cake”. The transfer of the businesses to the Joint Venture was to be financed by a bank loan to the Joint Venture secured on the assets of the Joint Venture and its subsidiaries, which would enable Granada and Thorn to be paid in cash. It was envisaged that the loan would be securitised a short time after completion.

7. The Joint Venture was thereafter established under the terms of a Contribution Agreement dated 17 December 1999, whereby Granada and Thorn each agreed to sell their respective TV rental businesses to the Box Clever group of companies. The ultimate holding company in the group was Box Clever Technology Limited (“BxC Tech”), in which Granada and Thorn each held 50% of the shares. We shall refer to Granada and Thorn in their capacity as shareholders in the Joint Venture collectively as the “Shareholders”. Annexed to this judgment is a structure chart of the Box Clever group as at 31 December 2009 which, as we will explain, is the relevant date for determining whether the Regulator had jurisdiction to issue the FSD in this case. Carmelite is the name of the former Thorn group. As can be seen from the chart, BxC Tech controlled the companies which operated the combined rental business via an intermediate holding company called Box Clever Holdings Limited (“BxC Holdings”). The companies in question included the operating subsidiaries of Box Clever Finance Limited (“BxC Finance”).
8. The sale of the rental businesses to the Joint Venture companies was completed in June 2000 for a total of £980m, of which £600m was payable to Granada. The £600m included some £73.9m in loan notes issued by BxC Finance of which £5m was applied as an equity contribution to BxC Tech. In addition to the loan notes, the purchase was funded with a loan facility to the Box Clever group of £860m from Westdeutsche Landesbank (“WestLB”), which was secured on the group’s assets under the terms of a debenture (“the Debenture”) dated 28 June 2000. BxC Holdings and BxC Finance together with the operating subsidiaries were parties to the Debenture as primary obligors and in that capacity covenanted to pay and discharge all the liabilities under the loan facility granted by WestLB to BxC Finance. Each of them also charged all of their assets (including, where relevant, the shares in any subsidiary) in favour of a Security Agent which acted as the agent and trustee for the lenders. The shares held by BxC Holdings in Telebank Television Rentals Limited (“Telebank”), Endeava Fulfilment Limited (“Fulfilment”) and Endeava Service Limited (“Endeva”) (we shall refer to Telebank, Fulfilment and Endeava collectively as “the Trio”) and the shares held in TUK Holdings Limited (“TUK”) by Thorn High Street Properties Limited (“THSP”) were therefore secured by a fixed first charge in favour of WestLB.
9. The loan facility provided under these arrangements was made without recourse to either Granada or Thorn, and under clause 2.4 of the Contribution Agreement Thorn and Granada were obliged to take the necessary steps to procure that each of the relevant Joint Venture companies drew down the maximum amount available to them under the WestLB facility. This meant that the acquisition of the rental businesses by the Joint Venture was highly leveraged and, as a result, it would need to generate substantial amounts of cash in order to service its debt. Failure to do so would lead to a default. Although the Joint Venture undertook this debt, the Joint Venture itself (as distinct from Granada or Thorn) carried out no due diligence of its own and received no advice as to the value of the businesses which it was acquiring or its ability to service the debt obligations that it would assume. Granada and Thorn undertook no legal obligation to

support the Joint Venture, and they were not required to charge their own assets as security for the debt taken on by the Joint Venture. Having obtained value for the businesses in the form of the cash paid for the transfer of their shares (used to pay off intra-group indebtedness and external debts), they were insulated from any further decline or even collapse of the business. At the same time, both Granada and Thorn stood to benefit from any upside in the Box Clever business whether by way of dividends or increases in the value of their shareholdings in BxC Tech.

10. These features of the Joint Venture were spelt out in the Shareholders' Agreement of 28 June 2000 which regulated the relationship between the Joint Venture parties. Under this agreement, major decisions relating to the Joint Venture required the approval of at least one of the directors representing Granada and one representing Thorn. Major decisions included the establishment of, or material amendment to, the Scheme. The Tribunal found that, in practice, major decisions were agreed informally between Mr Allen (a Granada appointed director and the Chief Executive of the Granada group) and Mr Hands, his Thorn counterpart; that the Joint Venture business was run on "autocratic" lines; and that no major decisions were made without the agreement of these two individuals.
11. Clause 3 of the Shareholders' Agreement provided:

"The parties intend that the Box Clever Group should be self-financing and should obtain additional funds from third parties without recourse to its Shareholders. Subject to any contrary agreement, no shareholder shall be obliged to contribute to the working capital or other financial requirements of the Company, whether by further subscription per shares, by loans, by guarantee or otherwise."
12. Clause 6 of the Shareholders' Agreement provided that all steps should be taken to ensure that 90% of the profits of the Joint Venture available for distribution should be distributed to the Shareholders in each year.
13. These provisions continued the principle whereby the parties to the Joint Venture agreement would extract maximum cash from the merged business on a non-recourse basis.
14. Under Schedule 10 to the Contribution Agreement the Box Clever group was to have its own pension scheme. This was to be established on a money purchase basis and be available to all permanent employees of BxC Tech and its subsidiaries. The level of basic contributions by the employers and the employees was to be agreed between BxC Tech, Granada and Thorn. During a transitional period, BxC Tech and its subsidiaries were to become participating employers in the existing Granada and Thorn pension schemes ("the Legacy Schemes"). Once the Scheme was established, there would be a transfer payment from the Legacy Schemes in respect of members who had become employees of Box Clever and wished to transfer their existing pension benefits to the new Scheme. Employees who did not wish to transfer their benefits would remain members of the relevant Legacy Scheme in respect of their existing pension rights, but would accrue new benefits from future pensionable service under the Scheme.

15. In the event, the interim participation period lasted until 1 October 2001 by which point it had been agreed that the Scheme should (like the Legacy Schemes) be a defined benefit scheme for existing Granada or Thorn employees who became members of the Scheme and agreed to transfer their accrued benefits under the relevant Legacy Scheme.
16. This development of a defined benefit scheme was first proposed in January 2001. The Shareholders were closely involved in and approved the proposal. The paper proposing this Scheme included among its authors Granada's Human Resources Director and referred to a defined benefit scheme as "the optimal arrangement for boxclever having regard to the dual needs of balancing acceptable emerging costs with the maintenance of appropriate employee relations".
17. The Tribunal explained what was meant by this as follows:

"352. We take from this that the 'maintenance of appropriate employee relations' was an important factor in the decision to establish a defined benefit rather than a money purchase scheme. The evidence shows that the stance of the Trade Union that represented many of the employees was a key consideration. The parties were keen to keep the Union onside by offering the pension proposal so as to assist with negotiations that would have to take place with the Union on other matters. Therefore, the new proposal was that separate sections were to be established within the Scheme providing mirror image defined benefits for ex-Granada and ex-Thorn members respectively who became members of the Scheme."
18. The establishment of the defined benefit scheme was approved in the manner envisaged by the Shareholders' Agreement through a resolution of the Board of Directors of BxC Tech passed at a meeting held on 7 March 2001. At the same meeting, the directors discussed the strategy of "managed decline" dictated by "the endemic shortcomings of rental". This strategy included achieving savings by reducing radically the number of shops over the coming years. This was a significant matter because, while it would achieve cost savings, it also increased the risk of a default by the Joint Venture on its borrowing covenants.
19. The proposal for a defined benefit scheme was approved on the basis that all employees wishing to join would have to agree to transfer their Legacy Scheme benefits to the new Scheme. This would have meant that there would have been no continuing obligations on the part of Granada in relation to pension liabilities in respect of transferring employees. If an employee wished to retain their accrued pension rights in the Granada scheme as a deferred member then they would only be entitled to defined contribution benefits in respect of pensionable service under the Scheme. For new employees (who had not been employees of either Granada or Thorn), the Scheme would provide only money purchase benefits. A transferring Granada employee would have a single final pension based upon their final salary with the Joint Venture calculated by reference to their entire period of service with Granada and the Joint Venture combined. Such a "Continuous Service Benefit" was clearly valuable to employees, provided that the new Scheme was properly funded.

20. In mid-July 2001 employees were sent a “transfer pack” explaining the new Scheme, including that it would no longer be possible to earn benefits in the Legacy Schemes but that identical benefits would be provided in the new Scheme. The majority of members of the Legacy Schemes elected to transfer to the new Scheme.
21. No promises were made to transferring employees that Granada or Thorn would stand behind the new Scheme. On the other hand, it appears that nothing was said to them either to explain the structural weakness of the Joint Venture, and thus of the new employer’s covenant, as a result of the debt burden which it was carrying.
22. It was envisaged that the new Scheme would receive a bulk transfer payment which would be large enough to fund the past service liabilities of the transferring members, plus the costs of providing increases based on salary increases while they worked for the Joint Venture. In the event, however, the terms for this transfer payment could not be agreed. As a result, it never happened and no transfer took place. Instead, the Scheme was established with effect from 1 October 2001 in respect of future service only on the terms of the Interim Trust Deed referred to above under which BxC Tech was the principal employer (even though it did not directly employ any of the members of the Scheme). The Trio, TUK and UK Consumer Electrics Limited (“UKCE”) (another company in the group) were the participating employers (“the Employers”). Box Clever Trustees Limited (incorporated on 3 April 2001) was the trustee of the Scheme (“the Trustee”). It has continued on this basis ever since.
23. Despite the initial expressions of optimism that the merger of the two rental businesses in the Joint Venture would provide cost savings and synergies that would allow the business to continue and grow, it was apparent from at least March 2001 that the business was in terminal decline which needed to be managed with a strategy based on sales of the rental book and store closures. By June 2003 BxC Finance had agreed a suspension of the payments due under the WestLB loan to allow a new business plan to be prepared. But on 24 September 2003 WestLB gave notice of default under the loan facility agreement which constituted a Declared Default under the Debenture. Administrative Receivers were appointed on that date over all of the assets of BxC Finance, the Trio, THSP, TUK and UKCE. Receivers were appointed over the assets of Telebank and BxC Holdings on 20 November 2003 and 21 December 2004 respectively. BxC Tech was never placed into receivership. BxC Holdings was in receivership until 7 September 2009 and was dissolved on 16 March 2010. All of the Box Clever companies are insolvent.
24. Following the appointment of Administrative Receivers in 2003, neither Granada nor Thorn had any further involvement in the Box Clever business.
25. At the time the Receivers were appointed, the Scheme had a funding deficit of some £25m on a gilts-matching basis which none of the Employers under the Scheme was able to meet. As mentioned earlier, the deficit has since increased to £115m. In 2003, once it was clear that the Scheme would never provide the continuous service benefits that had been promised to transferring members, the Trustee decided to introduce what was described as a Top-Up Arrangement. Under this arrangement, the benefits to transferring employees in respect of pensionable service with Box Clever would be based on their final pensionable pay at the end of that service. They would then receive Top-Up benefits to make up the difference between the combined value of their pensions under the Granada Legacy Scheme and the new Scheme on the one hand, and

what they would have received had they been entitled to a final salary pension based on continuous service with both Granada and Box Clever on the other.

26. On 29 September 2003, shortly after the appointment of the Administrative Receivers over most of the Box Clever companies, the directors of the Trustee met with the Administrative Receivers who confirmed that they would continue to make contributions to the Scheme at current levels but would not make up the funding deficit. At the same meeting, the Trustee resolved to change the investment strategy to 100% gilts and index-linked stocks.
27. Under the terms of the Interim Trust Deed, the Scheme could be closed to future accrual by the Principal Employer, BxC Tech, with the consent of the Trustee. At a meeting held on 16 December 2003 the directors of the Trustee decided to take this step with effect from 31 December 2003, and the necessary deed of amendment was executed by BxC Tech and the Trustee on 23 December 2003. At the same time, the Top-Up Arrangement was formally incorporated into the rules of the Scheme.
28. On 4 November 2003 the Administrative Receivers had granted pay rises of 3% to all Endeva staff and of 2% to the remaining staff with effect from 1 October 2003. Exceptional salary increases in excess of these amounts were granted to 16 employees to reflect their increased responsibilities following the receivership.
29. The Trustee first considered whether to wind up the Scheme in October 2003 (having been requested to do so by the Administrative Receivers), and gave frequent further consideration to this question in the years that followed. The main reasons why it decided not to wind up the Scheme were that:
 - (i) keeping the Scheme going allowed negotiations to take place with Granada, Thorn and the Legacy Schemes about providing assistance to the Scheme, whereas if the Scheme had completed its winding up by buying out benefits, it would have become impossible for members to transfer their benefits back to the Legacy Schemes. In fact, negotiations with Granada and Thorn continued up until October 2009, with a number of offers being made by Granada and Thorn, although in the event no agreement was ever reached. In October 2009 Granada (by then ITV) advised that it was no longer able to make an offer;
 - (ii) running the Scheme on as a closed scheme ensured that members could benefit in the event that the Regulator decided to issue an FSD, once the relevant statutory powers came into effect in April 2005; and
 - (iii) the Trustee wished to ensure that the Scheme was eligible for entry into the Pension Protection Fund (“the PPF”) once the provisions of the PA 2004 came into effect. Although not yet established, the PPF was in contemplation from October 2003.
30. This was a risky strategy, not least as the Scheme’s funding position became progressively worse while it ran on. Before the Tribunal this strategy was criticised strongly by the Targets. Save in one respect which we address below, these criticisms were not renewed on the appeal to this Court.

31. In the end, no financial assistance was provided by either ITV or Thorn. In July 2005 the Trustee wrote to the Regulator asking it to consider issuing an FSD, but it was not until 30 September 2011, following the Targets' unsuccessful clearance application which we will come to shortly, that a Warning Notice was served specifying a look-back date of 31 December 2009. This was followed by the DP's determination to issue the FSD which it made on 21 December 2011.
32. The Scheme is now (since November 2014, when one of the Scheme's participating employers was wound up) in an assessment period, although the assessment is being delayed pending the outcome of the present proceedings.

Pensions Legislation

33. Adverse market conditions, coupled with increases in life expectancy and the expense of funding defined benefit pension entitlement, have led to significant deficits in many defined benefit pension schemes. Since the early 1990s the amount of any shortfall in the assets of an occupational pension scheme has qualified as a statutory debt due to the trustees of the scheme in the event of the insolvency of the employer, and is provable (but not as a preferential debt) in the liquidation of the employer company together with any other unsecured liabilities: see now s.75 Pensions Act 1995.
34. The remedies available to such pension funds in the event of a breakdown in the contractual funding arrangements between the scheme and the employer have been supplemented and reinforced by the provisions of the PA 2004. Section 107 PA 2004 established the PPF under a Board with statutory responsibility for schemes affected by what is defined in s.121 as an insolvency event. This includes the appointment of an Administrative Receiver: see s.121(3)(c). In such circumstances the PPF takes over the assets and liabilities of the scheme and pays the members compensation at a prescribed rate which is generally less than the rate provided for under the scheme. The PPF is financed by levies upon other occupational pension schemes, subject to a ceiling which the Secretary of State must specify prior to the beginning of each financial year: see ss.175-178 PA 2004.
35. A concern underlying the measures introduced by the PA 2004 was that some employers might seek to arrange their affairs so as to throw the burden of any deficit in a relevant pension scheme onto the PPF. This is commonly referred to as "moral hazard". The power to impose an FSD was (at least in part) a response and an intended deterrent to such arrangements. Section 5(1) PA 2004 states that the main objectives of the Regulator in exercising its functions under the Act include the protection of the benefits of members of occupational pension schemes covered by the legislation, and the reduction of the risk of compensation becoming payable from the PPF which, as explained, is funded by other levy-payers. Section 43 PA 2004 gives the Regulator power to issue an FSD to a person who at the relevant time is either an employer in relation to an occupational pension scheme or is connected with or an associate of the employer. This is to be determined in accordance with s.435(10) of the Insolvency Act 1986 ("IA 1986"). Where the necessary relationship exists, the Regulator must also consider whether it is reasonable to impose the requirements of the FSD on the relevant target: see s.43(5)(b).
36. An FSD imposes on the target an obligation to provide financial support for the scheme which must be put in place within the period specified in the direction. It can include

future financial support during the life of the scheme: see s.43(3). There is provision in s.46 for a potential target to make an application to the Regulator for a clearance statement which includes a statement by the Regulator that in its opinion it would not be reasonable to impose the requirements of an FSD on the applicant in relation to the scheme. The precise circumstances envisaged by the legislature in including this clearance power are in dispute. However, it would in principle obviously enable a clearance statement to be obtained in relation to a transaction (such as the Joint Venture in this case) involving the establishment of a new defined benefit pension scheme for the existing employees of a transferred business in circumstances where the newly created purchasing companies and the trustees of the pension scheme would have no contractual recourse to the vendor companies who were also the members' previous employers. The difficulty in the present case is that no advance clearance was possible because, at the time when the sale and establishment of the Joint Venture took place in 2000, and, more particularly, when it was decided to establish a defined benefit scheme in 2001, the PA 2004 did not exist, and there had not been any indication of the possibility of legislation containing the provisions of s.43. An application for a clearance statement was, however, made by ITV plc on 17 November 2009 on behalf of itself and other companies within the ITV group including the Targets. It was refused in March 2010.

37. The power to issue an FSD is one of three relevant powers conferred on the Regulator under Part 1 of the PA 2004. The other two are the power to issue a contribution notice under s.38 and the power to make a restoration order under s.52. A contribution notice imposes an obligation to pay a specified sum to the trustee of an occupational pension scheme (other than a money purchase scheme) or the Board of the PPF if it has assumed responsibility for the scheme. The sum specified in a notice under s.38 may be either the whole or a specified part of the shortfall in the scheme calculated in accordance with s.39. The s.38 notice may be issued only if the target was party to an act or a deliberate failure to act which had a detrimental effect in a material way on the likelihood of accrued benefits being received by members of the scheme, or where the purpose or a main purpose of the act or failure was to prevent a statutory debt becoming due from the employer under s.75 PA 1995 or to prevent the recovery of such a debt: see s.38(3).
38. As in the case of an FSD, the PA 2004 makes provision for the issue of a clearance statement by the Regulator in relation to conduct which might attract a contribution notice: see s.42(1). This can include a statement that the target would not be a party to an act or a deliberate failure to act of the kind specified in s.38(5)(a) as falling within the jurisdiction of the Regulator under s.38(3). But if the act or failure to act occurred before 27 April 2004 then it is not conduct which can form the basis of a contribution notice: see s.37(3)(b). Although that date is before the commencement of the relevant PA 2004 provisions (6 April 2005), it was the date on which the draft provisions were announced in Committee and therefore a time when (and certainly after which) both the form and content of the proposed legislation were known.
39. The purpose of a restoration notice under s.52 PA 2004 is to reverse a transaction at an undervalue involving the assets of a scheme. As in the case of a contribution notice, the power conferred on the Regulator does not apply to a money purchase scheme and cannot be exercised in relation to transactions entered into prior to 27 April 2004, or

more than two years before an insolvency event has occurred in relation to the employer: see s.52(2)(b).

The Relevant Legislation

40. The provisions of the PA 2004 which are relevant to this appeal are those in force as at 21 December 2011, which is the date when the DP decided to issue the FSD.
41. As mentioned earlier, the statutory objectives of the Regulator are set out in s.5(1) PA 2004 as follows:
 - “(a) to protect the benefits under occupational pension schemes of, or in respect of, members of such schemes,

...

(c) to reduce the risk of situations arising which may lead to compensation being payable from the Pension Protection Fund ...”
42. In addition the Regulator, when determining whether to exercise a regulatory function such as the issue of an FSD, must have regard to the matters set out in s.100(2). They are:
 - “(a) the interests of the generality of the members of the scheme to which the exercise of the function relates, and

(b) the interests of such persons as appear to the Regulator to be directly affected by the exercise.”
43. In this case the interests of both the Targets and the Trustee are included under s.100(2)(b).
44. The power conferred on the Regulator to issue an FSD is contained in s.43 which, in the version of PA 2004 current as of 21 December 2011, provided as follows:
 - “(1) This section applies in relation to an occupational pension scheme other than—
 - (a) a money purchase scheme, or
 - (b) a prescribed scheme or a scheme of a prescribed description.
 - (2) The Regulator may issue a financial support direction under this section in relation to such a scheme if the Regulator is of the opinion that the employer in relation to the scheme—
 - (a) is a service company, or

- (b) is insufficiently resourced,
 - at a time determined by the Regulator which falls within subsection (9) (“the relevant time”).
- (3) A financial support direction in relation to a scheme is a direction which requires the person or persons to whom it is issued to secure—
 - (a) that financial support for the scheme is put in place within the period specified in the direction,
 - (b) that thereafter that financial support or other financial support remains in place while the scheme is in existence, and
 - (c) that the Regulator is notified in writing of prescribed events in respect of the financial support as soon as reasonably practicable after the event occurs.
- (4) A financial support direction in relation to a scheme may be issued to one or more persons.
- (5) But the Regulator may issue such a direction to a person only if—
 - (a) the person is at the relevant time a person falling within subsection (6), and
 - (b) the Regulator is of the opinion that it is reasonable to impose the requirements of the direction on that person.
- (6) A person falls within this subsection if the person is—
 - (a) the employer in relation to the scheme,
 - (b) an individual who—
 - (i) is an associate of an individual who is the employer, but
 - (ii) is not an associate of that individual by reason only of being employed by him, or
 - (c) a person, other than an individual, who is connected with or an associate of the employer.
- (7) The Regulator, when deciding for the purposes of subsection (5)(b) whether it is reasonable to impose the requirements of a financial support direction on a particular person, must have regard to such matters as the Regulator

considers relevant including, where relevant, the following matters—

- (a) the relationship which the person has or has had with the employer (including, where the employer is a company within the meaning of subsection (11) of section 435 of the Insolvency Act 1986 (c 45), whether the person has or has had control of the employer within the meaning of subsection (10) of that section),
 - (b) in the case of a person falling within subsection (6)(b) or (c), the value of any benefits received directly or indirectly by that person from the employer,
 - (c) any connection or involvement which the person has or has had with the scheme,
 - (d) the financial circumstances of the person, and
 - (e) such other matters as may be prescribed.
- (8) A financial support direction must identify all the persons to whom the direction is issued.
- (9) A time falls within this subsection if it is a time which falls within a prescribed period which ends with the determination by the Regulator to exercise the power to issue the financial support direction in question.
- (10) For the purposes of subsection (3), a scheme is in existence until it is wound up.
- (11) No duty to which a person is subject is to be regarded as contravened merely because of any information or opinion contained in a notice given by virtue of subsection (3)(c).

This is subject to section 311 (protected items).”

45. Financial support for the purposes of s.43 can include a number of different arrangements which are set out in s.45 as follows:

- “(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 schedule of contributions under section 227, and
 - (b) the liabilities for any debt which is or may become due to the trustees or managers of the scheme from the employer whether by virtue of section 75 of the Pensions Act 1995 (deficiencies in the scheme assets) or otherwise.”
- 46. It is apparent from s.45(3) that separate consideration must be given to the reasonableness of any arrangements proposed including, of course, the quantum of any contribution to a funding deficit. The Tribunal recognised in its decision that some of the issues raised by the Targets which were said to make it unreasonable to issue an FSD in this case will also have a relevance to the quantum of any financial support. For the same reason, the possibility of adjusting quantum to reflect the matters relied on by the Targets may be a relevant factor to consider in relation to whether it is reasonable to issue an FSD.
- 47. Clearance statements are dealt with under s.46, which provides as follows:
 - “(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—
 - (a) may request further information from the applicant;
 - (b) 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.”

48. It is common ground between the parties that the Scheme is not excluded by s.43(1), and that (if relevant association is established) the Employers were insufficiently resourced at the relevant time within the meaning of s.43(2)(b). In this case the Regulator chose 31 December 2009 as the relevant time (or what is often referred to as “the look-back date”) with the result that the prescribed two-year period under s.43(9) and the regulations then in force for any determination to issue an FSD ended on 31 December 2011: see regulation 5 of the Pensions Regulator (Financial Support etc)

Regulations 2005 (S.I. 2005/2188) as amended by regulation 2(2) of the Pensions Regulator (Miscellaneous Amendment) Regulations 2009 (S.I. 2009/617).

The Issues

49. Although some of the issues have now fallen away, the dispute between the Targets and the Regulator both before the Tribunal and on this appeal centres on three main issues:
- (1) was s.43 PA 2004 intended to have, or can it lawfully be given, retrospective effect in the sense of permitting the Regulator to have regard to events and other matters which pre-date the coming into effect of the relevant provisions of the Act on 6 April 2005? The Targets contend that, as a matter of domestic law, s.43 should be construed as having no application to events occurring prior to that date or, alternatively, that, on a proper application of Article 1 of the First Protocol to the ECHR (“A1P1”) as given effect by ss.3 and 6 of the Human Rights Act 1998 (“HRA”), s.43 should be read down so as to exclude it having such effect. Since all the relevant events relied upon by the DP in deciding whether it was reasonable to issue an FSD occurred in the period prior to April 2005, this would exclude the power to issue an FSD in this case;
 - (2) the Targets dispute that, on the relevant date of 31 December 2009, they were “connected with or an associate of” any of the Employers within the meaning of s.43(6)(c) which is the provision relied on by the Regulator in this case as satisfying the jurisdictional test under s.43(5)(a). The Targets accept that, but for the provisions of the Debenture and the subsequent appointment of the Administrative Receivers, the necessary association between them, the Trio and TUK would have existed at the relevant time. But they say that, in the case of the Trio, the Declared Default under the Debenture and/or the demand sent to the Chargors under the Debenture on 24 September 2003 had the effect of removing the power of BxC Holdings to control voting at a general meeting of its subsidiaries. In the case of TUK, the same result is said to have been achieved either by the demand served on THSP or by the appointment of the Administrative Receivers; and
 - (3) the Targets contend that, even if s.43 does empower the Regulator to rely on matters which pre-date the commencement of the legislation, and the Targets remained associated with the Employers as at the relevant date, it could not be reasonable to issue an FSD in this case given that the Joint Venture arrangements are accepted to have been a reasonable commercial decision for the Targets to have taken at the time; that they did not involve any element of fault or misconduct including moral hazard; and that they could not have been the subject of an application for a clearance statement before a decision on implementation was made. In this Court the challenge on reasonableness is to the decision of the Tribunal that it was reasonable for the Regulator to issue an FSD. Since, as we explain later, an appeal against that decision lies only in respect of an error of law, the Targets contend (and must establish) that the decision of the Tribunal is one which no reasonable tribunal could properly reach on the facts of this case or was otherwise legally flawed.

Issue 1: Retrospectivity

Construction of the legislation

50. Section 43 as enacted contains no express time limits in relation to the matters which the Regulator must take into account when deciding whether it is reasonable to impose the requirements of an FSD on the Targets. Although the identification of the Targets as permissible objects of the exercise of the power depends under s.43(5)(a) on their being associated with the Employers at the relevant date (in this case 31 December 2009), the terms of s.43(5)(b) are themselves neutral as to what factors are relevant and admissible to inform the Regulator's opinion as to whether the issue of an FSD against the Targets would be reasonable.
51. Section 43(7) contains a list of certain matters which the Regulator must consider (where relevant) as part of this exercise, while recognising that there will be other relevant matters which it must also take into account. Some of these factors are to be assessed by reference to how things stand as at the relevant date. The most obvious perhaps is the financial circumstances of the target: see s.43(7)(d). But it is clear both from the terms of the other provisions of s.43(7), and also from the nature of the exercise involved in a decision whether to issue an FSD, that the focus of the Regulator will, to a great extent, be on past events. While s.43(5)(a) operates to limit the exercise of the power to those who satisfy the statutory test of association as at the relevant date, reasonableness may require an examination of that relationship from its inception and a consideration of other relevant matters including, for example, the value of the benefits which the target has derived from it.
52. The references in s.43(7)(a) and (c) to the relationship or connection which the target "has had" with the employers under the pension scheme and with the pension scheme contains no obvious contextual limitation as to how far back the Regulator may go. On the face of it, the references to the relationship, connection or involvement between the target and the employer in question suggest that the whole of that relationship over whatever period it extended could be relevant and, as the opening words of s.43(7) make clear, relevance is a matter for the Regulator to determine.
53. A significant, perhaps the most significant, factor relied on by the Targets in this part of their argument is the absence of any opportunity to have sought a clearance statement from the Regulator under s.46 prior to establishing the Scheme. Mr Green QC, in his submissions on the issue of reasonableness, stressed that not only did the Joint Venture pre-date in its entirety the commencement of the legislation, but it also took place well before any indication existed that legislation containing measures of this kind was in contemplation by the legislature. Not only did this preclude any form of statutory clearance in advance of the Scheme's establishment (or alternatively a refusal of such clearance); it also meant that decisions, such as the one to create a defined benefit pension entitlement for some members of the Scheme, were taken at a time when there was no reason to believe that there could be some recourse to the Targets in the event that the Employers failed.
54. The Targets submit that the unfairness inherent in permitting the Regulator to rely on pre-April 2005 events to support its decision to issue an FSD compels the conclusion that Parliament cannot have intended the PA 2004 to have this effect. Lord Pannick QC relies on a principle of statutory construction according to which Parliament is

presumed not to have intended a statute to have retrospective effect. Retrospective effect is, he submits, to be given a wide meaning which is not limited to legislation which alters with retrospective effect rights which have already accrued, or renders unlawful conduct which at the time it took place was lawful. It extends to legislation similar to s.43 which creates a present or prospective liability based on conduct which pre-dates the coming into effect of the relevant legislation.

55. In *Bennion on Statutory Interpretation* (7th edition) the presumption against retrospectivity is stated in the following terms:

“5.12

- (1) It is a principle of legal policy that, except in relation to procedural matters, changes in the law should not take effect retrospectively.
- (2) Legislation is retrospective if it alters the legal consequences of things that happened before it came into force.

5.13

- (1) Unless the contrary intention appears, an enactment is presumed not to be intended to have a retrospective operation.
- (2) The strength of the presumption varies from case to case, depending on the degree of unfairness that would result from giving the enactment retrospective effect.
- (3) The greater the unfairness the clearer the language required to rebut the presumption...”.

56. One obvious difficulty about these principles is to identify what type of retrospective operation is sufficient to engage the presumption and how the question of fairness is to be judged. No-one can expect the law to stand still: it must react to changing circumstances and problems as they unfold. Clearly, legislation which removes or alters already-accrued rights is likely to be more objectionable, and therefore unfair, than legislation which imposes a new liability based on past conduct. But the balance of fairness may also be affected by the consequences of relying on past events: could, for example, the Targets have acted any differently had they had advance notice of the changes? Are they to be assumed to have altered their position or arranged their affairs based on the law at the time, in a way which makes it unfair now to impose a liability based on those past events? Was it reasonable for persons in the position of the Targets to assume that the law would not change in the future?

57. In approaching this issue, the courts have avoided adopting a rigid or mechanistic rule for determining whether the legislation in question is to be treated as retrospective. Instead, they have recognised the various forms and degrees of retrospective effect which can be incorporated into legislation as a spectrum, and have approached the issues of construction by reference to the degree of unfairness which the particular

measure may produce. This is necessarily an objective question which falls to be determined by looking at the legislation and its potential effects in general terms. It cannot depend on how it has operated in a particular case, but the particular case will often provide useful, perhaps compelling, evidence of how the legislation is capable of operating unfairly. It is worth noting in this context that the Targets do not attribute unfairness in this case to a positive counter-factual scenario of what they would have done back in 1999-2001 had s.43 then been in force or at least in contemplation, although Mr Green did submit that, in that event, they would not have established a defined benefits scheme. Not surprisingly, there was no evidence before the Tribunal of that kind. Changes in the proposed Scheme to include a defined benefit scheme for transferring employees were due, at least in part, to a decision to promote and preserve good industrial relations and to obtain the co-operation of the trade union in negotiations on other matters which the Tribunal did not identify. It is impossible to know, and idle to speculate, as to whether these considerations would have prevailed over the potential downside of a future liability to contribute to a shortfall in the Scheme, should that arise. The Targets' case on unfairness is therefore limited to a lack of opportunity to at least consider their position at the time, and to apply for a clearance statement before deciding whether to proceed.

58. In *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 the issue was whether in an arbitration the power to dismiss a claim for want of prosecution on grounds of inordinate and inexcusable delay which had been introduced into the Arbitration Act 1950 by s.102 of the Courts and Legal Services Act 1990 which came into force on 1 January 1992 could be exercised on the basis of delay occurring before that date. The House of Lords held that, as a matter of construction of the words of the amending legislation, the "delay" included delay occurring before the commencement date and that reading of the legislation was not precluded by a consideration of the unfairness or hardship which the introduction of the power with that degree of retrospectivity could cause. Lord Mustill at page 524 G-525 H said:

"My Lords, it would be impossible now to doubt that the court is required to approach questions of statutory interpretation with a disposition, and in some cases a very strong disposition, to assume that a statute is not intended to have retrospective effect. Nor indeed would I wish to cast any doubt on the validity of this approach for it ensures that the courts are constantly on the alert for the kind of unfairness which is found in, for example, the characterisation as criminal of past conduct which was lawful when it took place, or in alterations to the antecedent national, civil or familial status of individuals. Nevertheless, I must own up to reservations about the reliability of generalised presumptions and maxims when engaged in the task of finding out what Parliament intended by a particular form of words, for they too readily confine the court to a perspective which treats all statutes, and all situations to which they apply, as if they were the same. This is misleading, for the basis of the rule is no more than simple fairness, which ought to be the basis of every legal rule. True it is that to change the legal character of a person's acts or omissions after the event will very often be unfair; and since it is rightly taken for granted that Parliament will rarely wish to

act in a way which seems unfair it is sensible to look very hard at a statute which appears to have this effect, to make sure that this is what Parliament really intended. This is, however, no more than common sense, the application of which may be impeded rather than helped by recourse to formulae which do not adapt themselves to individual circumstances, and which tend themselves to become the subject of minute analysis, whereas what ought to be analysed is the statute itself.

My Lords, my purpose in stressing this point is not to suggest that the courts below approached the question in a mechanistic way. Their careful judgments show that this was not the case. It is simply to explain why I do not find it necessary to cite and analyse the numerous authorities on retrospective effect, but prefer to proceed directly to the ascertainment of the intention which Parliament intended section 13A to achieve, by a reference to the following statement by Staughton L.J. in *Secretary of State for Social Security v. Tunncliffe* [1991] 2 All E.R. 712, 724, quoted by Sir Thomas Bingham M.R. in the present case, ante, p. 495:

“In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.”

Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say.”

59. There was also consideration of the presumption against the retrospective operation of legislation in *Wilson v First County Trust Ltd (No. 2)* [2004] 1 AC 816 in relation to the operation of s.3(1) HRA. The House of Lords had to decide whether it should be construed as having retrospective effect in relation to credit transactions which occurred before the HRA took effect. The transactions were rendered unenforceable for non-compliance with s.60(1) of the Consumer Credit Act 1974, whose operation in that regard was said to breach the credit company's right to protection of property under A1P1.
60. The House of Lords approved the test set out by Staughton LJ in his judgment in *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712, 724, CA and held that it could not have been Parliament's intention that s.3(1) should alter existing rights and obligations under an agreement which pre-dated the legislation. However, in a number of the speeches, the members of the Appellate Committee were careful to emphasise the distinction between legislation which altered the effect of transactions which pre-dated the legislation and the rights accrued under them, and cases where the liability imposed *de novo* by the legislation depended upon events which had happened in the past. Lord Hope of Craighead said at [98]:

“Then there is the general presumption that legislation is not intended to operate retrospectively. That presumption is based on concepts of fairness and legal certainty. These concepts require that accrued rights and the legal effect of past acts should not be altered by subsequent legislation. But the mere fact that a statute depends for its application in the future on events that have happened in the past does not offend against the presumption. For a recent example of this point reference may be made to *R v Field* [2003] 1 WLR 882. In that case it was held that the making of a disqualification order under section 28 of the Criminal Justice and Court Services Act 2000 against a defendant from working with children in the future did not offend against the presumption where the offending behaviour had occurred before that Act came into force. It illustrates the point that there is an important distinction to be made between legislation which affects transactions that have created rights and obligations which the parties seek to enforce against each other and legislation which affects transactions that have resulted in the bringing of proceedings in the public interest by a public authority. The concepts of fairness and legal certainty carry much greater weight when it is being suggested that rights or obligations which were acquired or entered into before 2 October 2000 should be altered retrospectively.”

61. The same issue was considered by the Supreme Court in *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] AC 1016 (“*Welsh Asbestos*”). This was a challenge by various insurers to the legislative competence of the Welsh Assembly to pass the above-mentioned Bill, which conferred on NHS Wales the right to recover from employers the cost of treating their employees for any asbestos-related disease. The Bill included in s.14 a provision under which any insurance policy which covered the employers' liability to the employee in respect of the disease was to be treated as

extending to this additional liability for the cost of NHS treatment, whether the policy was issued before or after the enactment of the Bill. The insurers contended that provisions in this form would breach their rights under A1P1.

62. We will have to return to this case when we come to consider the Targets' alternative objection under A1P1 to giving s.43 retrospective effect. But it is worth noting that there was agreement in the Supreme Court that the Bill did operate retrospectively in a way which engaged A1P1 and, subject to what we have said about the need to avoid rigid categorisation of what does and does not amount to retrospectivity, we can see no reason in principle for not adopting the same approach in relation to the domestic issue of statutory construction. As Lord Thomas of Cwmgiedd CJ noted at [103] (in a passage with which Lord Mance, speaking for the majority, expressly agreed at [41]):

“Although the charges which can be recovered are only those that are incurred after the coming into force of the Bill and the liability to pay Ministers arises only where a compensation payment is made after the coming into force of the Bill, there is an element of retrospectivity in the imposition of the machinery of direct liability on employers. The liability imposed, though only in respect of future charges, is retrospective, as it is a new liability owed directly to Welsh Ministers which arises only by reason of negligence or breach of statutory duty which had occurred prior to the coming into force of the Bill. It is not simply an obligation to make future payments to an employee in respect of a recognised head of damages for an established liability, as would be the case if the machinery adopted had been to impose charges directly on the employees and recovery been obtained from employers. In the case of the employers, prior to the Bill, they would have had no such direct liability to Welsh Ministers. Thus the second aim and effect of the Bill has an element of retrospectivity.”

63. At [207] the Tribunal said this:

“It is clear from this analysis that the application of new legislation to existing circumstances does involve a degree of retrospectivity which may create a degree of unfairness or hardship. The court is therefore required to consider whether Parliament had intended legislation to have that effect. But this is not a binary question of whether the legislation is or is not retrospective and therefore whether the presumption against retrospectivity is or is not engaged. Whether Parliament had that intention depends on the degree of unfairness involved, the greater the unfairness the less likely it is that Parliament intended that result.”

64. Lord Pannick submitted that this was a correct statement of the law derived from the cases we have referred to. But the Tribunal, he says, failed properly to apply these principles in the passages in the decision which follow. It said:

“215. In our view, s 43 is not retrospective legislation as that term is defined by *Bennion* as stated at [198] above. We agree with the Regulator’s characterisation of s 43 as providing a present solution to a present problem; namely an employer being insufficiently resourced relative to its pension liabilities. That current situation may well have arisen because of the way in which the employers and those connected with them had been run historically. It may well be a result of events and transactions that took place some time before PA 2004 came into force. The purpose of the legislation is to create a rescue framework for pension schemes which are in deficit through the medium of imposing new liabilities on those who have had the necessary degree of association and connection with the relevant scheme at the relevant time. The legislation clearly could not meet those objectives if the Regulator was not able to take into account events which had occurred prior to the legislation coming into force, even if those events had sown the seeds of the problems that exist at the time when the exercise of the powers in the legislation is under consideration.

216. In our view the legislation is a paradigm example of legislation which does alter existing rights and duties but does not do so in a manner which is retroactive. There are new financial obligations imposed by reference to transactions that have been entered into before the legislation came into force but they only operate prospectively and do not alter the legal effect of transactions that have already been entered into. Granada entered into the Joint Venture transaction and received consideration for the sale of the assets that took place pursuant to the transaction. At the time of the transaction, it may well have assumed that there was no prospect of any future liability being incurred in respect of that transaction as a result of a change of legislation in the future. But, as Lord Rodger said at [192] of *Wilson*, individuals and businesses run the risk that Parliament may change the law governing their affairs and, as was the case in *West v Gwynne*, may suffer financial detriment because of the imposition of a new liability.

...

219. In our view Lord Pannick’s reliance on *Welsh Asbestos* is misplaced. Unlike the position in *Welsh Asbestos*, s 43 does not seek to impose a new liability, or augment an existing one, arising out of a past wrong. We do not accept that the issue of an FSD is properly characterised as an imposition of a financial sanction in respect of acts and omissions committed before the legislation came into force. As will become apparent later in this decision, we accept that the transactions that led to the establishment of the Joint Venture were perfectly legitimate business transactions which were not designed to enrich the

Targets at the expense of other parties. The Regulator's decision to issue an FSD arose out of its consideration of the circumstances of the Scheme as at the lookback date, a date which is sometime after the legislation has come into force, and whether it would be reasonable to impose an FSD in the light of those circumstances. Seen in that light, we cannot accept Lord Pannick's submission that the imposition of a liability in respect of existing circumstances without the attribution of any wrongdoing makes the Regulator's action more objectionable. It is not a matter of whether there is fault or criticism or no fault or criticism; rather it is the fact that the test for the issue of an FSD is not necessarily linked to one or more events or transactions but is linked to a state of affairs that exists at a particular time.

220. We therefore conclude that the presumption against retrospective legislation is engaged only lightly, if at all, in this case.”

65. The conclusion in [220] needs to be read in the context of the discussion which precedes it. It is intended to encapsulate the Tribunal's assessment that the degree of retrospectivity involved in s.43 is very much at the lower end of the scale. The Tribunal is saying no more than that legislation such as s.43 which imposes a new liability to contribute to a current pension deficit based on a consideration of past events is very different from legislation which removes already accrued rights (as in *Wilson*), or which amends existing contracts so as to cover loss which at the time of the contract was not recoverable (as in *Welsh Asbestos*).
66. Legislation which creates a present or prospective liability based on a current state of affairs will often not be classifiable as retrospective even though the present condition of most things is the consequence of past events. Many of the cases use taxation as an obvious example of this. A proposal to levy an annual tax on houses worth over £2m could be said to be unfair because it penalises owners who have lived there for many years and may have purchased the property when it was worth a fraction of its current value. They have had no control over, or responsibility for, house price inflation and could not have anticipated either the rise in value or the possibility of the levy at the time when they bought it. Even those who purchased houses which were worth over £2m at the time may be able to say that, had the tax been anticipated, they would have purchased a cheaper property. But in neither case would the imposition of the tax be retrospective. It would impose a liability on present ownership by reference to present value. Although the circumstances which have led to the taxpayer owning a house of that value will vary, in neither of the cases mentioned above would the tax legislation depend for its operation on anything but the current value of the property. This point was touched on by Lord Rodger of Earlsferry in his speech in *Wilson* at [192]:

“Since provisions which affect existing rights prospectively are not retroactive, the presumption against retroactivity does not apply. Nor is there any general presumption that legislation does not alter the existing legal situation or existing rights: the very purpose of Acts of Parliament is to alter the existing legal situation and this will often involve altering existing rights for

the future. So, as Dickson J went on to point out in *Gustavson Drilling* [1977] 1 SCR 271, 282-283, with special reference to tax legislation:

“No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.”

As the sparks fly upward, individuals and businesses run the risk that Parliament may change the law governing their affairs.”

67. Section 43 differs from tax legislation of this kind because it requires the Regulator to base its determination of reasonableness on past events which, on the Regulator’s construction of s.43(7), can include events and other matters which pre-date the commencement of the legislation. To that extent, it involves an element of retrospectivity. But the Tribunal was, we think, right in [219] to observe that the focus of this analysis of past events is not on whether the Targets can be said to be at fault in the decisions they took and the arrangements they entered into. As s.43(7) itself makes clear, the issue of reasonableness is to be considered by reference to the relationship or connection which subsisted between the Targets and the Employers; the benefits derived from that relationship; and the current financial circumstances of the Targets. If fault or misconduct can be said to have occurred, it will be relevant, but it is not essential.
68. The Targets, in fact, rely on this as part of their argument against giving s.43(7) the retrospective effect we have described. Lord Pannick submits that fault, particularly when serious, may justify looking back to past events even before the PA 2004 took effect. That, he says, was recognised by Parliament in s.38(5)(b) and s.52(2)(b) which limit the scope of contribution notices and restoration orders to events after 27 April 2004. But for this, a greater degree of retrospectivity might have been justified. The presence of fault is a factor which weighs in the balance against the unfairness of looking back to pre-Act events. By implication, the absence of any such limitation in s.43, and the fact that it is not a fault-based regime operate against giving the Regulator the power to base an FSD on events between 1999 and 2004.
69. We are not persuaded by this. The construction argument based on ss.38(5)(b) and 52(2)(b) is inconclusive. These provisions can be looked at both ways. As the Regulator submits, they can also be treated as an indication that Parliament intended to impose no time limits in relation to the operation of s.43. We consider, as the Tribunal did, that much more weight should be placed upon the purpose of the legislation; the interests it serves to protect; and the consequences to others of limiting the scope of the FSD power to events which post-date the legislation. Any consideration of the potential unfairness of imposing liability in circumstances where relevant events occurred before the legislation was contemplated or before a clearance statement could have been applied for must take these factors into account.

70. The Tribunal considered that the adverse effects of giving s.43 the construction which the Regulator contends for did not outweigh the policy considerations which support that construction. At [227] it said:

“We must also have regard to the Regulator’s statutory objectives. One of these is, as we have observed at [14] above, to reduce the risk of situations arising which may lead to compensation being payable from the PPF. The provisions relating to the PPF came into force at the same time as s 43. As Mr Stallworthy submitted, that objective would be substantially undermined if the PPF were immediately exposed to liabilities in respect of under-funded schemes but because of an inability to rely on events prior to the coming into force of PA 2004 no FSD could be issued. In our view, the legislation should be read so as to regard the powers in s 43 and the support for under resourced schemes available through the PPF as a package of measures which are available in relation to all circumstances concerning the relevant schemes which happen to be in existence after the relevant provisions come into force.”

71. We agree. It seems clear to us that the obligation imposed on the Regulator by s.5(1) PA 2004 to exercise its functions so as to protect the benefits under occupational pension schemes and to reduce the risk of compensation becoming payable out of the PPF points strongly towards giving the words of s.43(7) their ordinary and natural meaning. It is unlikely that Parliament intended in effect to limit the scope of the power to issue an FSD to future circumstances rather than to give it a wide and immediate effect. Our view about this is reinforced by the fact that, even where the Target comes within s.43(5)(a), liability can only be imposed if the Regulator considers it reasonable to impose the requirements of an FSD. A target who is dissatisfied with the Regulator’s decision on reasonableness also has the right to refer the matter for reconsideration by an independent tribunal which, as we explain later, is not simply a reviewing body but conducts its own judicial hearing with evidence in order to determine whether it is reasonable to issue an FSD.
72. Lord Pannick submitted that the inclusion of the requirement of reasonableness into the s.43(7) determination was not a sufficient or effective antidote to the prejudice which targets in the position of his clients will suffer from not having had the opportunity to consider the potential consequences of the Joint Venture before embarking on it. Reasonableness, he says, is a different criterion. The question of construction is not whether, on the facts, it is reasonable to require the Targets to contribute to the shortfall in the Scheme. It is a threshold question of whether, as a matter of principle, past events should be allowed to determine that liability.
73. We agree that the issue of construction is obviously a threshold question as is the question of whether the PA 2004 must be read down in order to become compliant with A1P1. But we do not accept that the safeguards provided by the requirement of reasonableness are irrelevant to a consideration of the unfairness that would be created by giving s.43 the retrospective scope for which the Regulator contends.

74. It seems to us that, in deciding whether Parliament can have intended to give s.43 that kind of reach, the legislature will have taken into account the fact that the Regulator and the Tribunal must consider all relevant circumstances (including the lack of availability of the clearance procedure) before deciding to impose an FSD. It seems to us unlikely that Parliament will have considered the safeguards which it chose to insert as insufficient to cater to the degree of unfairness involved. We do not therefore accept that the matters to be considered under s.43(7) cannot include anything which occurred before PA 2004 came into effect.
75. For those reasons, we would dismiss the Targets' appeal on construction.

A1P1

76. To succeed on this ground of appeal the Targets must show that s.43 (as we have construed it) would infringe A1P1. If there is no interference with A1P1 rights or if such interference as exists can be objectively justified then neither s.3 nor s.6 HRA has any application.

77. A1P1 provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions.

No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in the general interest or to secure the payment of taxes or other contributions or payments.”

78. It is common ground between the parties that PA 2004 engages A1P1 because the amount payable under an FSD would be a “possession”: see *AXA General Insurance Ltd v The Lord Advocate* [2012] 1 AC 868. The issue we have to decide is whether the level of interference is justified. In *Welsh Asbestos* (at [45]) Lord Mance JSC identified four stages in any review of whether legislation is compliant with Convention rights. The Court must consider:

- (i) whether there is a legitimate aim which could justify a restriction of the relevant protected right;
- (ii) whether the measure adopted is rationally connected to that aim;
- (iii) whether the aim could have been achieved by a less intrusive measure; and
- (iv) whether, on a fair balance, the benefits of achieving the aim by the measure outweigh the disbenefits resulting from the restriction of the relevant protected right.

79. In the case of retrospective legislation, the Strasbourg cases talk of the need to show some “special justification” which must also be factored into the compliance review. Lord Mance described the operation of that process in *Welsh Asbestos* at [52]-[53]:

“52. I conclude that there is Strasbourg authority testing the aim and the public interest by asking whether it was manifestly unreasonable, but the approach in Strasbourg to at least the fourth stage involves asking simply whether, weighing all relevant factors, the measure adopted achieves a fair or proportionate balance between the public interest being promoted and the other interests involved. The court will in this context weigh the benefits of the measure in terms of the aim being promoted against the disbenefits to other interests. Significant respect may be due to the legislature's decision, as one aspect of the margin of appreciation, but the hurdle to intervention will not be expressed at the high level of “manifest unreasonableness”. In this connection, it is important that, at the fourth stage of the Convention analysis, all relevant interests fall to be weighed and balanced. That means not merely public, but also all relevant private interests. The court may be especially well placed itself to evaluate the latter interests, which may not always have been fully or appropriately taken into account by the primary decision-maker.

53. It is also clear that the European Court of Human Rights scrutinises with particular circumspection legislation which confiscates property without compensation or operates retrospectively. In the case of confiscation, it will normally be disproportionate not to afford reasonable compensation, and a total lack of compensation will only be justifiable in “exceptional circumstances”. In the case of retrospective legislation, “special justification” will be required before the court will accept that a fair balance has been struck: paras 49-50 above. The Counsel General in his written case (paras 89 and 126) himself states that “It is of course accepted, as the case law ... makes clear, that there is a need for special justification where a statutory provision has retrospective effect”, while maintaining that this is present in the circumstances of this case.”

80. The concept of special justification is not spelt out in any great detail in the Strasbourg cases, but a convenient starting point is the decision in *Pressos Compania Naviera SA v Belgium* (App. no. 17849/91) – (1995) 21 EHRR 301, although this case does not actually use that term. The applicants, whose ships were alleged to have been damaged due to the negligence of Belgian pilots, challenged retrospective legislation which removed their claims to compensation. The Belgian government sought to justify the legislation on the ground of the costs involved. The Court held that there had been a violation of A1P1. On the issue of justification, it said:

“38. An interference with the peaceful enjoyment of possessions must strike a “fair balance” between the demands of the general

interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, including therefore the second sentence, which is to be read in the light of the general principle enunciated in the first sentence (see para. 33 above). In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions.

Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants. In this connection, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 only in exceptional circumstances (see, as the most recent authority, the *Holy Monasteries* judgment cited above, pp. 34-35, paras. 70-71).

39. In the present case the 1988 Act quite simply extinguished, with retrospective effect going back thirty years and without compensation, claims for very high damages that the victims of the pilot accidents could have pursued against the Belgian State or against the private companies concerned, and in some cases even in proceedings that were already pending.”

81. *Bäck v Finland* (2005) 40 EHHR 48, [2005] BPIR 1 concerned legislation under which a debtor who was unable to pay could ask the Court to write off the debt in return for agreeing to a repayment schedule. The schedule and the amount payable under it took account of the debtor's means and other living expenses. The applicant, a creditor, complained that the effect of the adjustment was to all but extinguish his claim without compensation and did not serve any legitimate general or public interest. The Court held that there had been no violation of A1P1.
82. In considering the issue of justification the Court took account not only of the social and potential aims of the legislation, but also the fact that the adjustment process involved an assessment by the national court as part of which the applicant was afforded a fair opportunity to defend his interests:

“[55] An interference with peaceful enjoyment of possession must nevertheless strike a ‘fair balance’ between the demands of the public or general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Art.1 as a whole which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought

to be realised by any measure depriving a person of his possessions or controlling their use. Compensation terms under the relevant legislation are material to the assessment of whether the contested measure respects the requisite fair balance, and notably, whether it does not impose a disproportionate burden on the applicant.

[56] Although Art.1 of Protocol No.1 contains no explicit procedural requirements, the proceedings at issue must also afford the individual a reasonable opportunity of putting his or her case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. In ascertaining whether this condition has been satisfied a comprehensive view must be taken of the applicable procedures.”

The Court went on:

“[60] The court agrees with the applicant that a transfer of property effected for no reason other than to confer a private benefit on a private party cannot be 'in the public interest'. Nonetheless, it is settled case-law that the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest. Thus, a transfer of property effected in pursuance of legitimate social, economic or other policies may be 'in the public interest', even if the community at large has no direct use or enjoyment of the property transferred (see *James v United Kingdom* (1986) 8 EHRR 123, at paras 40–45). The debt adjustment legislation clearly serves legitimate social and economic policies and is not therefore ipso facto an infringement of Art 1 of Protocol 1.

[61] The court must, however, also satisfy itself that the application of the 1993 Act in the concrete case before it did not impose an excessive burden on the applicant.

[62] It is true that at the moment when the applicant agreed to guarantee N's loan he could not foresee the economic recession and the subsequent legislation allowing for the adjustment of N's debts. The detriment which this adjustment caused to the applicant was no doubt significant in monetary terms. It is equally true, however, that when guaranteeing N's loan the applicant had to calculate the risk that N would fail to comply with his payment obligation. He also had to consider the possibility that N might be declared bankrupt, in which case his claim against N would most likely become worthless. The fact that in the case of a bankruptcy the applicant's claims would have remained legally valid and enforceable at a possible later stage does not change the fact that by entering into the guarantee

agreement the applicant took upon himself a risk of financial losses.

[63] The court would not exclude that a court-ordered irrevocable extinction of a debt, as opposed to the scheduling of payments of a debt over a longer period of time or the bankruptcy of a private individual, could in some circumstances result in the placing of an excessive burden on a creditor. The question whether such a burden was placed on the applicant also depends on whether the procedure applied provided him with a fair possibility of defending his interests as one of some 70 debtors.

[64] In this respect, the court recalls that the applicant was heard by the District Court and was thus able to put forward his views on N's request for debt adjustment and the proposed payment scheme. The court is satisfied that the District Court carried out a thorough and careful assessment of the case and finds no indication of any arbitrariness in the conclusions reached. The applicant was further entitled to a full review by an appellate court as regards both the decision to grant the debt adjustment and the details of the adopted payment scheme. Finally, the applicant was able to seek leave to appeal to the Supreme Court.”

83. The Court concluded that the requisite “special justification” existed, saying at [68]:

“Turning to the retroactive effect of the 1993 Act, the Court notes that neither the Convention nor its Protocols preclude the legislature from interfering with existing contracts. The Court considers that a special justification is required for such interference, but accepts that in the context of the 1993 Act there were special grounds of sufficient importance to warrant it. The Court observes that in remedial social legislation and in particular in the field of debt adjustment, which is the subject of the present case, it must be open to the legislature to take measures affecting the further execution of previously concluded contracts in order to attain the aim of the policy adopted. Also other Council of Europe Member States such as Norway and Sweden have introduced legislation allowing for the adjustment of debts contracted prior to its entry into force.”

84. Lord Pannick submitted that the provision of a fair hearing is not sufficient in itself to redress any appreciable imbalance between the purpose of legislation and its effect on an individual’s A1P1 rights. In some cases that must be so. But in *Bäck* the inclusion of a judicial process of assessment was obviously considered by the Strasbourg Court to be material to whether the interference was justified and to an assessment of the impact which the legislation had on the position of the individual.

85. Lord Mance in *Welsh Asbestos* referred to the decisions in *Pressos* and *Bäck* as examples of retrospective legislation which may require some special justification in

balancing the public interests involved against the interference with the individual's property rights. But the Strasbourg cases do not suggest that this is more than a need to show "exceptional circumstances" in order to justify the removal retrospectively of such rights without compensation, or that the degree of justification required must be the same regardless of the degree of retrospectivity involved. Lord Pannick was inclined to accept that, as with the domestic presumption against retrospectivity, there will be a spectrum of cases in which the retrospective effect of the legislation will vary in its impact and seriousness. The degree of justification required will vary consistently with the seriousness of the interference.

86. The Targets' challenge to s.43 PA 2004 is directed to the fourth stage of the compliance review described earlier in [78]. It is accepted that the three other conditions are satisfied. The Targets contend that the retrospective aspects of the legislation, which allow an assessment of whether it is reasonable to issue an FSD to be based on events occurring before the commencement date, mean that a fair balance has not been struck. In terms of the impact of the legislation on their AIP1 rights, they rely on matters such as their inability to make an advance application for clearance which we discussed earlier.
87. The Tribunal rejected this argument. It concluded that a fair balance had been struck so as to justify the legislation in this form because s.43 did not remove or alter existing accrued rights and was social remedial legislation whose stated objectives overrode the impact of giving s.43 immediate effect by reference to past events (including those which preceded the legislation). Even if the degree of retrospectivity required some element of special justification to be shown, the Tribunal was satisfied that the legislation struck a fair balance between the interests of the Targets; those of the members of under-funded pension schemes; and the levy payers who would otherwise be required to fund the shortfall through the PPF. At [239]-[242] it said:

"239. In this case, the relevant provisions of PA 2004 can be said to be legislation with a social remedial aim, namely to deal with the problems of underfunded pension schemes. If extending the FSD power so that it can be exercised in circumstances where the lack of scheme funds arises from causes stretching back before s 43 came into force were not permissible under AIP1, the legislature would have been faced with two unattractive choices. Either the opportunity for scheme members to benefit from payments from the PPF would have to be delayed for several years so that the underlying reasons for the insufficient resourcing were more likely to post-date s 43 or there would be a substantial period when the PPF would take over the burden of insufficiently resourced schemes but without any assistance from an FSD. Either of those options would have significantly hindered the achievement of the objectives of the legislation. We agree with Mr Stallworthy's submission that Parliament intended there to be a symmetry between the liabilities of the PPF and the FSD regime.

240. Furthermore, there is no automatic imposition of liability if the threshold conditions are satisfied. The legislation confers on a public body a discretionary regulatory power which cannot be

exercised except where it is reasonable to do so on the facts of a particular case. The exercise of that power is subject to judicial oversight through an independent tribunal with a full merits jurisdiction. That is a factor that the ECtHR considered relevant in *Bäck v Finland* where the creditor whose debt was extinguished was entitled to and had obtained a thorough and careful assessment of the case and was also entitled to a full review by an appellate court. These proceedings offered him, the Court held, a reasonable opportunity of putting his case to the competent authorities with a view to establishing a fair balance between the conflicting interests at stake: see [64] of *Bäck*.

241. In our view, all of these factors clearly outweigh the features which the Targets rely on as being unfair, namely the lack of a clearance procedure and the moral hazard point. We therefore conclude that any interference with the Targets' A1P1 rights in this case is proportionate and justified.

242. We have therefore rejected the Targets' case on a lack of jurisdiction on grounds of retrospectivity. However, as is apparent from the foregoing discussion, one of the reasons we have done so is because the Targets' arguments on the issue are capable of being considered in the context of the assessment which we must make as to whether it is reasonable in the circumstances of this case to issue an FSD. Therefore, we shall revisit the Targets' arguments in the context of our assessment of reasonableness."

88. We agree that a fair balance has been struck by the legislation. The conduct of that review, like any other proportionality review, was, of course, a matter for the Tribunal and its decision can only be set aside if it discloses an error of law: see ss.13-14 Tribunals, Courts and Enforcement Act 2007. It is only in those circumstances that this Court can re-make the decision.
89. We discuss the role of this Court in relation to appeals from the Upper Tribunal in more detail in relation to the issue of reasonableness below. For present purposes, it is necessary only to state that we do not consider that the question of whether the PA 2004 could operate retrospectively or can be objectively justified requires any particular expertise which this Court does not have, and we therefore accord little weight on this issue to the fact that the Tribunal is a specialist Tribunal. These are questions of law.
90. That being said, we do not consider that the decision of the Tribunal discloses an error of law. The liability of the PPF and that of its levy-payers to contribute to a present shortfall is imposed even if the causes of the funding deficit can be traced to events long ago. Parliament has provided a similar basis for the liability of connected persons to contribute under an FSD. This is the symmetry referred to in [239] of the decision. The Tribunal conducted an assessment of all the factors relevant to whether the interference with the Targets' A1P1 rights was justified, including by taking into account the particular disadvantages which can be said to be attributable to the retrospective aspects of the legislation. This included recognising in [242] that those

same factors had to be taken into account in assessing whether it was reasonable under s.43(5)(b) to impose on the Targets the requirements of an FSD.

91. The Targets have relied on the issue about A1P1 as a threshold question going to jurisdiction. As such, it requires a review of proportionality and justification for the effect which it will have on their A1P1 rights to be conducted at this stage of the analysis. Given the degree of retrospectivity involved, the Tribunal was entitled to find that the disadvantage it has the potential to create is outweighed by the other factors it identified.
92. In the present case, the requirement for it to be reasonable to issue the FSD brings into the balance an important further factor which, as the Tribunal found, is relevant to the proportionality exercise. The Regulator can only issue an FSD if it is reasonable to do so bearing in mind any retrospective elements of the case. Under s.96(3) PA 2004, any Target or other person affected by an FSD may then have that determination referred to the Tribunal as an independent judicial body, which will consider whether it is reasonable to issue an FSD *de novo* and unconstrained by the view of the DP.
93. We accept (as we have done implicitly in an earlier discussion of the construction of PA 2004) that the inclusion of an obligation to consider reasonableness (such as the one under s.43(5)(b)) will not of itself always provide a sufficient antidote to the retrospective effects of legislation. Some measures which operate to confiscate property or to annul already-accrued rights will, by their very nature, be unreasonable. But the FSD regime is not in that category and the Tribunal was correct in our view to find that a fair balance has been struck.

Conclusion

94. The appeal on the issue of retrospectivity is dismissed.

Issue 2: Association

95. By virtue of s.43(5) PA 2004, the Regulator will have been entitled to issue an FSD to the Targets only if at least one of them was at the “relevant time” (here, 31 December 2009) “connected with or an associate of” one or more of the Employers within the meaning of s.43(6)(c). Whether an entity is “connected with” or an “associate of” an employer is to be determined by reference to provisions of IA 1986. Section 51(3) of PA 2004 states that for the purposes of ss.43 to 50:
 - “(a) section 249 of the Insolvency Act 1986 (c. 45) (connected persons) applies as it applies for the purposes of any provision of the first Group of Parts of that Act,
 - (b) section 435 of that Act (associated persons) applies as it applies for the purposes of that Act ...”.
96. In the present case, it is s.435 IA 1986 which is chiefly relevant. That provision, headed “Meaning of ‘associate’”, includes this:
 - “(1) For the purposes of this Act any question whether a person is an associate of another person is to be

determined in accordance with the following provisions of this section (any provision that a person is an associate of another person being taken to mean that they are associates of each other).

...

- (6) A company is an associate of another company—
- (a) if the same person has control of both, or a person has control of one and persons who are his associates, or he and persons who are his associates, have control of the other, or
 - (b) if a group of two or more persons has control of each company, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom he is an associate.
- (7) A company is an associate of another person if that person has control of it or if that person and persons who are his associates together have control of it.

...

- (10) For the purposes of this section a person is to be taken as having control of a company if—
- (a) the directors of the company or of another company which has control of it (or any of them) are accustomed to act in accordance with his directions or instructions, or
 - (b) he is entitled to exercise, or control the exercise of, one third or more of the voting power at any general meeting of the company or of another company which has control of it;

and where two or more persons together satisfy either of the above conditions, they are to be taken as having control of the company ...”.

97. The corporate structure of the Box Clever group is shown in the chart annexed to this judgment. According to the Regulator, the requisite association existed on 31 December 2009 as regards, first, the Trio (i.e. Telebank, Fulfilment and Endeva) and, secondly, TUK. There was no association with UKCE (one of the Employers) because UKCE’s parent company (shown as “Elecrent” on the annexed chart) was dissolved on 3 April 2007.

98. It will be seen that BxC Holdings, in which the Targets had a 50% interest through BxC Tech, had held the shares in the Trio and, via BxC Finance, owned the company (viz. THSP) that held 99% of the shares in TUK. Telebank, Fulfilment, Endeava and TUK were all participating employers for the purposes of the Scheme.
99. In practical terms, the Targets had, of course, ceased to have any control over either the Trio or TUK long before 31 December 2009. Of itself, that does not matter: it is common ground that the question whether the Targets were associates of the Trio and/or TUK is to be answered by reference to the technical rules laid down in s.435 IA 1986. The Regulator contends that, applying those rules, ITV plc and, hence, all the Targets were associates of the Trio and TUK on the basis outlined in paragraph 126 of the Tribunal's decision. The Targets, however, maintain that the appointment of Administrative Receivers in respect of Box Clever companies (including BxC Holdings, BxC Finance and THSP) in September 2003 has the consequence that they were not associates of any of the Employers on 31 December 2009. Their arguments to that effect are in part rooted in the terms of the Debenture and, so far as TUK is concerned, also based on interpretation of s.435 IA 1986.
100. It is convenient to refer to aspects of the Debenture before turning to consider the Trio and TUK in turn.

The Debenture

101. The Debenture was designed to secure the Joint Venture's indebtedness to WestLB and other banks. Each of the Box Clever companies that was a party to it (referred to as "the Chargors") covenanted with the "Security Agent" that it would discharge all liabilities under the loan facilities granted to the Joint Venture and charged its assets by way of security. WestLB was initially designated as Security Agent and entered into the Debenture as agent and trustee for itself and other lenders. However, by September 2003, when Administrative Receivers were appointed, JP Morgan had become the Security Agent. WestLB was throughout the "Facility Agent" in respect of the loan facilities. BxC Holdings, BxC Finance and THSP were amongst the Chargors.
102. The key provisions of the Debenture in the present context are clauses 4.2 and 10.2.
103. Clause 4.2 reads as follows:
- "Each Chargor ... hereby as continuing security for the payment, discharge and performance of all the Secured Liabilities at any time owed or due to the Lenders (or any of them):
- (a) mortgages and charges and agrees to mortgage and charge to the Security Agent (as agent and trustee as aforesaid) all Group Shares held now or in the future by it and/or any nominee on its behalf, the same to be a security by way of a first mortgage; and
 - (b) mortgages and charges and agrees to mortgage and charge to the Security Agent (as agent and trustee as aforesaid) all the Related Rights accruing to all or any of the Group Shares held now or in the future by it and/or any nominee on its behalf, the same to be a security by way of a first mortgage or charge.

PROVIDED THAT:

- (i) whilst no Declared Default exists, all dividends and other distributions paid or payable as referred to in paragraph (b) above may be paid directly to the relevant Chargor free from the security created hereunder ... and, if paid directly to the Security Agent, shall be paid promptly by it to the relevant Chargor;
- (ii) whilst no Declared Default exists, the Security Agent shall use all its reasonable endeavours to forward to the relevant Chargor all material notices, correspondence and/or other communication it receives in relation to the Group Shares; and
- (iii) subject to Clause 10.2, whilst no Declared Default exists, all voting rights attaching to the relevant Group Shares may be exercised by the relevant Chargor or, where the shares have been registered in the name of the Security Agent or its nominee, as the relevant Chargor may direct in writing, and the Security Agent and any nominee of the Security Agent in whose name such Group Shares are registered shall execute any form of proxy or other document reasonably required in order for the relevant Chargor to do so.”

104. Clause 10, which is part of a clause headed “Special Provisions relating to the Security Shares”, includes the following:

“10.1 Registration on transfer

Each Chargor hereby authorises the Security Agent ... to arrange for the Security Shares to be delivered to any nominee of the Security Agent or to any purchaser or transferee ... or registered as the Security Agent may feel appropriate to perfect the security thereover ... and each Chargor undertakes from time to time promptly to execute and sign all transfers, contract notes, powers of attorney and other documents ... which the Security Agent may reasonably require for perfecting its title to any of the Security Shares ...

10.2 Powers

The Security Agent ... may at any time after a Declared Default has occurred or in any other instance where the Security Agent is of the reasonable opinion that it is necessary for the avoidance of an Event of Default or necessary for the protection of its material interests ... exercise or refrain from exercising (in the name of each Chargor, the registered holder or otherwise and without

any further consent or authority from each Chargor and irrespective of any direction given by any Chargor) in respect of the Security Shares any voting rights and any powers or rights under the terms thereof or otherwise which may be exercised by the person or persons in whose name or names the Security Shares are registered or who is the holder thereof ... PROVIDED THAT in the absence of notice from the Security Agent each Chargor may and shall continue to exercise any and all voting rights with respect to the Group Shares subject always to the terms hereof. No Chargor shall without the previous consent in writing of the Security Agent exercise the voting rights attached to any of the Group Shares in favour of resolutions having the effect of changing the terms of the Group Shares (or any class of them) or any Related Rights or prejudicing the security hereunder or breaching the terms of any Finance Document, in each case, in any way which could reasonably be expected materially and adversely to affect the interests of the Lenders. Each Chargor hereby irrevocably appoints the Security Agent or its nominees its proxy to exercise all voting rights so long as the shares remain registered in the name of the relevant Chargor and to the extent that the Security Agent is entitled to exercise such voting rights in accordance with the terms of this Debenture.”

105. It is to be noted that:

- (i) the expression “Group Shares” encompassed, among others, the shares that BxC Holdings held in BxC Finance and the Trio and those that THSP held in TUK;
- (ii) “Related Rights” were dividends and other distributions and the like;
- (iii) “Security Shares” were the Group Shares and the Related Rights;
- (iv) the Security Agent could choose whether to have Group Shares registered in its name. The option was not exercised as regards the shares that THSP held in TUK, which remained registered in THSP’s name. In contrast, the shares in the Trio that had formerly been held in BxC Holdings’ name were registered in the name of JP Morgan (as Security Agent);
- (v) the voting rights attaching to shares are prima facie exercisable by the registered shareholder. If, therefore, shares are registered in the name of a mortgagee (as happened with shares in the Trio), the mortgagee will, in the absence of provision to the contrary, be entitled to vote the shares. In *Siemens Bros & Co v Burns* [1918] 2 Ch 324, Swinfen Eady MR explained at [336]:

“In the ordinary way, where shares are transferred to and registered in the name of a mortgagee it follows, from his position as owner at law of the shares, that the ownership

carries with it the voting right, that this is vested in the owner of the shares; and it would require a contract to exclude that right. Sometimes, where shares form a security, there is a contemporaneous collateral agreement as to the mode in which, and the extent to which, voting rights in respect of the shares shall be exercised. But in the absence of any such agreement the voting rights would be with the legal owners of the shares, and it would require a contract to control the exercise of those rights”;

- (vi) “Declared Default” involved an “Event of Default” resulting in the service of notice under a facility agreement. It is common ground that there was a “Declared Default” when WestLB sent a notice of default on 24 September 2003; and
- (vii) on 31 December 2009, the Trio, THSP and TUK were all still in administrative receivership, but BxC Holdings was not.

The Trio

- 106. As we have said, the Security Agent elected to have the shares in the Trio registered in its name rather than that of the relevant Chargor, BxC Holdings. There is no doubt, however, that BxC Holdings could direct the Security Agent how to vote the shares up to the date of the Declared Default. That follows from clause 4.2(iii) of the Debenture, which provided for “all voting rights attaching to the relevant Group Shares” to be exercised “as the relevant Chargor may direct in writing” “where the shares have been registered in the name of the Security Agent or its nominee”.
- 107. The Targets’ case is that BxC Holdings’ right to direct how the shares in the Trio should be voted came to an end automatically on the occurrence of the Declared Default or, alternatively, should it be the case that a notice was needed to terminate the right, that the requisite notice was given.
- 108. So far as the former possibility is concerned, Mr Railton QC, who argued this part of the appeal for the Targets, focused on the words “whilst no Declared Default exists” in clause 4.2(iii). These show, he said, that the right to direct how shares were to be voted which clause 4.2(iii) conferred was to endure only for so long as there was no Declared Default. Once there was a Declared Default, clause 4.2(iii) could not be in point, and clause 10.2 would not apply either as regards shares registered in the name of the Security Agent. The inclusion in clause 4.2(iii) of the words “subject to Clause 10.2” is explicable on the basis that clause 10.2 provided for circumstances in which the Security Agent could exercise voting rights even before a Declared Default (if the Security Agent was of the reasonable opinion that that was necessary for the avoidance of an Event of Default or the protection of its material interests – see the opening lines of clause 10.2). Moreover, clause 10.2 did not itself, Mr Railton submitted, grant a Chargor power to control how shares were voted. The proviso to the first sentence of clause 10.2 stated that, in the absence of notice from the Security Agent, each Chargor “may and shall continue to exercise any and all voting rights”. For this to be applicable, Mr Railton maintained, the Chargor must have an existing right to control voting as it could not otherwise “continue” to exercise voting rights. Mr Railton suggested that the

rival approach to clauses 4.2(iii) and 10.2 favoured by the Regulator renders the words “whilst no Declared Default exists” in clause 4.2(iii) redundant, and that the Court should not adopt an interpretation producing that result. In that connection, Mr Railton referred us to passages from *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 in which Lord Hodge spoke of the Court giving “more or less weight to elements of the wider context” “depending on the nature, formality and quality of drafting” when construing a contract, and the need to “consider the quality of drafting of the clause” (see [10] and [11]). Here, Mr Railton said, the Debenture could be seen to have been the subject of the highest standards of legal precision and formality.

109. The Tribunal did not accept such arguments. It concluded that the voting rights attaching to the shares in the Trio remained under the control of BxC Holdings after the appointment of the Administrative Receivers unless and until BxC Holdings was given notice by the Security Agent pursuant to clause 10.2 (see [159]).
110. The Tribunal considered that “the proviso to Clause 4.2 and the operative provisions of Clause 10.2 must be read together” ([150]). So read, it could be seen that the words at the beginning of clause 4.2(iii) “qualify the rest of the provision” in part by “point[ing] the reader to the only provisions in the Debenture which expressly deal with the position as regards the exercise of voting rights in the period after the occurrence of a Declared Default” ([153]). In the Tribunal’s view, “the reference to the right to ‘continue to exercise’ [in the proviso to clause 10.2] can only be a reference to the general right vested in the Chargor that prevailed prior to the occurrence of the Declared Default and which would, but for the opening words of sub-paragraph (iii) to the proviso to Clause 4.2 and the operative provisions of Clause 10.2, cease to have applied leaving the voting rights exercisable by the Security Agent as registered holder” ([153]). The proviso to clause 4.2, the Tribunal said, “operates as a bridge between the provisions of Clause 4.2 and its proviso and Clause 10.2”, and “[t]he words ‘in the absence of notice’ in Clause 10.2 make it clear that the provisions of Clause 4.2 continue to apply unless and until notice is given pursuant to the latter provision” ([154]). While that analysis might mean that the words “whilst no Declared Default exists” in clause 4.2(iii) “are not strictly necessary”, they “add clarity in that they emphasise that the proviso as a whole is only dealing with the position before a Declared Default occurs, consistent with the wording of sub-paragraphs (i) and (ii) of the proviso” ([155]). That construction of the Debenture, the Tribunal thought, also makes commercial sense. As to this, the Tribunal said:

“156. In our view our analysis reflects the natural reading of the two provisions, when read together. This analysis also makes commercial sense in that it is consistent with the intention that the Chargor should continue to exercise the voting rights attaching to the shares despite the granting of security over them unless notice to the contrary is given by or on behalf of the mortgagee in accordance with the terms of the Debenture. Furthermore, there is no apparent business sense in there being a difference between whether the shares concerned are charged by way of a legal mortgage or by way of an equitable charge. On Mr Railton’s analysis, the position is different because where a legal mortgage had been perfected by the transfer of legal title into the name of the Security Agent, the voting rights would

automatically vest in the Security Agent upon the occurrence of a Declared Default, but where there was only an equitable charge because the shares had remained in the legal ownership of the Chargor, it would be necessary for notice to be given under Clause 10.2 before the Security Agent could exercise its voting rights. In our judgment, it makes more commercial sense for the Security Agent to be given the option as to whether it wishes to exercise the voting rights in both circumstances.

157. Furthermore, as [counsel for the Regulator] submitted, and consistent with standard commercial practice, the lenders sought to enforce their security not through taking possession of the mortgaged property but through the appointment of Administrative Receivers over all the assets of the Chargors. That meant there was no commercial imperative for the Security Agent to assume the voting rights over the Group Shares. As a matter of law, the Administrative Receivers act as agent of the relevant company over whose assets they have been appointed receivers when they deal with those assets. They would nevertheless be able to act in the interests of the lenders when deciding how to exercise those rights in the same way as the Security Agent could have done, were it considered necessary at any point to exercise those rights.”

111. On balance, we agree with the Tribunal. Our reasons include these:

- (i) but for the inclusion of the words “subject to Clause 10.2”, clause 4.2(iii) would have provided for a Chargor to exercise, or control the exercise, of voting rights attaching to shares, regardless of whether they were registered in the Chargor’s name or that of the Security Agent or a nominee, for so long as there was no Declared Default and no longer. The opening words were clearly intended to qualify that, to the extent explained in clause 10.2;
- (ii) the first part of clause 10.2 addresses the position “after a Declared Default has occurred”, where the Security Agent is of the reasonable opinion that it is “necessary for the avoidance of an Event of Default” and where the Security Agent is of the reasonable opinion that it is “necessary for the protection of its material interests”. Nothing is said to indicate that any of this is intended to apply only where shares are registered in the Chargor’s name, and that is plainly not the case as regards the second and third of these possibilities. It is inconceivable that the Security Agent was not meant to be able to invoke clause 10.2 when reasonably of the opinion that that was necessary “for the avoidance of an Event of Default” or “for the protection of its material interests” if it held the relevant shares in its own name;
- (iii) the proviso to the first sentence of clause 10.2 is in similarly general terms. It says simply that “in the absence of notice from the Security Agent each Chargor may and shall continue to exercise any and all voting rights”. It is nowhere stated that the proviso, unlike the earlier part of the clause, was to be limited to shares registered in the name of the Security Agent. The Targets suggest that that can

be inferred from the use of the word “continue”, but that word is apt to refer to the parties’ intention that rights conferred by clause 4.2(iii) which would otherwise come to an end on a Declared Default are instead to persist;

- (iv) no good reason has been suggested for the parties having intended the Security Agent to be able to choose whether to assume voting control in respect of shares registered in the name of a Chargor but not those held in its own name. WestLB could be expected to have preferred to have a choice in both cases; and
 - (v) while the Tribunal’s construction of the Debenture may be said to render the words “whilst no Declared Default exists” in clause 4.2(iii) unnecessary, there is no inconsistency between the words and the Tribunal’s construction and “[t]he fact is that even in legal documents (or, some might say, especially in legal documents) people often use superfluous words” (*Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266, at [274], per Lord Hoffmann, quoted by Lord Neuberger in *In re Lehman Bros International (Europe) (No 4)* [2018] AC 465, at [67]). In the present case, the fact that the other provisos to clause 4.2 began “whilst no Declared Default exists” makes it the less remarkable that the draftsman followed that pattern in clause 4.2(iii), adding “subject to Clause 10.2” by way of qualification. Further, the fact that the Debenture was formal and the subject of sophisticated drafting (on which the Targets rely in support of their surplusage argument) might be said to make it the more surprising that the Debenture did not specify that the proviso to clause 10.2 was to apply only to shares registered in the name of the Security Agent or its nominee, if that was the intention.
112. The upshot is that the Chargor’s right to control the voting rights attaching to shares in the Trio did not fall away automatically on the Declared Default, but will have ceased only if there was “notice from the Security Agent” within the meaning of the proviso to clause 10.2. The Tribunal did not consider any such notice to have been given, but the Targets argue otherwise.
113. In *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, it was held that notices to exercise contractual rights need to be “sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate” (see Lords Steyn and Clyde, at [768] and [782] respectively). Mr Railton contended that documents such as the letter to which he took us by way of example would sufficiently have brought home to a reasonable recipient that notice was being given under clause 10.2. The letter in question was headed “Guarantor Demand in relation to the Senior Facility Agreement” and stated to be signed “For and on behalf of WestLB, London Branch (in its capacity as Facility Agent in relation to the Senior Facility Agreement)”. After referring to the senior facility agreement, the Debenture and other documents, the letter said this:

“We hereby give you notice that, pursuant to clause 24.2 (Acceleration) of the Senior Facility Agreement, in our capacity as Facility Agent, acting on the direction of the sole Bank, we made formal demand (a copy of which is attached ...) (the **Demand**) on Box Clever Finance Limited (as Borrower) under the Senior Facility Agreement as referred to in the Demand for the payment forthwith of the sums referred to in the Demand.

No payment has been received from Box Clever Finance Limited following the Demand. Accordingly, pursuant to clause 19 of the Senior Facility Agreement, in our capacity as Facility Agent (acting on the direction of the sole Bank) we hereby make formal demand on each Relevant Guarantor for the payment forthwith of the aggregate sums unpaid referred to in the Demand being £48,480,446.31

We give you notice that as referred to in the Demand the security created by the Debenture is enforceable and failing payment to us forthwith of all amounts demanded herein, we reserve the right of the Security Agent under the Debenture without further notice to exercise the power to appoint a receiver or receivers over the undertaking, property and assets of each Relevant Guarantor, the power of sale and all other powers conferred on us by law or the Debenture, or by any other mortgage, charge or security created by each Relevant Guarantor in the Security's Agent's favour.

This demand is made without prejudice to and shall not be construed as a waiver of any other rights or remedies which we in our capacity as Facility Agent under the Senior Facility Agreement, or the Security Agent may have or be owed including, without limitation, the right to make further demands in respect of the sums payable by each Guarantor under the Senior Finance Documents or otherwise.”

114. Mr Railton emphasised the penultimate paragraph and, in particular, the words “we reserve the right of the Security Agent under the Debenture without further notice to exercise ... all other powers conferred on us by ... the Debenture”. The letter was thus, he argued, unequivocally saying that any exercise of the powers which the Debenture gave to the Security Agent would be “without further notice”. One such right was that to vote shares, and that could only be exercised “without further notice” if notice had been given pursuant to the proviso to the first sentence of clause 10.2. The letter had, therefore, to be taken as the notice.
115. It seems to us, however, that a reasonable recipient of the letter would not have understood that notice was being given under the proviso to the first sentence of clause 10.2. The letter made no mention of clause 10.2 and, notwithstanding the fact that the proviso in that clause required notice from the Security Agent, the letter was avowedly signed for WestLB “in its capacity as Facility Agent”; referred more than once to WestLB acting “in our capacity as Facility Agent”; and nowhere asserted that WestLB was also acting on behalf of the Security Agent. Further, in its penultimate paragraph, the letter spoke merely of rights being “reserved”, not exercised. A reasonable recipient would, we think, have taken WestLB to have been concerned not to prejudice any rights that it or the Security Agent might have (including the right to give notice under the proviso to the first sentence of clause 10.2), not to be purporting to give notice on behalf of another entity, the Security Agent, for the purposes of clause 10.2. The paragraph would have been viewed as a belt-and-braces exercise.

116. In all the circumstances, we agree with the Tribunal that no notice was given in accordance with the proviso to the first sentence of clause 10.2 and, hence, with the Tribunal's conclusion (in [171]) that BxC Holdings controlled the Trio within the meaning of s.435 IA 1986 and was accordingly associated with those companies for the purposes of s.43(6) PA 2004.

TUK

117. The fact that we have concluded that no notice pursuant to the proviso to the first sentence of clause 10.2 of the Debenture was given means that we do not need to address an argument advanced by the Targets which depended on the existence of such a notice. There remains to be considered, however, an alternative argument, to the effect that the fact that THSP was in administrative receivership on 31 December 2009 means that, at that date, it did not have "control" of TUK for the purposes of s.435(7) IA 1986.
118. Stressing the extensive powers available to the Administrative Receivers, Mr Railton said that the practical reality was that the Targets had no influence at all over matters relating to TUK once the Administrative Receivers had been appointed. That had the implication, Mr Railton submitted, that neither THSP nor any company higher up the chain was any longer to be considered to be "entitled to exercise, or control the exercise of, one third or more of the voting power at any general meeting" of TUK within the meaning of s.435(10) IA 1986. Mr Railton recognised that the Administrative Receivers were treated as agents of the relevant Chargors under both clause 16 of the Debenture and s.44(1) IA 1986, but argued that the agency was merely a deemed one and should not be allowed to obscure the reality. Support for his contentions was, Mr Railton suggested, to be found in the decision of Lewison J (as he then was) in *In re Kilnoore Ltd, Unidare plc v Cohen* [2005] EWHC 1410 (Ch), [2006] Ch 489 and cases cited in *Kilnoore*.
119. *Kilnoore* concerned the validity of a debenture that Kilnoore Limited ("Kilnoore") had granted to Unidare plc ("Unidare"). The issue turned on whether Unidare was connected with Kilnoore. 80% of Kilnoore's shares were registered in the name of Unidare Holdings Limited ("Holdings"), which was itself wholly owned by Unidare, but by the time the debenture was granted an agreement to sell Holdings' shareholding in Kilnoore to Kozo Limited ("Kozo") had been concluded. Since part of the purchase price was to be paid by instalments, Holdings retained legal ownership of the shares, but it executed a power of attorney appointing Kozo to exercise all rights attaching to the shares and declared that it held them on trust for Kozo. The result, as Lewison J explained (in [21]), was that "although Holdings remained the registered shareholder as regards 80% of the shares in the company, ... it held them on a bare trust for Kozo, and Kozo was entitled to act in Holdings' name in its absolute discretion".
120. Lewison J held that, in the circumstances, Holdings no longer had "control" of Kilnoore and, in consequence, that Unidare did not have "control" either. Having referred to a number of authorities, Lewison J derived the following from them (in [54]):

"(i) In the vast majority of cases, whether a person is entitled to exercise voting rights is to be determined simply by looking at the register of shareholders and the company's articles of association. (ii) In such cases, it is not permissible to look outside those materials and to inquire whether there are contractual or

fiduciary restraints, as between the registered shareholder and others, which inhibit him in exercising those rights. (iii) In general there is no warrant for distinguishing between different degrees of trusteeship. (iv) The Court of Appeal has expressed the view that where the question is whether a person has a controlling interest in a company an exception may be made in the case of a bare trustee (or nominee or ‘dummy’). In such a case control resides in the beneficial owner to the exclusion of the trustee. (v) In the case of a shareholder which is itself a corporation, in determining how its voting rights as shareholders are exercised it is permissible to look outside the register of shareholders and inquire whose voice is heard when its votes are cast.”

121. Having observed (in [57]) that he could not “discern any cogent policy reason for concluding that Parliament must have intended that bare trustees would be treated as connected with companies in which they are registered shareholders”, Lewison J said this in [58] in arriving at his conclusion:

“The phrase I have to construe in section 435(10)(b) of the 1986 Act is a typically compressed piece of draftsmanship. The verb ‘entitled’ governs both the exercise of voting power and the control of voting power. In looking at control of voting power, the word ‘entitled’ must, in my judgment, mean ‘entitled as between the registered shareholder and the controller of the voting power’. Why, then, should the word ‘entitled’ in its application to the exercise of voting power be construed as meaning ‘as between the registered shareholder and the company’? There is a further slight clue to the meaning of section 435. Unlike sections 736 and 736A of the 1985 Act, which refer to ‘voting rights’, section 435 of the 1986 Act refers to ‘voting power’. The word ‘rights’ naturally directs attention to legal rights, especially since section 736A(2) of the 1985 Act goes on to explain that voting rights means ‘rights conferred on shareholders in respect of their shares’. The word ‘power’, by contrast, gives me some encouragement to look to the economic reality of the case. A registered shareholder who holds his shares on a bare trust under which he is required to cast his vote in accordance with the directions of the beneficial owner might be said to have voting rights, but I do not consider that in any real sense he can be said to have voting power. The Court of Appeal, in two cases I have mentioned (*Inland Revenue Comrs v J Bibby & Sons Ltd* [1944] 1 All ER 548 and *Inland Revenue Comrs v Silverts Ltd* [1951] Ch 521), were clearly impressed by the appeal to the common sense and economic reality of the case of a bare trustee. I do not consider that the wording of section 435 compels me to take a different view. In addition Holdings was a corporate shareholder. If I ask whose voice would be heard if, after the declaration of trust, Holdings were to cast the votes

attached to the shares registered in its name at a general meeting of the company, the only answer, in my judgment, is Kozo's."

122. Mr Railton took us to each of the authorities cited in this paragraph and also to a third case which Lewison J discussed, *S Berendsen Ltd v Inland Revenue Comrs* [1958] Ch 1. All three decisions concerned liability to tax: "excess profits tax" in one instance and "profits tax" in the others.
123. The earliest of the decisions, *Inland Revenue Comrs v J Bibby & Sons Ltd*, reached the House of Lords (see [1945] 1 All ER 667). The question was whether account should be taken of shares held as trustees when deciding if a company was one "the directors whereof have a controlling interest therein" within the meaning of s.13(9) of the Finance (No 2) Act 1939. Both the Court of Appeal ([1944] 1 All ER 548) and the House of Lords answered in the affirmative on the facts of the case, but the position as regards a bare trust was left open. In the Court of Appeal, Lord Greene MR, delivering the judgment of the Court, said this (at [549]-[550]):

"Subject to the one case of a bare trustee who is bound to vote in accordance with the directions of his beneficiary, we can find nothing in the language of the subsection which points to an intended distinction between a beneficial interest and an interest held by a trustee. A trustee in whom shares are vested in such circumstances that he has the usual discretion to vote as he thinks fit in the interests of the beneficiaries as a whole appears to us to be a person who, if he holds more than half the voting power, is properly and naturally described as a person who has a controlling interest in the company. He is commonly so described in the language of those familiar with the law and practice relating to companies

The case of a bare trustee is not, of course, before us. But it seems to us that, in such a case, the control would naturally be said to be in the beneficial owner and not in the trustee; so that, if the shares carried more than half the voting power and the beneficial owner was director, he would properly be described as having a controlling interest in the company."

In the House of Lords, Lord Russell of Killowen, with whom Lord Wright concurred, said (at [670]):

"The words 'controlling interest' mean 'controlling voting power': that is the interest in view, not beneficial interest. As at present advised I agree with the Court of Appeal in the view that there is no half-way house between a construction which restricts the controlling interest to shares which are in the absolute beneficial ownership of the trustees and a construction which includes all shares of which the directors are registered holders. It is true that the Court of Appeal except the case of what they describe as a bare trustee, but express a view that the control

would reside in the beneficial owner of the shares. The case envisaged is no doubt the case of the director who puts shares into the name of a nominee, taking probably a blank transfer executed by the nominee. I prefer to express no definite opinion in relation to this question, but to keep it as an open question to be debated when the necessity for a decision thereon in fact arises.”

Lords Porter and Simonds, too, reserved their positions as regards bare trustees (see [672] and [673]).

124. There was also reference to the position in relation to a bare trust in the next case, *Inland Revenue Comrs v Silverts Ltd* [1951] Ch 521. The issue there was whether a company was one “the directors whereof have a controlling interest therein” for the purposes of paragraph 11 of Schedule IV to the Finance Act 1937 on the basis that account should be taken of shares which a bank held as custodian trustee, the managing trustees being two of the directors. The Court of Appeal held that the directors did not have a “controlling interest”. In the course of giving the judgment of the Court, Evershed MR noted (at [526]) that one of the Crown’s arguments had invited the Court to hold “that, in the relevant matter of voting power, the position of a custodian trustee *vis-à-vis* the managing trustees is so closely analogous to that of a bare trustee *vis-à-vis* his principal as to bring the case within the spirit, albeit not within the letter, of the exception made by Lord Greene MR and the reservation made by the House of Lords in the *Bibby* case”. At [530], Evershed MR said:

“We confess that we feel strongly ... the weight of the argument based on common sense, and where the registered shareholder is a bare trustee, in the sense of being a mere name or ‘dummy’ for the true owner, we should feel strongly inclined to answer the question reserved by the House in the *Bibby* case in the same way as Lord Greene MR. In the present case, however—perhaps fortunately—the answer would not, on an appeal to common sense, appear so clearly.”

125. Turning finally to *S Berendsen Ltd v Inland Revenue Comrs*, that too involved paragraph 11 of Schedule IV to the Finance Act 1937. As is recorded in the headnote, the Court of Appeal concluded that “where a registered shareholder was a body corporate it was necessary to look beyond the share register to ascertain who by their votes controlled that body corporate” and, therefore, that regard was to be had to shares in the relevant English company that were held by a Danish company that was itself controlled by a director of the English company. Evershed MR said this at [37]-[38]:

“The House has laid it down that you cannot ask the question, when the votes are cast, ‘is the voice of the voter affected by obligations imposed upon him by some external control?’ One cannot ask, so to speak, has the tune been called by some third party? But you surely can ask and must ask, since the company itself cannot speak, whose is the voice that you hear? ... I have already supposed the case, by way of contrast to the facts in

Silverts' case, where the custodian trustee happened to be a private company incorporated by two of the directors, all the shares of which were held by two of the directors. In such a case the votes of such a company would in truth be the votes of the directors, their's would be the voice, their's the will and ordering of that company's voting power, and the fact that the company had obligations as a trustee, which were imposed upon it from an external source, would not make it legitimate to consider the interest of that external source. Put the other way, the National Provincial Bank, for the present purposes, votes not with the voice of the management trustees in question but with the voice of its own management, the shareholders and directors controlling. It is no doubt in some degree a fine distinction But, where the registered shareholder is a body corporate, you nevertheless may, and indeed must, for certain purposes, look beyond the register; for since the company cannot itself speak you must find out with whose voice it must do so. You may therefore ask, who does control the body corporate by the necessary shareholding interest in it?"

126. We do not ourselves see these cases as casting any real light on how s.435 IA 1986 should be interpreted. The statutory provisions and contexts are too different. The 1937 and 1939 legislation with which the Courts were concerned in *Bibby*, *Silverts* and *Berendsen* referred simply to "a controlling interest" in a company. Section 435 IA 1986, by contrast, is an elaborate provision under which a multitude of individuals and companies can potentially be considered to be "associates" simultaneously. Whereas, moreover, a "controlling interest" presumably had to be one commanding a majority of the votes attaching to a company's shares, someone can be "taken as having control" under s.435 with no more than a third of the voting power (see s.435(10)(b)). In fact, it would seem that a person could be deemed to have control in the context of IA 1986 if, say, he held just 35% of the shares in a company which in turn held 35% in a company holding 35% in another company with a 35% holding in a yet further company. Plainly, Parliament did not wish s.435(10) (and thus s.435(7)) to bite only on people or entities who control a company in practical terms. It was evidently Parliament's intention that s.435(7), and the term "associate" more generally, should have a wide meaning for the purposes of, for example, the preference and transaction at an undervalue provisions (see e.g. ss.239(6), 240(1)(a) and 249(b) IA 1986).
127. Returning to [58] of the *Kilnoore* judgment, Lewison J considered that the fact that "entitled" governs both the exercise of voting power and the control of voting power in s.435(10)(b) IA 1986 shows that it means "entitled as between the registered shareholder and the controller of the voting power". It seems to us, however, that Lewison J's approach conflates entitlement "to exercise ... voting power" and entitlement "to ... control the exercise of ... voting power". Section 435(10) provides for a person to be taken as having control of a company in either situation. Yet it is difficult to see how someone could be entitled "to exercise ... voting power" without also being entitled "to ... control the exercise of ... voting power" if *Kilnoore* is correct. While, moreover, it may make sense to judge entitlement "to ... control the exercise of ... voting power" by reference to the position "as between the registered shareholder

and the controller of the voting power”, that is not so in relation to the other possibility, entitlement “to exercise ... voting power”. That naturally falls to be determined, surely, by reference to the position as between the company and the person said to be so entitled. On that basis, s.435(10) would extend both to someone who, as between himself and the registered shareholder, is entitled “to ... control the exercise of ... voting power” and also to a registered shareholder with, so far as the company is concerned, the right “to exercise ... voting power”.

128. Lewison J attached some significance to the reference to “voting power” in s.435(10)(b) IA 1986. The word “power” gave him “some encouragement to look to the economic reality of the case” (see [58]). In our view, however, the use of the word “power” takes matters no further. “[V]oting power” is apt to refer simply to the sum of the voting rights attached to the issued shares. It may be that the draftsman could have substituted “voting rights”, but nothing can be inferred from his choice. It is notable that “voting rights” and “voting power” were used interchangeably in the *Bibby* case, especially in Lord Simonds’ speech.
129. In all the circumstances, we respectfully take a different view from Lewison J. As we see it, a person registered as the holder of shares carrying a third or more of the total votes attaching to the relevant company’s issued shares, and so as between himself and the company “entitled to exercise ... one third or more of the voting power”, is also to be considered to be so entitled within the meaning of s.435(10)(b) IA 1986 and, hence, an associate of the company.
130. In the present case, it would doubtless have been the Administrative Receivers rather than THSP’s directors who would have decided how the company’s shares in TUK should be voted had there been a general meeting on 31 December 2009. That, however, is neither here nor there. The Administrative Receivers would have been voting in THSP’s name and on its behalf. It was THSP that was “entitled to exercise” the voting power and it is, accordingly, to be taken as having had control of TUK and so an associate of it. That the Administrative Receivers were also, presumably, associates of TUK is immaterial.
131. The result is that we, like the Tribunal, consider the Targets to have been associates of TUK on 31 December 2009.

Conclusion

132. In our view, the Tribunal was correct that the Targets were associates of both the Trio and TUK on the relevant date, 31 December 2009. This ground of appeal therefore fails.

Issue 3: Reasonableness

133. We deal next with the issue of reasonableness.

The statutory provisions

134. The relevant legislation is set out in full above. Section 43(5)(b) PA 2004 provides that the Regulator may issue an FSD to a person only if “the Regulator is of the opinion that it is reasonable to impose the requirements of the direction on that person”. Section 43(7) lists matters to which the Regulator must have regard when considering the

question of reasonableness. No “such other matters” have been prescribed under s.43(7)(e).

135. The question of whether it is reasonable to issue an FSD is, in the first instance, a judgment for the Regulator. The matters to which the Regulator may have regard are not limited to the list of matters specified in s.43(7). The word “including” makes clear that the list is not exhaustive. However, where those matters are relevant, which is an objective question of law, the Regulator must have regard to them. The weight to be given to each of them is for the Regulator to decide. They are not necessarily to be given equal weight.
136. The Regulator is entitled to consider the relationship between the target and the employer (s.43(7)(a)) and the target’s involvement with the scheme (s.43(7)(c)), not only as these exist at the time when the imposition of an FSD is being considered (“which the person has”) but also as they existed in the past (“or has had”).
137. The Regulator is entitled to take a similar approach to “the value of any benefits received” (s.43(7)(b)). Thus it may be that, viewing the matter as at the time when the imposition of an FSD is being considered, it can be seen that the benefit received in the past has turned out to be much more valuable than may have been considered at the time or, conversely, that it has in the event proved to be of less value or even of no value at all. While the primary focus of s.43(7)(b) is on the position as it exists when the imposition of an FSD is being considered, we see no reason why the Regulator should not take some account of a benefit received in the past even if that benefit has proved to be less valuable than was expected or hoped.
138. The fact that s.43(7)(b) speaks of “the value” of any benefits received does not mean that the value of such benefit must be susceptible of precise quantification. Where that is possible, it will be a factor which may be relatively easy to take into account and to give appropriate weight, but there are other benefits whose value may nevertheless be real, even if difficult or impossible to quantify in money terms.
139. In addition to the matters set out in s.43 itself, the Regulator must also have regard to its statutory objectives set out in s.5 PA 2004. It was common ground that the Regulator is also subject to the general duty set out in s.100 PA 2004 to have regard to “(a) the interests of the generality of the members of the scheme” and “(b) the interests of such persons as appear to the Regulator to be directly affected by the exercise” of its regulatory function, which would include any proposed target.
140. The legislation allows, and we would say requires, the Regulator to have regard to the fact that, when it is the case, the matters relied upon as relevant to the question of reasonableness all occurred before the coming into force (or even the announcement) of the legislation. That can either be regarded as part and parcel of consideration of the listed matters or as an additional matter which must be taken into account, bearing in mind that the list in s.43(7) is not exhaustive. Plainly, however, where this is the case, as it is here, it will be a relevant consideration, and it would be an error of law not to take it into account and to give it appropriate weight. We consider later in this judgment whether (as the Targets submit) this was as a matter of law a determinative consideration on the facts of the present case.

141. It is common ground, as the Tribunal stated, that the burden of proof is upon the Regulator. That applies not only to the process of finding the facts but also to the issue of reasonableness generally.

The role of the Tribunal

142. The decision as to whether an FSD should be issued is made by the DP. However, s.96(3) PA 2004 entitles a target or other person affected to refer the determination to the Tribunal (now the Upper Tribunal (Tax and Chancery Chamber)).
143. Although the provisions of s.43(7) PA 2004 are concerned with the matters to which the Regulator must have regard, and the objectives and duties referred to in ss.5 and 100 are the objectives and duties of the Regulator, they apply equally to the Tribunal when considering on a reference what is the appropriate action for the Regulator to take.
144. The approach to be taken by the Tribunal on such a reference is set out in s.103 PA 2004:
- “(3) On a reference, the Tribunal may consider any evidence relating to the subject-matter of the reference, whether or not it was available to the Regulator at the material time.
 - (4) On a reference, the Tribunal must determine what (if any) is the appropriate action for the Regulator to take in relation to the matter referred to the Tribunal.
 - (5) On determining a reference, the Tribunal must remit the matter to the Regulator with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination.
 - (6) Those directions may include directions to the Regulator—
 - (a) confirming the Regulator’s determination and any order, notice or direction made, issued or given as a result of it;
 - (b) to vary or revoke the Regulator’s determination, and any order, notice or direction made, issued or given as a result of it;
 - (c) to substitute a different determination, order, notice or direction;
 - (d) to make such savings and transitional provision as the Tribunal considers appropriate.”
145. Section 103(7) requires the Regulator to act in accordance with the determination of, and any direction given by, the Tribunal.

146. It was common ground that the Tribunal will consider the matter *de novo*, unconstrained by the view of the DP. This is the approach explained by Warren J in *Re Bonas Group Pension Scheme* [2011] Pens LR 109:

“37. ... In my view, it is clear from section 103(3), (4) PA 2004 that it is for the tribunal to determine, in the light of the evidence before it, the appropriate action for the Regulator to take. 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.

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

The approach of the Court of Appeal

147. As mentioned above, and in contrast to the position on a reference to the Tribunal from a decision by the DP, an appeal to this Court from the Tribunal lies only on a question of law.
148. There was some debate before us as to the relevance of the fact that the Tribunal is a specialist tribunal to which the decision whether an FSD should be issued has been entrusted by Parliament. Reference was made to the comments of Lady Hale in *AH (Sudan) v SSHD* [2007] UKHL 49, [2008] 1 AC 678 at [30]:

“This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that the decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently. I cannot believe that this eminent tribunal had indeed confused the three tests or neglected to apply the correct relocation test. ...”

149. The context for these remarks is important. It appears clearly from the speeches as a whole. Lord Hope at [19] expressed his agreement:

“I agree also with what Baroness Hale of Richmond says about the caution with which the ordinary courts should approach the decision of an expert tribunal. A decision that is clearly based on a mistake of law must, of course, be corrected. Its reasoning must be explained, but it ought not to be subjected to an unduly critical analysis. As your Lordships have indicated, there are passages in the decision that is before us which might, when read in isolation, suggest that the tribunal misdirected itself. But I am quite satisfied that the decision as a whole was soundly based, and that a more accurate wording of the passages that have attracted criticism would have made no difference to the Tribunal’s conclusion on the facts that the Secretary of State’s refusal of asylum in these cases should be upheld.”

150. So too did Lord Brown of Eaton-under-Heywood at [43]:

“I, too, regard the Court of Appeal’s approach to have been wrong. There was no sound basis here for overturning the tribunal’s decision. Certainly, as both Lord Bingham (at para 11) and Baroness Hale (throughout her opinion) indicate, the tribunal’s determination could have been clearer. ... I, too, conclude, however, that so expert and experienced a tribunal cannot readily be supposed to have committed any of these errors sought to be inferred from its sometimes infelicitous drafting. ...”

151. The issue in *AH (Sudan)* with which these comments were concerned was whether it was unreasonable (or unduly harsh) for an asylum seeker to be required to relocate to a “safe haven” in another part of the country to which he was to be returned. The Asylum & Immigration Tribunal had found that it was not unreasonable, but had expressed some parts of its decision in a way which appeared to assimilate the test of unreasonableness with the requirement that a person should not be treated in a way that would infringe Article 3 of the European Convention on Human Rights. That was not the correct test of unreasonableness, and if that was what the tribunal had meant to say, its decision would have been wrong in law. The passages set out above were directed to ensuring a benevolent reading of the decision as a whole, treating it as inherently unlikely that an experienced specialist tribunal would have made such an error of law, and warning against seizing upon isolated passages in order to find a misdirection of law as a basis on which to allow an appeal. This appears most clearly from the opinion of Lord Bingham, who acknowledged at [11] that part of the tribunal’s decision did appear to assimilate the two tests, but that there were other parts of the decision which stated the position correctly. He continued:

“It may very well be that the multiplicity of issues with which it had to deal led the tribunal into making less plain than it should the issue it was addressing at some points in the judgment. I do not, however, think that the Court of Appeal was entitled to attribute to this experienced and well-qualified tribunal what would, if made, have been an egregious and inexplicable error, and read as a whole the judgment does not suggest that the tribunal made such error.”

152. The most recent consideration by this Court of the approach which it should take to an appeal from the Upper Tribunal to which we were referred is *Obrey v SSWP* [2013] EWCA Civ 1584, [2014] HLR 12. The issue was whether the indirectly discriminatory effect on patients detained in a mental hospital for more than 52 weeks of a regulation enabling local authorities to suspend their payment of housing benefit was “manifestly without reasonable foundation”. The Upper Tribunal (Administrative Appeals Chamber) held that the discrimination was justified. This Court emphasised that an appeal from the Upper Tribunal is not a rehearing but is limited to an appeal on a point of law. Sullivan LJ (with whom Laws and Sharp LJ agreed) said at [18]:

“The submission that the court should consider the appeal in accordance with the usual approach in CPR r.52.11 ignores the limitation expressly imposed by s.13(1) of the 2007 Act. I do not accept the submission that the issue of justification raised in this appeal is an issue which was outwith the expertise of the Upper Tribunal, nor do I accept the submission that the issue before the Upper Tribunal was one of ‘constitutional significance’. It is common ground that there was no direct or targeted discrimination in these three appeals. In my judgment, the question whether the indirectly discriminatory effect of a particular rule in the benefits system because it does not distinguish between mental patients and other patients in hospital is, or is not, ‘manifestly without reasonable foundation’ is very far from being an issue of ‘constitutional significance’. On the

contrary, it is precisely the kind of issue that is best left for evaluation and judgment by a specialist appellate tribunal with a particular expertise in the field of social security law. If, as in the present case, the First-tier tribunal has not applied the correct legal test when deciding the issue of justification, that specialist appellate tribunal is the Administrative Appeals Chamber of the Upper Tribunal. I will therefore consider whether the appellants have demonstrated an error of law on the part of the tribunal which has a particular expertise in the benefits system.”

153. Sullivan LJ went on at [26] and [27] to draw a distinction between questions of law on the one hand and “questions of evaluative judgment for the expert appellate tribunal” and questions where it was an advantage to have familiarity “with the practical operation of the appellate system in this field” on the other.
154. In *General Medical Council v Bawa-Garba* [2018] EWCA Civ 1879, [2019] 1 WLR 1929 the appeal was not from the Upper Tribunal, but from the Medical Practitioners Tribunal, a tribunal which consisted of two lay members and a registered medical practitioner, in this case a consultant surgeon, assisted by a legal assessor. This Court held that such an appeal was by way of review and not rehearing, the question being whether the decision of the tribunal was wrong, and that a decision as to sanction following a finding that a practitioner’s fitness to practise had been impaired was an evaluative decision based on many factors with which the court would only interfere if there had been an error of principle in carrying out the evaluation or the evaluation fell outside the bounds of what the tribunal could properly and reasonably decide. The Court emphasised at [67] that the general caution which applies to an appellate court when reviewing such a decision made by a judge “applies with particular force in the case of a specialist adjudicative body, such as the Tribunal in the present case, which (depending on the matter in issue) usually has greater experience in the field in which it operates than the courts”. It added at [93] to [97] that the tribunal was the body best qualified to make a judgment “as to the appropriate sanction for maintaining public confidence” in the medical profession.
155. The Targets drew attention to *R (R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47, [2018] 1 WLR 4079, which was concerned with the proportionality of disclosure to an employer of information that a potential employee had been acquitted of rape. In proceedings for judicial review the judge concluded that disclosure was reasonable and proportionate, and therefore not a violation of the claimant’s rights under Article 8 of the ECHR. A question arose as to the approach to be taken in these circumstances by an appellate court. Giving the only judgment in the Supreme Court, Lord Carnwath explained the correct approach as follows at [64]:

“In conclusion, the references cited above show clearly in my view that to limit intervention to a ‘significant error of principle’ is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle—whether of law, policy or practice—which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge’s reasoning, such

as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be ‘wrong’ under CPR r 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said in *R (C), Secretary of State for Work and Pensions* [2016] PTSR 1344, para 34:

‘the appeal court does not second-guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong’.”

156. This is helpful guidance but, to the extent that there is any difference between this approach and the approach explained in *Obrey*, we must follow the latter case which was directly concerned with an appeal from the Upper Tribunal where the jurisdiction of this Court to set aside a decision of the Tribunal depends upon finding that the making of the decision concerned involved the making of an error on a point of law. That said, an identifiable flaw in the Tribunal’s reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor undermining the cogency of the conclusion, is likely to be a strong indication that such an error has been made.
157. We would identify four principles from these authorities which are relevant in the present case:
- (i) first, the cases emphasise that the statutory jurisdiction of the Court of Appeal on appeals from the Upper Tribunal is limited to deciding questions of law;
 - (ii) second, that limitation must not be evaded by being too ready to find a misdirection of law. In general, within its specialised field of expertise, it can be assumed that the Tribunal will have got the law right, and if that is confirmed by a fair (or even “benevolent”) reading of the decision as a whole, an appeal should be dismissed even if there are some passages within the decision which, taken in isolation, might indicate otherwise. Ultimately, however, it is for this Court to determine whether the Tribunal’s decision is correct in law;
 - (iii) third, the weight which this Court will give to a decision of the Tribunal as a specialist body will depend on all the circumstances, including in particular the nature of the issue for decision. There will be some matters particularly within the Tribunal’s expertise, such as country guidance issues in immigration and asylum cases, the practical implications of a challenge to the benefits system, or (in appeals from professional bodies) the maintenance of standards and public confidence in the profession. Other matters, conversely, may require no particular expertise which this Court does not have. The questions whether legislation was intended by Parliament to operate retrospectively or the true construction of the debenture in the present case are examples in the latter category; and

- (iv) fourth, however, the question whether something is reasonable is not in general a question of law at all. The grounds upon which a challenge can be made on appeal from a decision of the Upper Tribunal that something is (or is not) reasonable remain as stated by Lord Radcliffe in the well-known case of *Edwards v Bairstow* [1956] AC 14 at [36]:

“When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been an error in point of law.”

Such a case was described by Lord Radcliffe as being one in which, once the facts are found, there is “only one true and reasonable conclusion”.

158. To establish an error of law on this basis means that a high hurdle must be overcome, but, as explained below, this is a challenge which the Targets accept.

The decision of the DP

159. The view of the DP on the question of reasonableness was summarised at [168] of its statement of reasons as follows:

“... it is our view that it would be reasonable to issue FSDs to the Targets and to require them to secure that financial support is put in place for the Scheme, within six months of the issue of the FSDs. The factors that have weighed most heavily with us are the value of benefits received by the Targets from the Employers and the Targets’ relationship with those Employers. Overall it seems to us that this is a case where the Scheme’s principal employer, [BxC Tech], was set up by the Granada and Thorn groups as part of a transaction that aimed to extract value from the consumer rental 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 [BxC Tech] to borrow £860m from WestLB, left all of [BxC Tech’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 [BxC Tech]. 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 [BxC Tech] and the Scheme.”

160. We set this out for completeness. As the hearing before the Tribunal was a rehearing and the Tribunal made its own findings and reached its own conclusions, it is unnecessary to consider further the reasoning of the DP.

The decision of the Tribunal

161. The reasoning of the Tribunal on the issue of reasonableness is detailed and thorough. It began by making extensive findings of fact which we have set out in outline at the beginning of this judgment. The Tribunal then examined carefully each of the matters set out in s.43(7) together with the other matters which were contended to be relevant.

The Tribunal's reasoning

General approach

162. The Tribunal stated its general approach to the matters specified in PA 2004 s.43(7) at [425] to [427] in terms with which we agree and which, so far as they go, we did not understand to be challenged:

“425. ... We accept, as the Regulator submitted, that the jurisdiction in s.43 is primarily founded on there being a present or past relationship between the potential targets of an FSD and the scheme and the nature of that relationship making it reasonable for the potential target to provide financial support to the scheme. It is therefore apparent that the closer the relationship is or has been the more likely it will be that it will be reasonable to issue an FSD, whereas if the relationship in practice was more distant, or ceased to exist a long time before the issue of an FSD was being considered, it is less likely that the issue of an FSD would be reasonable, even if the potential target has received benefits directly or indirectly from the employer.

426. Therefore, the fact that a target has not received any substantial benefits directly or indirectly from an employer is not a bar to the issue of an FSD if, taking into account the nature of the relationship between the potential targets and the employer or the scheme, it is otherwise considered reasonable for an FSD to be issued in circumstances where the scheme is insufficiently resourced, particularly where those circumstances have arisen as a result of the breaking of the connection between the potential targets and the employer of the scheme.

427. However, if the potential target has in fact received substantial benefits from the employer in circumstances where there is or has been a close relationship between the potential target and the scheme or its employer, it is more likely that it will be reasonable to issue an FSD where the employer is insufficiently resourced.”

163. The Tribunal continued by affirming that the Regulator needs to be guided by its statutory objectives, including protecting the benefits of members under occupational pension schemes and reducing the risk of situations arising which may lead to compensation being payable from the PPF. It also noted the need to take into account the interests of potential targets as persons directly affected by the exercise of the power to issue an FSD.

164. The Tribunal then identified five features of its approach to the issue of reasonableness. The first was what it regarded as the need to give a purposive interpretation of the legislation having regard to its policy objective:

“430. Furthermore, in making our assessment, we should give the legislation a purposive interpretation, having regard to the policy objective of the legislation, which ... is to create a rescue framework for pension schemes which are in deficit through the medium of imposing new liabilities on those who have had the necessary degree of association and connection with the relevant scheme at the relevant time. We should therefore consider whether the legislation was intended to embrace the circumstances pertaining to this case as being circumstances in which it is reasonable to issue an FSD. Therefore, we should not interpret the provisions restrictively and should give terms such as ‘relationship’ ‘involvement’ and ‘benefit’ a wide meaning.”

165. The Targets criticised this approach, submitting in particular that it was inappropriate to give the term “benefit” a wide meaning as distinct from its ordinary natural meaning.

166. Second, the Tribunal pointed out that the FSD regime does not depend on fault, a point which was common ground:

“431. It is also the case ... that s.43 PA 2004, in contrast to the contribution notice regime created by s.38 PA 2004, is not a fault-based regime. The jurisdiction under s.43 is not established by reference to specific acts or omissions having occurred but by reference to the circumstances prevailing at the time the decision is taken to issue the FSD.”

167. Third, the Tribunal made clear that it attributed no fault or blame to the Targets, but it nevertheless drew a distinction between fault and responsibility, a distinction which in the event was fundamental to its reasoning:

“433. In our view, it is not necessary to find well-founded criticisms of the manner in which a particular transaction was structured or implemented, or the way that a business was operated before the jurisdiction can be exercised. As will become apparent, we do not seek to attribute any blame to the Targets as regards the manner in which the Joint Venture was structured or implemented but there is an important distinction between blame and responsibility. Even if all the decisions made by the Targets were taken for good commercial reasons at the time and, without the benefit of hindsight, were perfectly reasonable decisions to take, in our view the key question is whether the structure left the Joint Venture vulnerable to adverse movements in the market so that Granada should bear some responsibility for the risks which eventuated for the Employers and the Scheme. The fact that this is a matter of responsibility rather than blame is also relevant to the extent to which hindsight is a legitimate factor in our consideration.”

168. The Targets relied strongly on the Tribunal’s finding of absence of fault on their part and submitted that an undemanding test of “some responsibility” was insufficient to justify a conclusion that it was reasonable to issue an FSD. However, it is apparent from its decision as a whole that the Tribunal regarded the Targets as having a high degree of responsibility for the failure of the Joint Venture. As we read this paragraph, the reference to Granada bearing “some responsibility” is explained by care on the part of the Tribunal not to prejudice any future issue as to the quantum of an FSD.
169. Fourth, the Tribunal addressed the Targets’ submission that the FSD regime sought “to address a particular problem, namely the risk that the existence of the PPF gives rise to morally hazardous behaviour”. The Tribunal accepted the Targets’ submission that, as the setting up of the Joint Venture and the establishment of the Scheme predated the creation of the PPF, moral hazard could not be a relevant factor in the present case. However, the Tribunal concluded that, while evidence that the Targets had relied on the existence of the PPF when setting up the Scheme would have been a highly relevant factor pointing in favour of an FSD, the absence of such motivation was not a material factor militating against the issue of an FSD. Rather, it was neutral.
170. Finally, the Tribunal referred back to an earlier part of its decision where it had set out factors on which the Targets relied:

“118. The Targets also contend that they had no connection with the Scheme after the appointment of the Administrative Receivers and that the conduct of the Trustee in relation to the operation the Scheme is a relevant factor. In that regard they contend:

- (1) The Targets ceased to have an economic interest in the Joint Venture after the appointment of the Administrative Receivers and all the liabilities accrued in the Scheme after that date were at the behest of the Administrative Receivers.

- (2) There were avoidable delays in closing the Scheme to accrual after the appointment of the Administrative Receivers.
- (3) The additional liabilities arising from pay rises after the appointment of the Administrative Receivers could easily have been avoided.
- (4) No advice was sought about whether it was advisable to incorporate the Top-Up Arrangement into the rules of the Scheme in December 2003.
- (5) Continuing to run the Scheme after 2003 was very risky and was highly likely to result in the large increase in the deficit that has in fact occurred.
- (6) It was wrong not to put the Scheme into winding up soon after 2003 so as to take advantage of the anticipated creation of the PPF which has resulted in a large increase in the PPF's exposure.
- (7) There was no justification for not winding up the Scheme after 2003 and not triggering a PPF assessment period after April 2005.

119. Finally, the Targets contend that Granada has already provided a degree of financial support to the Scheme.”

171. The Tribunal accepted the Targets' submission that (if made good) these matters were in principle relevant not only to any later issue of quantum but also to the question whether it was reasonable to issue an FSD, there being no strict dividing line between matters relevant to quantum and matters relevant to reasonableness. But, in the event, it rejected the Targets' criticisms of the Trustee's conduct.
172. The Tribunal then addressed each of the factors relating to reasonableness which it regarded as relevant.

The relationship between the Targets and the Employers

173. The Tribunal regarded the question of the relationship between the Targets and the Employers as a practical question requiring an examination of how close the connection was in practice, both in the manner in which the Joint Venture was structured and financed initially and also in the extent to which the Shareholders influenced the running of the business thereafter, but “taking into account that any influence the Shareholders had over the running of the business was in practice eliminated following the appointment of the Administrative Receivers”.
174. So far as the initial structure was concerned, the Tribunal reached the following factual conclusions:

- (i) the relationship between the Shareholders and the Joint Venture was created by the Shareholders in their own interests without any independent assessment on behalf of the Joint Venture itself whether the structure was in its own best interests, or of the amount which it was being asked to pay for the Shareholders' rental businesses;
- (ii) it was the Shareholders who determined not only the Joint Venture's level of borrowing, but how it should be utilised (i.e. to pay cash to the Shareholders for the transfer of their shares, so as to maximise the cash available to them). There were other structures which could have been adopted; and
- (iii) the cash consideration could only be realised through the borrowings which the Shareholders determined that the Joint Venture should undertake, secured by charges over the Joint Venture's (but not the Shareholders') assets.

175. In these circumstances, the Tribunal found in terms that "the sale of the respective rental businesses was a *bona fide* commercial transaction and that a combination of the businesses was recognised by all concerned at the time as being a logical and obvious step for both of them". It expressly disclaimed any criticism of the way in which Shareholders had chosen to structure the Joint Venture, but added that "clearly that choice gave rise to greater risks of failure if the Joint Venture was unable to generate sufficient cash flow to service its debt obligations in a business environment where the parties recognised that the rental market for brown goods was in 'continuing serious and endemic decline'." The risks identified by the experts existed and would have been known to the Joint Venture parties, who undertook the transaction in full knowledge of them. Accordingly:

"453. ... as it was the Shareholders who decided the level of risk that they would ask the Joint Venture to bear, and there was no independent assessment of those risks on its behalf, it is clear that there is a high degree of responsibility on the part of the Shareholders for what ultimately transpired, namely that many of these risks came to pass and the Joint Venture failed. We do not seek, however, to attribute blame to the Shareholders; to do so would be to exercise a degree of hindsight and we accept that at the time of the transaction the Shareholders hoped and expected that the Joint Venture would be a success."

176. The Tribunal regarded this as "a highly relevant and important factor":

"459. ... the responsibility of the Shareholders for the creation of the Joint Venture with the features that it had, in the context of which a decision was made to establish a defined benefit occupational pension scheme, is a highly relevant and important factor in our assessment of reasonableness."

177. The Tribunal went on to find that the structure adopted was a cause of failure of the Joint Venture:

“482. ... The initial financing of the acquisition, with the commitment to refinance the borrowings through a securitisation, were, as we have found, the result of decisions made by the Shareholders. Those decisions were made against a background of a long-term decline in the rental market as the Shareholders were fully aware. It is therefore plain that the failure of the Joint Venture was a direct result of the structure adopted by the Shareholders and they therefore must bear the responsibility for it, even if, as we previously said, we make no criticism of the choice they adopted. They were fully aware of the risks and they decided to accept them. This is therefore another clear factor demonstrating a close relationship between the Shareholders and the Joint Venture.”

178. Further, when it came to the ongoing running of the business, the Tribunal rejected the Targets’ submission that the Shareholders had done “no more than take a natural and responsible interest in their shareholding”. The Tribunal found (at [478]) that the Shareholders had “exercised close control in practice over the operations of the Joint Venture and all major decisions relating to its business during the life of the Joint Venture prior to the appointment of the Administrative Receivers”.
179. The Tribunal recognised that from the date of their appointment the Administrative Receivers were in practical control of the Joint Venture’s operating companies, including the Employers, and that the Targets had no further control or influence over them so that the Targets’ commercial connection with the Employers had ceased over six years before the look-back period began. The Targets relied on this as a reason why the imposition of an FSD would be unfair, but the Tribunal did not accept that this was a strong point in the Targets’ favour. It considered that a past relationship could in principle be as important as any ongoing relationship and regarded the Targets’ responsibility for the manner in which the Joint Venture was structured and operated as having been set from the outset. The extensive level of control and influence exercised in the past outweighed the fact that at the time the look-back period began, the Targets had control only in the technical sense required for the purpose of establishing jurisdiction.
180. Overall, the Tribunal concluded (at [492]) that the relationship between the Targets and the Employers pointed “very strongly in favour of the issue of an FSD to the Targets”.

The value of any benefits received

181. The Tribunal turned next to the value of any benefits received directly or indirectly from the Employers by the Targets. A major issue here was whether the price received by Granada for its rental business exceeded its true value. Extensive valuation evidence was adduced by the parties, but in the end the Tribunal found that it was impossible to reach a conclusion about this. Its carefully nuanced finding was that it was not possible to say that the price of £600 million was an overvaluation:

“507. ... we cannot say, so long after the event, in circumstances where both experts agree that it is impossible now to do a proper valuation of the business, that a price of £600 million is so

obviously unreasonably high that it cannot reflect a proper valuation of the Granada rental business at the time. We therefore have not concluded that the price of £600 million paid overvalued Granada's rental business at the time.

508. However, we do not conclude from this that the fact that the Targets may have paid an appropriate price for the business is a positive factor tending against the issue of an FSD. All we have concluded at this stage is that the Targets did not obtain any benefit from the Joint Venture having acquired the Granada rental business at an overvalue.”

182. However, the Tribunal identified three benefits which the Targets had obtained (at [509]):

- “(1) An immediate cash realisation of its interest in a declining business.
- (2) Access to potential upside in the event the Joint Venture generated distributable funds or was listed in the future, with protection from any downside given the non-recourse structure of the Joint Venture.
- (3) The proceeds of the transaction helped Granada reduce its net debt and improve its financial position.”

183. The Targets submitted that to exchange an asset for cash at a fair value was an equal exchange in which neither side can be said to have obtained a benefit. Plainly, however, viewing the matter at the date of the determination, the fact that Granada had obtained very substantial cash proceeds for a business which was already in terminal decline was a very valuable benefit. By the time of the determination, the business had failed and was of no value at all. Even putting to one side the Tribunal's finding that the failure of the Joint Venture was caused by the highly leveraged structure adopted with a view to realising cash for the business, there can be no real doubt that, viewing matters with the benefit of hindsight, the rental business would no longer have been viable. But hindsight is unnecessary. Even at the time, and recognising that the price paid may have been an appropriate price, it was plainly perceived to be beneficial to the Shareholders to obtain cash for the business upfront rather than (for example) retaining shares and realising value through the payment of dividends over time. Obtaining such cash enabled Granada, as the Tribunal indicated, to reduce its net debt and to improve its general financial position. Moreover, as events turned out there were (we understand) no profits available for distribution as dividends (although we cannot say whether there might have been if the Joint Venture had not had to service its high level of debt), which only underlines the value of the benefit represented by taking the price in cash.

184. So far as the potential upside was concerned, this was no doubt considered to be a benefit at the time, but by the date of the determination (and indeed by the date of the appointment of the Administrative Receivers at the latest), it was apparent that no such upside would be achieved. On the other hand, for precisely that reason, the fact that the

cash had been obtained together with protection from any downside was undoubtedly of value.

185. The Tribunal's overall conclusion on benefit was as follows (at [518]):

“In summary the points that we have made regarding the benefits which arose out of the payment of the cash consideration and the structure of the Joint Venture transaction, reinforce the conclusions we have come to on the relationship issue, to which they are closely linked. We find that the other factors that we have considered in relation to the benefit issue are broadly neutral.”

186. The Tribunal did not address in this section of its decision its finding at [352] cited above that “the maintenance of good employee relations was an important factor in the decision to establish a defined benefit rather than a money purchase scheme”. However, the Tribunal did go on in the next section (at [521]) to record that “good employee relations was an important factor in the success of the Joint Venture as a whole, and therefore it was in [Granada's] own interests, as well as those of the Joint Venture itself, to take account of this factor when approving the proposal for the Scheme”. It is unnecessary to consider whether this could be regarded as a further benefit obtained by the Targets from the Employers. It is, however, apparent from the way in which the Tribunal stated its final conclusion on reasonableness (see below), that it is a factor to which it attributed weight, as it was entitled to do, the list in s.43(7) being non-exhaustive.

The connection and involvement of the Targets with the Scheme

187. The Tribunal found that Granada was “closely involved in the decision to establish the Scheme and it did so in full knowledge and acceptance of the risks and rewards that may result”. The risks included in particular those resulting from the debt burden undertaken by the Joint Venture, which was necessary in order to enable the Shareholders to obtain a cash consideration:

“522. ... the decision to create a defined benefit scheme did create a funding risk to the Employers, and consequently a risk to pension benefits that former Granada members would in future earn in the Scheme. Furthermore, Granada made a conscious decision to approve the establishment of the Scheme as a defined benefit scheme against the background of the Employers being part of a highly leveraged Joint Venture, with the inherent risks of such a structure. Without the support of the Shareholders the Employers' covenant was therefore undoubtedly relatively weak.”

188. The Tribunal also found that, until the appointment of the Administrative Receivers, the Targets were closely involved in decisions affecting the Scheme. Moreover, while the Trustee took decisions which may have led to increases in the current deficit in the Scheme [at 534]: “they were decisions that were taken with the full knowledge and

approval of the Targets, they were decisions that were reasonable at the time and which potentially benefited the Targets by smoothing employee relations, making it more likely that the Joint Venture would move forward successfully”.

189. The Tribunal also dealt under this heading with the Targets’ criticisms of decisions made by the Trustee, both before and after the appointment of the Administrative Receivers. It rejected these criticisms and, as they have not (subject to one point) featured in the appeal, we need say no more about them.
190. The one point which remains concerned the Tribunal’s conclusion (at [568]) that it was lawful in the circumstances of this case for the Trustee to have some regard to the availability of the PPF when deciding whether to continue the Scheme or to wind it up. Having analysed the decision of Henderson J in *Independent Trustee Services v Hope* [2009] EWHC 2810 (Ch), [2010] ICR 553, the Tribunal stated:

“It is quite clear to us, therefore, that Henderson J was not seeking to lay down any general principle as to when it was legitimate for a trustee to take into account the availability of the PPF. The question has to be considered on a case-by-case basis. We accept the Trustee’s submissions that the circumstances in this case are quite different, and rather than having the objective of ensuring that the PPF would be available to provide compensation, its primary aim was to avoid that event occurring through its negotiations with the Shareholders or, if those failed, the regulatory process leading to the issue of an FSD. The fact that the Trustee knew that the PPF would be available were neither of those objectives realised, does not in our view make the Trustee’s strategy impermissible in the way that it was found to be in *Hope*. We accept that the Trustee was not seeking to justify by reference to the PPF a course of conduct that would otherwise have been improper. It was seeking to preserve the possibility of continuing negotiations with the Targets and to preserve the possibility of an FSD (and ultimately a contribution notice) if a compromise could not be reached, fully aware of the risks if either of those outcomes was not achieved.”

191. The Targets criticised this conclusion and asked us to rule that it is wrong in law. However, time did not allow for this submission to be developed orally. To the extent that the Tribunal here made findings as to the Trustee’s objectives, those were findings of fact. Moreover, we agree with the Tribunal and with Henderson J in *Hope* at [106] “that there is no single all-purpose answer to the question whether the PPF is a relevant consideration for trustees to take into account. It all depends on the context and purpose of the particular power which the trustees are proposing to exercise, and the particular way in which they wish to take the PPF into account”. We can, therefore, see no error of law in the Tribunal’s reasoning. Its ultimate conclusion on the point, however, was that the postponement of a decision whether to wind up the Scheme did not significantly shift responsibility for the deficit from the Targets to the Trustee, but that the question of what account should be taken as regards the increase in the deficit attributable to this period should be left to be determined as a matter of quantum.

The Targets' financial circumstances

192. While noting that the Targets have the funds to comply with any FSD which may be imposed, the Tribunal did not regard the Targets' financial circumstances as relevant to the question of reasonableness. That view has not been challenged.

Other factors including retrospectivity

193. Having dealt with the list of matters specified in PA 2004 s.43(7), the Tribunal turned to other matters not included in that list. The most important of these was retrospectivity. Because this is so central to the appeal, we set out the Tribunal's reasoning on this issue:

“580. ... we accept that because, as we have found, the legislation is capable of imposing new financial obligations by reference to transactions that have been entered into before the legislation came into force, the question as to whether taking account of all the circumstances it is reasonable to direct such an imposition is a highly relevant factor to be taken into account in our assessment of reasonableness. As we observed at [16] above, account must be taken of the interests of the Targets as well as those of the members of the Scheme and the Trustee.

581. As we observed at [207] above, application of new legislation to existing circumstances does involve a degree of retrospectivity which may create a degree of unfairness or hardship. We should consider whether in the circumstances of this case that degree of unfairness or hardship is so significant that we should conclude that it would not be reasonable to direct the issue of an FSD to the Targets.

582. As Lord Pannick powerfully submitted, Granada arranged their affairs in 1999 to 2000 by entering into a particular transaction by which they disposed of the rental business for which they received a sum of money which they then applied in the course of their business. The Regulator is now seeking to upset those plans as to the sale and the proceeds of sale by imposing a liability that did not exist in 1999 to 2000. Although Lord Pannick had submitted that the basis of the Regulator's case for the issue of an FSD is based on criticisms of the transaction, we seek to make no criticism of the choice that the Targets made in how they wished to structure the transaction.

583. As we have found, the transaction created risks for which the Targets are responsible because of the manner in which the Joint Venture was structured. At the time of the transaction, however, there was no basis on which the Targets could have foreseen that many years later they may be called upon to support the liabilities of the Scheme and the whole basis of the structure that the Shareholders created was that both the Joint

Venture and the Scheme were to be non-recourse to the Shareholders.

584. Furthermore, as we have observed at [228] above, there was no opportunity for the Targets to seek clearance as to the transactions and thereby identify the potential consequences and decide whether or not to proceed in the light of the answers they received from the Regulator. There is clearly a disadvantage to those who entered into transactions prior to the coming into force of PA 2004 relative to those who entered into transactions once the legislation came into force. However, we decided at [229] above, degree of hardship created was a very qualified kind of hardship.

585. We therefore conclude that the fact that the Targets could not have known at the time of the transaction that further liabilities were liable to be imposed as a result of it and that they had no opportunity to seek clearance in relation to the transaction are significant factors tending against the issue of an FSD in this case.”

194. We would note that although the Tribunal cited what it had said at [229] about Lord Mustill’s reference to “a very qualified kind of hardship”, what it actually decided there was that the unfairness resulting from an inability to seek advance clearance was outweighed by the other factors which led it to conclude that overall Parliament intended the FSD legislation should operate with a degree of retrospectivity.
195. The Targets criticise in particular the final sentence of [581], submitting that this puts the matter the wrong way round as the starting point should be that it is unfair to impose an FSD in reliance on events and transactions which occurred before the legislation came into force or was even proposed. It is, however, clear from these paragraphs of its decision that: (1) the Tribunal did take retrospectivity into account when making its decision on reasonableness; including the absence of any fault on the part of the Targets; (2) it regarded this as “a highly relevant factor”; and (3) it was a “significant” factor tending against the issue of an FSD in this case.

The overall balance

196. Having addressed each of the various factors which it had taken into account, the Tribunal set out at [586] the following summary of its conclusions:

“(1) The circumstances relating to the relationship which the Targets had with the Employers point very strongly in favour of the issue of an FSD: see [492] to [494] above. By their choice of structure for the Joint Venture, the Shareholders extracted considerable cash from the business with no risk of recourse to their assets. They retained an ongoing interest in the merged business with the possibility of further value being generated if the business was successful, but without having to bear any

responsibility if the business, whose strategy they continued to determine, subsequently failed.

(2) These findings are reinforced by our conclusions on the benefits issue: see [518] above.

(3) The Targets had a strong connection and involvement with the Scheme up to the point at which the Administrative Receivers were appointed, a factor which is not diminished significantly by the fact that the practical connection with the Scheme ceased once the Administrative Receivers were appointed or by the actions that the Trustee took after that time.

(4) We place some weight on the other factors identified by the Targets, the most significant being the issue of retrospectivity.”

197. The Targets suggested that the reference here to “some weight” indicated that retrospectivity had not been given the weight which it deserved, but this summary must be viewed in the light not only of the Tribunal’s reasoning as a whole, but also of the immediately following paragraph:

“587. The Targets’ case is, as they say, straightforward. The Joint Venture was a *bona fide* transaction undertaken in the belief that the new venture would benefit from synergies and deliver considerable further value in the future to the Shareholders. That belief was not an idle hope but was supported by the considerable success both Shareholders had had in acquiring declining businesses in the past. The structure adopted was a logical one, and the price paid was an appropriate one. The due diligence which was undertaken by the Shareholders for their own benefit was considerable, appropriate in the circumstances, and involved appropriate consideration of the risks of the transaction. The Tribunal must guard against being illegitimately influenced by hindsight. Questions of judgment of risk must be assessed by reference to what was actually known at the time. Furthermore, at the time of the transaction the Targets had no reason to believe that further liabilities would be imposed and there was no basis on which they could have obtained clearance for the transaction.”

198. Although the Tribunal did not accept all aspects of this case, it was not suggested that this was an inaccurate summary of the Targets’ case or that the Tribunal had overlooked or failed to place in the balance any element of the Targets’ case on retrospectivity.
199. Finally, the Tribunal stated its conclusion as to how the balance should be struck:

“588. As we have said, we do not take issue with the commercial merits of the transaction or the manner in which it was structured. However, taking those factors together which we say

point strongly in favour of the issue of an FSD, our conclusion is that the key issue of responsibility for the risks to the Scheme that the Shareholders agreed to create as a defined benefit scheme because it was in both the Joint Venture's and their own interest to do so, and the substantial benefits received, all through a structure that the Shareholders created and which meant that the Scheme had a weak employer's covenant, clearly outweigh on the facts of this case the strong points that the Targets make on retrospectivity.

589. We therefore conclude that it is reasonable in this case for the Regulator to issue an FSD to the Targets.”

200. Thus the Tribunal regarded the Targets as having a strong case on retrospectivity as a factor against the imposition of an FSD, but considered that it was not merely outweighed but clearly outweighed by the factors pointing the other way.

The Targets' submissions on appeal

201. The Targets' essential submission on the issue of reasonableness is that the Tribunal erred in law by reaching a decision that no reasonable Tribunal could have reached. They submit that, on the facts of this case, there is (in Lord Radcliffe's words in *Edwards v Bairstow*) “only one true and reasonable conclusion”, namely that it is unreasonable for an FSD to be imposed.
202. In support of this submission, the Targets rely on the following matters:
- (i) all the material transactions in this case – the establishment of the Joint Venture, the establishment of the Scheme, and the manner in which the Joint Venture was operated – were begun and completed prior to the FSD legislation in the PA 2004 coming into force on 6 April 2005;
 - (ii) the creation of the Joint Venture did not, of itself, engage, even retrospectively, the FSD legislation, because that legislation only applies to defined benefit schemes (see PA 2004 s.43(1)(a), which exempts money purchase schemes from its ambit) and no such scheme was in existence, or even envisaged, at that stage;
 - (iii) the only decision taken by the Joint Venture partners which, in retrospect, had at least the potential to engage those provisions was the subsequent creation of the Scheme itself;
 - (iv) the Scheme was decided upon and set up at a time before the powers of the Regulator to impose FSDs, and the existence of the PPF (let alone the related moral hazard provisions), were even mooted;
 - (v) there was, in consequence, no reason whatsoever for the Targets to believe, at the time the Scheme was decided upon and created, that they might be made liable for any shortfall in the funding of the Scheme, or for the liabilities of the employer companies. On the contrary, the legal position at the time was incontrovertibly that they could have no such liability;

- (vi) there was also no possibility of the Targets applying for clearance from the Regulator in respect of the creation of the Scheme because the legislation creating the clearance mechanism had not been passed;
- (vii) since the appointment of the Administrative Receivers in 2003, the Targets have had no control or influence over the Employers or the Scheme;
- (viii) any benefits received by the Targets were likewise received before the time when the legislation was passed or even mooted and part of the “benefit” identified by the Tribunal, namely the prospect of a share in the upside if the Joint Venture prospered, had completely disappeared before this time; and
- (ix) the determination to issue FSDs has retrospectively turned a *bona fide* commercial transaction, which had been entered into in the entirely justifiable belief that it would be on a non-recourse basis so far as the Joint Venture partners were concerned, into a transaction in which the Targets have become liable for any shortfall in the Scheme in consequence of the insolvency of the Joint Venture companies (and decisions later taken by the Trustee over which the Targets had no control).

203. Reducing their submission to its essentials, the Targets summarised their case in the following terms:

“Put simply, it cannot be reasonable to impose a financial sanction on a party in respect of conduct which has been found to be *bona fide*, and has not been found to be legally or ethically improper, by reason of legislation which was not in force, and not even envisaged, at the time of the conduct in question and therefore in circumstances where he could not have had any opportunity to avoid such consequences or even become aware of the risk of them coming to pass. That is especially so where that very legislation, when enacted, provided a clearance mechanism specifically set up as a safeguard to allow persons who might be affected to establish their potential exposure and act accordingly.”

204. The Targets acknowledged that the position might be different if a transaction was not *bona fide* or if there were valid criticisms of its conduct to be made, but as the Tribunal had repeatedly stated, that was not so in the present case. The distinction drawn by the Tribunal between fault and responsibility was of no relevance where the transactions in question all pre-dated the legislation.

205. Further, the Targets submitted that the “benefits” identified by the Tribunal were not benefits within the meaning of PA s.43(7)(b), and that the Tribunal had wrongly applied a wide meaning of the term “benefit”, which had vitiated the conclusion which it had reached.

206. Finally, the Targets submitted that the Tribunal had misdirected itself in law as to the “policy object” of the FSD legislation, which was not “to create a rescue framework for pension schemes which are in deficit through the medium of imposing new liabilities

on those who have had the necessary degree of association and connection with the relevant scheme at the relevant time”. This was to state the purpose of the legislation too broadly and had led the Tribunal to give too wide an interpretation to the concept of reasonableness.

Analysis and conclusion

207. Whether it is reasonable to impose an FSD must be decided at the date of the determination and is not dependent on any fault on the part of the Targets. It was for the Tribunal to determine whether the imposition of an FSD was reasonable in the circumstances of this case. In making that determination, it was obliged by PA 2004 s.43(7) to take the specified matters into account “where relevant”. Those specified matters require the Tribunal to consider the position, not only at the time of the determination, but also as they stood in the past, to the extent that this is relevant. In the present case the matters listed in sub-paragraphs (a) to (c), that is to say, the Targets’ past relationship with the Employers, the value of benefits received and the Targets’ past connection or involvement with the Scheme were undoubtedly relevant, for the reasons which the Tribunal explained in great detail. These are, as the Tribunal explained, practical considerations, in contrast to the tests of connection and association in PA 2004 s.43(6)(c) which may be satisfied where (as in this case) the connection or association is highly technical. The Tribunal was therefore not only entitled but required to take them into account, and cannot be criticised for concluding that they were factors pointing in favour of the imposition of an FSD.
208. It will be recalled that an important factor in our conclusion in relation to the first ground of appeal, that the retrospective operation of the FSD legislation is not unfair and not in violation of A1P1, is that the imposition of an FSD must be reasonable and that reasonableness is to be determined by an independent judicial body. It follows that, in assessing reasonableness, the Tribunal was not only entitled but required to take into account the retrospective elements in this case, together with the fact that the Targets’ practical connection with the Employers and the Scheme had ceased as long ago as 2003 when the Administrative Receivers were appointed, and to give them appropriate weight.
209. We would accept that the Tribunal was obliged as a matter of law to treat the matters relied upon by the Targets under the heading of retrospectivity as matters having substantial or significant weight against the imposition of an FSD. That is emphatically not, however, to treat words such as “substantial” or “significant” as terms of art. The sense of our conclusion is that, whatever word is used, these factors must be regarded as weighing heavily against the imposition of an FSD.
210. However, there is no doubt that this was the Tribunal’s approach. It is apparent from our review of its decision, not only that the Tribunal had fully in mind as being “highly relevant” all of the points made by the Targets relating to the retrospective operation of the legislation and the impact on them of an FSD imposed in the circumstances of this case, but that it regarded them as factors weighing against the imposition of an FSD. Indeed, it went further. Despite one or two paragraphs of its decision where the Tribunal used the expression “some weight”, it is apparent from a fair reading of the decision as a whole that the Tribunal regarded the Targets’ submissions on this issue as powerful and treated these factors as having “strong” or “significant” weight on the issue of reasonableness.

211. The Targets were prepared to accept that, in a case where there had been fault on their part, the imposition of an FSD might be reasonable notwithstanding that the events and transactions in question occurred before the coming into force of the legislation. However, we do not accept that the absence of fault on the part of the Targets means that the balance in such a case must necessarily come down against imposing an FSD. The distinction drawn by the Tribunal between fault on the one hand and responsibility on the other is in our view a valid one. Thus it is possible to say, as the Tribunal did say in this case, that even though a target was not at fault legally or ethically, it nevertheless bears a high degree of responsibility for an insufficiency of funding.
212. Accordingly, even in a case where all relevant events and transactions occurred before the coming into force of the legislation, there remains a balance to be struck. It is for the Tribunal to decide how much weight to give to the various factors and whether, giving each factor appropriate weight, the imposition of an FSD is reasonable. In such a case, where there is no valid criticism to be made of the Targets' conduct, it would only be reasonable for an FSD to be imposed if the factors relevant to retrospectivity are clearly outweighed by the factors in favour of an FSD. But as we have set out, that is exactly what the Tribunal found.
213. The need for a balance to be struck is apparent when the consequences of a decision that the imposition of an FSD is (or is not) reasonable are considered. Another way of asking whether it is reasonable for an FSD to be imposed on the facts of any given case is to ask whether, having regard to: the relationship between the target and the employer; the target's connection with the scheme; and the value of any benefits received by the target from the employer, and giving appropriate weight to any retrospectivity and absence of moral hazard, fairness requires that an insufficiency of funding should be borne by the levy payers of the PPF and the scheme members on the one hand, or the target on the other. That is the kind of question on which there is likely to be something to be said on each side. It is an issue on which the decision of the Tribunal is entitled to respect. Retrospectivity, even in a case where the target is not at fault, is not necessarily a trump card.
214. In these circumstances, the Tribunal's conclusion that the factors in favour of an FSD "clearly outweigh on the facts of this case the strong points that the Targets make on retrospectivity" involves no error of law. It is irrelevant whether this Court or a differently constituted Tribunal might have come to a different conclusion. The Tribunal was entitled to reach the conclusion which it did.
215. The Targets' specific criticisms of the Tribunal's reasoning are without substance. Whether the term "benefit" should be given a wide meaning is not a question which arises on the facts of this case. In our judgment, the benefits which the Tribunal identified as having been received by the Targets clearly were benefits within the ordinary meaning of that term. They had a value, even if that value was not necessarily readily quantifiable, and the Tribunal was entitled to take that into account. Moreover, the benefits arose from the way in which the transaction had been structured and, as the Tribunal recognised, this factor therefore supported the Tribunal's reasoning concerning the relationship between the Targets and the Employers rather than providing independent support for its conclusion.
216. Nor do we accept that the Tribunal misdirected itself as a result of stating too broadly the "policy object" of the FSD legislation. The only significance of this submission was

that it is said to have led to the Tribunal giving too broad a meaning to terms such as “relationship”, “involvement” and “benefit” used in s.43(7). However, an examination of the Tribunal’s specific reasoning as to the matters listed in the subsection demonstrates an entirely conventional usage of such terms. The submission adds nothing of significance to the Targets’ submission on retrospectivity and has no independent validity.

Special justification – the application to amend

217. In the course of the hearing the Court asked whether the question of “special justification” for the purpose of AIP1 might arise, not necessarily at the stage of considering whether the legislation was in accordance with the European Convention, but as part of the consideration of reasonableness in an individual case. This was not how the Targets had put their case, either before the Tribunal or on appeal, but the question led to an application by the Targets to amend to add further grounds of appeal as follows:

“1. The Tribunal failed to recognise that s.43(5)(b) and s.43(7) read with Article 1 of the First Protocol to the European Convention on Human Rights mean that an FSD cannot be ‘reasonable’ if it is applied with retrospective effect, unless there is a ‘special justification’. The Tribunal erred in the final sentence of paragraph 581 of the Decision by stating the test as being whether the ‘degree of unfairness or hardship is so significant that we should conclude that it would not be reasonable to direct the issue of an FSD to the Targets’, a reversal of the applicable principle.

2. In any event, the Tribunal erred in failing to understand at paragraphs 586 and 588 that there was and could be no special justification in the present case because:

- (1) Each of the facts relied on at paragraph 586(1)-(3) was based on retrospectivity.
- (2) The Tribunal found no fault or misconduct or even grounds for criticism of the Targets for the acts or transactions on which the Tribunal relied.
- (3) There was no basis for finding a special justification in the context of an Act which includes the clearance procedure in section 46 (the protection of which is ineffective if section 43 is applied with retrospective effect) and which provided for retrospective effect in section 38 and 52 where fault or misconduct is required but only back to April 2004.
- (4) The Tribunal (at paragraph 586(4)) wrongly relegated retrospectivity to a ‘factor’ on which ‘some weight’ should be placed.”

218. Paragraph 1 of this proposed amendment makes two points. The first is that the Tribunal applied the wrong test because it failed at the stage of determining reasonableness to consider whether there was a “special justification” for the retrospective effect of imposing an FSD. However, as it was not part of the Targets’ case that this was something which the Tribunal had to consider, it is not surprising that it did not do so. It would therefore be unfair to allow this amendment, as Lord Pannick implicitly recognised when putting it forward. The second point concerns the way the Tribunal expressed itself in the final sentence of [581]. Reading this sentence in isolation, there may be something in this point, but, when the Tribunal’s decision is read as a whole, it is apparent that there is not. Thus the concluding sentence of [588], quoted above, in which the Tribunal expressed its final conclusion makes clear that the Tribunal did not have a starting point that significant unfairness or hardship was required as a result of retrospectivity before other factors pointing in favour of an FSD could be outweighed. In any event, it is not at all clear that the Tribunal would not have found a special justification if it had been asked to do so. The overall tenor of the Tribunal’s decision, together with the conclusion in [588] that the factors pointing in favour of an FSD “clearly outweigh on the facts of this case the strong points that the Targets make on retrospectivity”, suggests that it might well have found that there was special justification in this case.
219. Paragraph 2 of the proposed amendment was clarified in the course of oral argument. As clarified, the proposed argument is that “special justification” must be demonstrated on the particular facts of the case before it can be reasonable for an FSD to be imposed and that, as a result of the retrospective operation of an FSD in the circumstances of this case, the only possible conclusion in law here is that there was no special justification present. It is, therefore, a variant on the submission which we have already considered that, as a matter of law, there is only one possible outcome in this case on the question of reasonableness. We have rejected that submission despite accepting that the Tribunal was obliged as a matter of law to give substantial weight to the matters relied on by the Targets which include those listed at sub-paragraphs (1) to (3) of the proposed amendment. In those circumstances, we question whether putting the test in terms of “special justification” would make any practical difference, but we would, in any event, reject the submission that there is only one possible outcome, for the same reasons as already given. It is therefore unnecessary to explore further whether the question of special justification falls to be considered at this stage.
220. So far as sub-paragraph (4) is concerned, we do not accept that the Tribunal relegated retrospectivity to a “factor” on which “some weight” should be placed. As we have already explained, that is not a fair reading of the Tribunal’s decision as a whole.
221. Accordingly, we refuse permission to amend.

The Respondent’s Notice

222. As we have noted, the Tribunal concluded after hearing extensive evidence that it was impossible now to do a proper valuation of the Granada rental business. As a result, it declined to find that the price of £600 million was an overpayment. By way of a Respondent’s Notice the Regulator sought to contend that this Court should now make findings on the basis of the contemporaneous documents and expert evidence with a view to concluding that the cash received by Granada was not only in itself a significant benefit but was in addition beneficial because it was very substantially greater than the

true value of the business. In view of our conclusion this question does not arise, but this is not an exercise which we would have been prepared to undertake.

223. If we had concluded that the Tribunal's decision on reasonableness was wrong in law, we would have had to decide whether to re-make that decision ourselves or to remit it to the Tribunal. If we had decided to re-make the decision ourselves, we could only have done so as a practical matter by reference to the facts found by the Tribunal. If we had decided to remit the decision, there would have been no point (even assuming that it would otherwise have been appropriate, which we do not decide) in directing the Tribunal to undertake an exercise which it had already found, having heard evidence on this issue extending (we understand) over several days, to be impossible.
224. Accordingly, we need say no more about this Respondent's Notice point.

Conclusion on reasonableness

225. The appeal on the issue of reasonableness is dismissed.

Disposal

226. For those reasons, we dismiss the appeals.

