Upper Tribunal Reference FS/2010/0007
Pensions Regulator Reference TM1514

BARRING OF PART OF RESPONDENT'S CASE - Rule 8 Upper Tribunal Rules - no .
CONTRIBUTION NOTICE under section 38 Pensions Act 2004 - revival of application to issue against person not referring decision of Determination Panel to Tribunal - not permitted - discussion of extent of admissibility of evidence and argument on referral to Tribunal

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
ON A REFERENCE FROM THE PENSIONS REGULATOR

IN THE MATTER OF THE BONAS GROUP PENSION SCHEME
("the Scheme")

BETWEEN:

MICHEL VAN DE WIELE NV

Applicant

And

THE PENSIONS REGULATOR

Respondent

Tribunal: Mr Justice Warren, President

Sitting in public in London on 25, 26 and 27 October 2010

Robert Ham QC and Edward Sawyer, instructed by Ward Hadaway, for the Applicant

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

DECISION

Introduction

1. This is the hearing of the application of Michel Van De Wiele NV ("**VDW**"), dated 12 August 2010 for orders under Rule 8(2), Rule 8(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008, as amended and/or the Tribunal's inherent jurisdiction to bar the Pensions Regulator ("**the Regulator**") from pursuing certain allegations and contentions in its Statement of Case, or in the alternative for directions regarding the future conduct of this reference, including if appropriate directions for the determination of preliminary issues and evidence including expert evidence. The scheme with which the case is concerned is the Bonas Group Pension Scheme ("**the Scheme**").

2. The application for a barring order is in the nature of a strike out. If the Regulator has a case which has a real, and not simply a fanciful, prospect of success on a particular issue, an order should not be made. An application is not the occasion for a mini trial. The fact that an application for a barring order raises difficult issues does not mean that those issues should be addressed only at the final hearing; a difficult issue may, on analysis, admit of a clear answer in favour of the applicant in which case an order should be made. The present application raises difficult and important issues of some general importance in relation to the operation of the contribution notice regime under section 38 Pensions Act 2004 ("**PA 2004**"). It was not suggested on behalf of the Regulator at the commencement of the hearing that I should not hear the application on the footing that it raised issues not suitable to be dealt with on a barring application at all. If I had understood at the beginning the complexity of the application and the nature of the issues raised, I might have considered that some, at least, of the issues which arose would best be left to be dealt with at the final hearing. However, in order to arrive at that position, I have had to hear lengthy arguments over 2½ days. And having heard the argument, I consider that I should deal at some length myself with them and express some conclusions which, as will be seen, result in the barring of certain aspects of the Regulator's case without going anywhere near as far as the application seeks.

3. References in this Decision to section numbers are, unless the context otherwise requires, references to those sections of PA 2004.

The statutory and regulatory background

4. The Regulator is a body corporate constituted in accordance with the provisions of sections 1 to 3. The Regulator has the functions referred to in section 4. The present case is concerned principally with those functions which are exercised by the Determination Panel ("**the Panel**").

5. The Panel is a committee which the Regulator is required to establish and maintain under section 9, comprising a chairman and at least 6 other persons. Certain persons, specified in section 6(5) are ineligible for appointment to the Panel. The membership and the manner of appointment of members are designed to ensure independence of the Panel from the Regulator in its decision making.

6. Under section 4(2)(b), certain functions of the Regulator can only be exercised by the Panel (subject to any regulations referred to in section 4(3) which is not relevant for present purposes). Those functions are the ones mentioned in section 10(1) and section 99(10).

7. Under section 10(1), the Panel has power (a) to determine, in certain circumstances, whether to exercise a "reserved regulatory function" and (b) where it so determines, actually to exercise that function. Only the Panel can exercise either of those powers: see section 10(3).

8. The circumstances referred to in section 10(1) are those set out in subsection (2). For present purposes it is necessary only to mention the first circumstance, namely where the Regulator considers that the exercise of the reserved regulatory function may be appropriate. A reserved regulatory function is a function listed in Schedule 2. Part 4 of that Schedule lists the relevant functions under PA 2004. They include the power to issue a contribution notice under section 38 and the power to issue a financial support direction (a "**FSD**") under section 43. The present case concerns a contribution notice under section 38.

9. Section 38 applies to the Scheme by virtue of subsection (1). The provisions of section 38, as originally enacted, which are relevant to the present application are as follows:

> "(2) The Regulator may issue a notice to a person stating that the person is under a liability to pay the sum specified in the notice (a "contribution notice")—
>
> (a) to the trustees or managers of the scheme, or
>
> (b) where the Board of the Pension Protection Fund has assumed responsibility for the scheme in accordance with Chapter 3 of Part 2 (pension protection), to the Board.
>
> (3) The Regulator may issue a contribution notice to a person only if—
>
> (a) the Regulator is of the opinion that the person was a party to an act or a deliberate failure to act which falls within subsection (5),
>
> (b) the person was at any time in the relevant period—
>
> (i) the employer in relation to the scheme, or
>
> (ii) a person connected with, or an associate of, the employer,
>
> (c) the Regulator is of the opinion that the person, in being a party to the act or failure, was not acting in accordance with his functions as an insolvency practitioner in relation to another person, and
>
> (d) the Regulator is of the opinion that it is reasonable to impose liability on the person to pay the sum specified in the notice.

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

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

(a) the Regulator is of the opinion that the main purpose or one of the main purposes of the act or failure was—

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

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

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

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

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

(c) it is either—

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

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

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

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

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

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

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

……

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

10. I should also mention section 39(1) which provides that the sum specified in a contribution notice may be either the whole or a specified part of the shortfall sum in relation to the scheme. This provision does not, of course, override the need for the specified sum to be reasonable. The cumulative effect of section 38 and section 39 is that the sum specified must (a) be the whole or part of the shortfall sum and (b) be reasonable.

11. The shortfall sum is defined in section 39(2) as extended and explained by the subsections which follow it. To understand the working of section 39, it is easiest to start with the "relevant time" as defined in section 39(4). In the case of an act falling within section 38(5) the time is the time of the act; in the case of a failure to act, it is the time of the failure or, where the failure continued over a period of time, the time which the Regulator determines and which falls within that period.

12. The shortfall sum, in a case where at the relevant time a debt was due from the employer under section 75, is the amount which the Regulator estimates to be the amount of that debt at that time. In a case where, at the relevant time, no debt is due, it is the amount which the Regulator estimates to be the amount which would become due if a section 75 debt had in fact been triggered at that time.

13. Section 39(3) provides a qualification to that definition. It provides for the shortfall sum to be increased where the act or failure to act has resulted in the section 75 debt being less than it would otherwise have been.

14. Where a contribution notice is issued under section 38, it is provided by section 40 that it must, among other matters, contain a statement of the matters which it is asserted constitute the act or failure to act which falls within section 38(5).

15. Sections 93 to 101 deal with the exercise of regulatory functions. Under section 93, the Regulator must determine the procedure that it proposes to follow in relation to its own exercise of its regulatory functions. The functions include the reserved regulatory functions which, in turn, include the power to issue a contribution notice under section 38. The Regulator must, under section 94, issue a statement of the procedure determined under section 93. There are two procedures envisaged, the standard procedure (see section 96) and the special procedure (see section 97). In the present case, we are concerned only with the standard procedure.

16. Subsection (3) provides that the Panel must determine the procedure to be followed by it in relation to the exercise by it on behalf of the Regulator of (a) the power to determine whether or not exercise a regulatory function and (b) where it so determines, the power to exercise the function in question.

17. Section 96 provides that the procedure adopted under section 93 must make provision for the standard procedure as set out in subsection (2). It requires:

> "(a) the giving of notice to such persons as it appears to the Regulator would be directly affected by the regulatory action under consideration (a "warning notice"),
> (b) those persons to have an opportunity to make representations,

(c) the consideration of any such representations and the determination whether to take the regulatory action under consideration,
(d) the giving of notice of the determination to such persons as appear to the Regulator to be directly affected by it (a "determination notice"),
(e) the determination notice to contain details of the right of referral to the Tribunal under subsection (3),
(f) the form and further content of warning notices and determination notices and the manner in which they are to be given, and
(g) the time limits to be applied at any stage of the procedure."

18. Subsection (3) is the provision giving a right of reference to this Tribunal. It is in the following terms:

> "Where the standard procedure applies, the determination which is the subject matter of the determination notice may be referred to the Tribunal (see section 102) by—
>
> (a) any person to whom the determination notice is given as required under subsection (2)(d), and
>
> (b) any other person who appears to the Tribunal to be directly affected by the determination."

It is to be noted that the Regulator (acting though its executive arm) has no right to refer to this Tribunal a determination by the Panel, including a determination not to exercise the regulatory function as sought by a warning notice.

19. Accordingly, in a case of a reserved regulatory function (a function which can be exercised only by the Panel) there must be a warning notice followed by consideration by the Panel of the warning notice and any representations from the persons directly affected. The Panel then makes a determination "whether to take the regulatory action under consideration". The meaning of the phrase "regulatory action under consideration" in the context of the present case is found in section 95(2)(a); it means "the exercise of the one or more regulatory functions which the Regulator considers that it may be appropriate to exercise".

20. The determination referred to in section 96(2)(c) is clearly the decision whether or not to exercise the regulatory functions concerned. It is not a reference to the exercise of the power itself. Similarly, the determination notice referred to in section 96(2)(d) is a notice of that decision. The right of referral to this Tribunal under section 96(3) is given in relation to that decision, not to the actual exercise of the regulatory power. Indeed, section 96(5) prevents the Regulator (through the Panel) from exercising the regulatory function until any reference (made within the time-limit specified in section 103(1)) and any appeal has been finally disposed of.

Panel procedure

21. The procedure determined for standard procedure matters is to be found in a document entitled "Determinations Panel procedure" published by the Regulator ("the **Procedure**"). It was revised in June 2008 and is effective from 28 July 2008. The preamble explains that it is intended to be short and succinct. In particular, where relevant matters are covered by PA 2004, such as the content of

warning or determination notices, they are not repeated unless that seems appropriate.

22. Paragraphs 12 to 15 relate to matters which are dealt with on paper without an oral hearing. The papers on which the Panel will make its decision are the warning notice and any representations made in respect of it. The Panel reserves a power to look at other papers, but these will only be considered if they have been served on all directly affected parties.

23. Paragraph 15 provides as follows:

> "The warning notice will contain:
>
> a. the circumstances of the case, the action or decision the application invites the Determinations Panel to consider and the grounds on which the application is based, including where appropriate the details of any alleged breach of law;
>
> b. evidence to support the allegation or application – this should include all information that is appropriate to support the need for a power to be used, and other papers considered to be relevant to the application including any relevant correspondence between the regulator and directly affected parties or between the directly affected parties;
>
> c. details of the specific powers that the Determinations Panel is being asked to consider using; and
>
> d in relation to any application to the Determinations Panel originating from an application by a person other than the regulator, the regulator shall include any additional relevant evidence and a statement on the merits of the case."

24. The Panel may decide to hold an oral hearing as set out in paragraphs 16 to 19. Where it does so, paragraph 20 applies:

> "20. The Determinations Panel may conduct an oral hearing in such manner as it considers appropriate having regard to the issues before the panel members and shall settle the details of the procedure to be followed. This will deal with the extent to which the regulator and the directly affected parties may call and question witnesses and the making of representations. The directly affected parties and the regulator may be legally represented at any oral hearing. The decision reached by the Determinations Panel at an oral hearing will take account of everything that was in the papers before it and all evidence and representations made at the hearing."

25. The Panel has two aspects. It is, on the one hand, a body which makes its determinations on behalf of the Regulator. But, on the other hand, it has to make its own judgments about whether regulatory functions should be exercised. There is no doubt that the Regulator through its relevant staff is able to present its case to the Panel both on paper and at an oral hearing. Indeed it is the Regulator rather than the Panel which initiates the process leading to a determination whether or not to exercise a prescribed regulatory function in respect of a person. The

Regulator, at an oral hearing for instance, is able to advocate the case which it then sees as appropriate for the taking of regulatory action. It is then for the Panel to make its determination on behalf of the Regulator, a determination by which the Regulator is bound since it has no right to refer a determination to this tribunal, as I have already noted.

26. References under section 96(3) – originally to the Pensions Regulator Tribunal and now to the Upper Tribunal ("the **Tribunal**") – are dealt with in section 103. The Tribunal is expressly permitted (see subsection (3)) to consider any evidence relating to the subject matter of the reference whether or not it was available to the Regulator at the material time. PA 2004 contains no definition of the material time for this (or any other) purpose but it must include the time when the warning notice was given.

27. Under subsection (4), the Tribunal must, on a reference, "determine what (if any) is the appropriate action for the Regulator to take in relation to the matter referred" to it. On determining a reference, the Tribunal must then remit the matter to the Regulator with such directions (if any) as the Tribunal considers appropriate for giving effect to its directions; subsection (6) sets out five specific directions which the Tribunal might make.

28. The matter having been remitted to it, the Regulator is under an obligation, pursuant to subsection (7), to act in accordance with the determination of, and any direction by, the Tribunal and so that section 96 does not apply although (under subsection (8)) the Tribunal may make recommendations as to the procedure to be followed by the Regulator or the Panel.

The Upper Tribunal Rules

29. The Procedure before me is governed by The Tribunal Procedure (Upper Tribunal) Rules 2008. The reference in the present case is a "financial services case" (see Rule 1(3)); in such a case, the Rules apply generally but the special provisions found in Schedule 3 (introduced by Rule 26B) also apply. The "applicant" in a financial services case is the person who refers the case to the Upper Tribunal. The "respondent" is "the maker of the decision in respect of which a reference has been made".

30. In a case where the decision whether or not to exercise a reserved regulatory function has been made by the Panel, it is not entirely clear whether the respondent should be the Panel or the Regulator. It is the members of the Panel who actually make the relevant decision so it might be thought that it is the Panel which should be the respondent. However, the Panel in making its decision does not exercise its own power; instead it exercises a power on behalf of the Regulator. The Panel's determination is therefore a determination of the Regulator itself and is in that sense made by the Regulator. In a case where the Regulator itself decides whether to take regulatory action and the Panel is not involved (*ie* where the regulatory function concerned is not a reserved regulatory function) clearly the Regulator is the correct respondent. It would add a level of complexity – an unintended level of complexity I would suggest – if in a case where the Panel <u>is</u> involved the Panel itself should be a respondent. I doubt that,

in practice, anything turns on this provided that the powers of the Tribunal (which I come to later) on a reference are kept very much in mind.

31. A respondent to an application must provide a statement of case under paragraph 4 Schedule 3. This statement is referred to in paragraph 4(1) as one "in support of the referred action". Under paragraph 4(2), it must set out among other matters the reasons for the referred action and all the matters and facts which the respondent relied on to support the referred action. The respondent must also provide documents which it relies on in support of the referred action and any further material which in its opinion might undermine the decision to take that action.

32. The provisions of Schedule 3 apply to all financial services cases. They include, therefore, references from the Financial Services Authority. Indeed, Schedule 3 reflects to a considerable extent the provisions of the previous rules of the Financial Services and Markets Tribunal insofar as they are not reflected in the body of the Upper Tribunal Rules. In that context, there is to be borne in mind the different ways in which regulatory decisions are taken in the pensions context and the financial services context. In the former, as we have seen, reserved regulatory functions are exercised, on behalf of the Regulator, by the Panel. In the latter, regulatory decisions are taken by the Regulatory Decisions Committee which is a committee of the board of the Financial Services Authority, and which reports to the board. That Committee is, therefore, more closely associated with the Authority than the Panel is with the Regulator, albeit that PA 2004 describes the Panel as a committee..

33. Returning to the body of the Upper Tribunal Rules, Rule 8 provides for the striking out of a party's case. The Upper Tribunal has power under Rule 8(3)(c) to strike out the whole or part of the proceedings if it considers there is no reasonable prospect of the applicant's case or part of it succeeding. That provision applies, under Rule 8(7), to a respondent as it applies to an applicant but so that a reference to the striking out of proceedings is to be read as a reference to the barring of the respondent from taking further part in the proceedings. This applies equally to part of the proceedings. Thus the Tribunal may bar a respondent from taking part in a part of the proceedings.

34. It is to be noted that the Rule does not allow the Tribunal simply to strike out part of a respondent's case but only provides for the barring of a respondent from taking part in the proceedings or part of the proceedings. However where such a bar is in place, Rule 8(8) provides that the Upper Tribunal need not consider any response or other submission made by the respondent and may summarily determine any or all issues against the respondent.

35. Although Rule 8 is not as clear in its operation in relation to a respondent as it might be, the reality, is that once the Tribunal has decided that the respondent can take no further part in the proceedings relating to an issue or argument, then the issue or argument is dead. The Tribunal, in making its barring order, will have decided that the issue has no substance or the argument has no merit. The Tribunal at the interim hearing can recognise the substance of the matter by making not only a barring order but also a further order, by which either it summarily

determines the issue or rejects the argument pursuant to Rule 8(8) or it "deals" with the issue under Rule 5(3)(e) by directing that the Tribunal should not consider the issue or argument any further.

Some conclusions to be drawn in relation to PA 2004 and the Upper Tribunal Rules

36. There are a number of issues about the meaning and effect of PA 2004, the Procedure and the Upper Tribunal Rules which are of relevance to the present reference and application.

37. The first is the question of what the correct approach to the Tribunal's functions is. 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. This was the approach taken, using different language, by the Financial Services and Markets Tribunal in *Parker v FSA* [2006] FSM 037.

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

40. That is not to say that the parties have the right to start all over again as if the matter had never been before the Panel, although in an appropriate case it could no doubt take that course. There may be some reluctance on the part of the Tribunal to hear oral evidence and cross-examination if that has already taken place in front of the Panel whose findings of fact it may consider there is no need

to review. The Tribunal is not obliged to hear oral evidence all over again just because one side or the other hopes that the Tribunal will take a different view of the witnesses from the Panel. Receipt of new evidence (or indeed, evidence from witnesses who have already been cross examined) is a matter for the Tribunal. Each case will be heavily dependent on its own facts. No doubt the Tribunal will be very cautious about allowing further cross examination of a witness, but there may be cases where this is appropriate, for instance where new material shows that a witness has lied to the Panel.

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

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

43. The third issue is closely connected with the second issue which is the extent to which the Regulator can argue before the Tribunal that the Panel was incorrect in its decision (I deliberately refrain from using the word "determination" at this point) or the reasons it gave for it. Suppose, for instance, a case where the warning notice identifies proposed regulatory action in the form of contribution notices to be issued to two individuals, Mr A and Mr B. The Panel decides to issue a notice to Mr A but not to Mr B. On a reference, Mr A seeks a decision from the Tribunal that no notice should be issued to him either. Clearly the Tribunal can substitute its own determination in relation to Mr A, increasing the amount specified in the contribution notice if it thought fit. But then a number of questions arise, including these:

    (i) Is it open to the Regulator to argue in favour of an increase to the amount specified in the notice or is that entirely a matter for the Tribunal without such further assistance?

    (ii) Is it open to the Regulator, now that the matter is before the Tribunal, to reopen the case for issuing a contribution notice to Mr B or can it only support the Panel's conclusion in relation to Mr A?

(iii) Suppose that, in that example, the Regulator relies before the Panel on one act within section 38(5)(a) which is specified in the warning notice. Is it open to the Regulator to seek to uphold the Panel's determination in relation to Mr A by relying on another act which is disclosed by the evidence but which has not featured in the warning notice?

44. To answer those questions, it is necessary to look at sections 93 to 96 in more detail and to mention a point about section 38.

45. The regulatory function with which the present case is concerned is section 38 which confers on the Regulator (acting through the Panel under section 10) the power to issue a contribution notice to a person. Each person who is to be placed under a statutory liability under section 38 (I shall refer to such a person as the "**target**") must be issued with a warning notice. In essence a separate exercise of a regulatory function is required in respect of each of them. It may be possible to issue a contribution notice jointly to two or more persons so as to make them jointly or even jointly and severally, liable; but that is not a question which I need to resolve in the present case. The fact that a contribution notice must be issued to each target does not mean that the same form of notice cannot relate to more than one person so as to specify a sum in respect of each of them. But a notice must be issued to each of them. There will be separate pieces of paper identically worded, one sent to each target. But each piece of paper is a separate contribution notice issued to the relevant person. Thus notices in identical form can be issued to Mr A and Mr B at the same time, but there are, for the purposes of section 38, two contribution notices, one issued to Mr A and one issued to Mr B. Two exercises of the section 38 power are involved.

46. Before actually exercising a reserved regulatory function, the Panel will have had to reach a decision whether or not to do so. Its decision or decisions are reached in accordance with the Procedure. The end result of the Procedure must be a decision whether or not to exercise a particular regulatory function in a particular way against a particular person.

47. Where the Regulator considers that the exercise of one or more regulatory functions may be appropriate, it must comply with the standard or special procedure: see section 95(1). The procedure is to be determined by the Regulator or the Panel pursuant to sections 93(1) and (3) as the case may require. The process, in either case, starts with the Regulator when it considers that regulatory action is appropriate. It issues a warning notice and, in the case of a reserved regulatory function, makes an application to the Panel.

48. The Regulator will, of course, consider the exercise of regulatory powers in the context of a specific factual matrix. In relation to that factual matrix, the Regulator might consider that the exercise of one or more regulatory functions is appropriate. It might consider that different action should be taken against a single person, or it might consider that the same powers should be invoked against more than one person (or even a combination of both). The term, "the regulatory action under consideration" is adopted by section 95(2) to describe what it is that the Regulator considers may be appropriate in a particular case.

49. It is that regulatory action which must be the subject matter of the warning notice for which the standard procedure must provide under section 96(2)(a). Section 95(2) and section 96(2)(a) must clearly be read together. They require the identification of regulatory functions which the Regulator considers it may be appropriate to exercise and the giving of a warning notice in relation to such function. These provisions do not result in all relevant regulatory functions having to be dealt with in one go. For instance, the Regulator might be considering the issue of contribution notices against two persons; having a strong case against one but needing to obtain further evidence against the other, a warning notice is given only to the former (assuming that the other does not have to be given the notice as a person directly affected). There can be no objection to that course.

50. But where it is decided to take action against more than one person at the same time, there can be no objection, either, to the giving of the same warning notice to both of them (and any other person directly affected) thus dealing with related regulatory issues arising out of a given state of affairs at the same time. The giving of such a notice to everyone affected clearly complies with the standard procedure.

51. The standard procedure requires an opportunity to be given for the persons who are given a warning notice to make representations; and, in compliance with that requirement, the Procedure also envisages such representations being made. In the light of the contents of the warning notice and those representations, the Panel will make its decision or decisions More precisely, the standard procedure must provide under section 96(2)(c) for the determination whether to take the regulatory action under consideration.

52. There is, unfortunately, an ambiguity within section 96(2)(c) in relation to what is there being referred to by "the determination". The Regulator or the Panel will be considering, in a case where more than one target is involved, the exercise of a regulatory power or powers in respect of each of them; there will be separate "determinations" in respect of each of them for the purposes of section 10(1)(a). The determination being referred to in section 96(2)(c) can be seen, in one way, as a reference to each determination which has to be made in order to decide what regulatory action can be taken. This is to read the provisions as if the words "in respect of each function referred to in section 95(2)(a)" appeared before the words "whether to take".

53. The "determination" in section 96(2)(c) could be seen in a different way as referring to the overall determination of the matters raised in the warning notice which will itself have identified the regulatory action under consideration. Thus, if the warning notice seeks the issue of contribution notices against two persons and the Panel determines that a notice should be issued against one but not the other, there is on this approach a single determination within section 96(2)(c). This is to read the provision as if the words "any, and if so which of," appeared before "the regulatory action under consideration". This interpretation would be compliant with section 93(3). It would still result in a number of determinations for the purposes of section 10(1)(a) since the overarching "determination" on this interpretation will contain within it the separate determinations required in respect

of each regulatory function the exercise of which the Regulator consider may be appropriate.

54. In my judgment, the first of those interpretations is correct. Quite clearly, a decision has to be made in relation to the exercise of each regulatory function under consideration and referred to in the warning notice. Since separate decisions need to be made it is more natural to read "the determination" in section 96(2)(c) as referring to each of those matters – the exercise of each of the regulatory powers comprised in the "regulatory action under consideration" – than as a reference to some overarching determination. Secondly, it must, I consider, be open to the Panel to give more than one decision in relation to the same warning notice. Take an example. Suppose that the Regulator wants to see contribution notices issued to Mr X and to Mr Y. A warning notice is given in the same form to each of them. Mr X makes no representations to the Panel but Mr Y does. The case against Mr X is very clear and the Panel accepts that a contribution notice should be issued to him. The case against Mr Y is not so clear and an oral hearing is required. It cannot sensibly be suggested that the Panel is unable to make a determination in relation to Mr X until after the oral hearing required in order to deal with Mr Y. But if the second interpretation is correct, either this cannot be done (because there has to be one single overarching determination) or there can be separate determinations which deal with some but not all of the regulatory actions under consideration. But once it is accepted that separate (one might say partly overarching) determinations can be made, the reality has to be recognised that each such "determination" really contains separate determinations in relation to the exercise of each regulatory power.

55. I add that whichever approach is correct, the "determination" within the meaning of section 96 is the determination whether to take the regulatory action under consideration, in the present case whether to issue a contribution notice. The reasons for the determination are not part of the determination itself. This is reflected in the Procedure. Paragraph 25 states that reasons will, save in exceptional cases, be included in the determination notice which demonstrates that the determination and the reasons are seen as different things.

56. Notice of "the determination" must be given (see section 96(2)(d)) to the persons directly affected by it, all of whom should already have been given a warning notice in advance of the determination. A person directly affected by a particular determination made by the Panel must be given notice of that determination; but he is not entitled to be given notice of any other determination which does not directly affect him. As a matter of convenience, it may be sensible for the Panel to produce a single form of determination notice, just as it might produce a single written decision, with that form of notice being given to every person directly affected. But in substance, that single notice serves separate functions namely, the giving of notice of the Panel's determination in relation to such aspects of the warning notice as directly affect that individual.

57. In the example of Mr A and Mr B, the Procedure results in separate determinations in respect of Mr A and Mr B. Mr A must be given notice of the determination in respect of him and similarly with Mr B. But Mr A does not have to be given notice of the determination in respect of Mr B or *vice versa*, subject to

this. It may be that Mr A is directly affected by the determination in respect of Mr B. In that case, Mr A would have to be given notice of the determination in respect of Mr B.

58. The right of referral to the Tribunal is given by section 96(3). The subject matter of a referral is "the determination which is the subject-matter of the determination notice". The person who may make such a referral is any person to whom the determination notice is given as required under section 96(2)(d). If my analysis so far is correct, each of the determinations which I have identified is a separate determination. Whether or not the form of the determination notice is such that the same form can be used in relation to each of those separate determinations, they are and remain separate determinations for the purposes of section 96(2)(c). In this context, it is to be noted that section 96(3)(a) (power to refer to the Tribunal) refers to the determination notice required by section 96(2)(d). As I have already explained, the only notice which has to be given to a person is notice of the determination which directly affects that person. If he is given a wider notice which includes details of the determination directly affecting other persons, but not him, then to the extent that it goes wider it is not, *vis a vis* him, a notice which is required to be given to him under section 96(2)(d) and is not, to that same extent, therefore a determination which he can refer to the Tribunal.

59. This result is supported by reference to section 96(5). This applies to a case where "the determination which is the subject-matter of the determination notice is a determination to exercise a regulatory function" and where the determination has been referred to the Tribunal. This suggests that the Tribunal is to consider each determination to exercise a regulatory power as a separate determination with the result that only a person directly affected by a determination may refer it to the Tribunal.

60. In the example, Mr A can refer to the Tribunal the decision to issue a contribution notice to him and similarly with Mr B. But neither can refer the decision in respect of the other unless he is a person directly affected by the decision in respect of the other.

61. On a reference, the Tribunal must, under section 103(4), determine what (if any) is the appropriate action for the Regulator (which would include the Panel where relevant) to take "in relation to the matter referred to the Tribunal". The matter referred to the Tribunal is, so far as relevant to the present case, the determination which may be referred pursuant to section 96(3). In other words, it is the determination which directly affects the person making the reference. It does not include any other determination made by the Panel (including a decision not to exercise a regulatory power in relation to a person) even if the determinations all arise in the same factual matrix and even if all aspects were the subject-matter of a single warning notice. I should emphasise that what is referred is the determination and not the reasons given for it. The Tribunal will, of course, pay due respect to the reasoning of the Panel and will agree or disagree as the case may be. But what gives the Tribunal jurisdiction is the referral of the determination.

62. In the example, the Tribunal has no power to alter the determination of the Panel in respect of Mr B if it is only Mr A who refers the determination in respect of him, Mr A, to the Tribunal.

63. Where a person is directly affected by regulatory action in respect of another person (so that he has to be given the warning notice and notice of the determination) not only does he have a right to refer the Panel's determination to the Tribunal under section 96(3) but he is also, it seems to me, subject to the Tribunal's decision under section 103(4). If the Tribunal's decision alters the determination which has been referred (for instance by increasing the amount specified in a contribution notice) any person directly affected by the change will be bound.

64. It might be argued against these conclusions that it leaves a gap in the regulatory framework. Let me go back to the example and suppose the following:

    (a) The total section 75 debt (to use that short-hand) is £2X. The Panel decides to issue each of Mr A and Mr B with a contribution notice in the sum of £X, considering on the facts that each of them is equally responsible for the shortfall and should bear half each.

    (b) Mr A refers the matter to the Tribunal but Mr B does not. New facts have come to light which show that Mr A should not be liable.

    (c) The Tribunal considers that no contribution notice should be issued to Mr A but would like there to be issued to Mr B a contribution notice in the full amount of £2X.

65. Since the determination in relation to Mr B is not before the Tribunal, it cannot increase the amount specified in respect of him under section 103(4) as a "matter referred to the Tribunal". Nor, it seems to me, can it impose a contribution notice on Mr B under that subsection by reference to the matter which is before it even if Mr B is directly affected by the determination in respect of Mr A.

66. This restriction on what the Tribunal can achieve might be thought to be contrary to the policy which could be identified as being to enable the Tribunal to determine the appropriate action for the Regulator to take where it is considered that the Panel has got matters wrong. However, to state the policy in that way is to beg the question. It is to be noted that the Regulator cannot itself refer a matter to the Tribunal. It cannot, therefore, seek to alter its own decision (in a case where the Regulator itself has determined to exercise a regulatory function in a case where the Panel is not involved) or seek to go behind the determination of the Panel (in a case where the determination is one made by the Panel on behalf of the Regulator). There is, therefore, no policy that the Tribunal should be able to review the decision of the Regulator or of the Panel in any case. It should also be remembered that any person directly affected by the determination may refer it to the Tribunal. In the case of a contribution notice, it is, I think, correct to say that the trustees or managers of the scheme concerned who are entitled to receive payment are persons "directly affected" and could themselves refer the matter to the Tribunal if they consider that the Panel has been too lenient or, indeed, to

preserve the position against one person where another person has referred a determination to the Tribunal. Thus in the example, if Mr A refers the determination to issue a contribution notice to him of £X to the Tribunal, the trustees could refer the determination in respect of Mr B so that, if the Tribunal exonerates Mr A, the opportunity remains to increase the amount specified in the contribution notice issued to Mr B.

67. To return to the questions posed at the end of paragraph 43 above, I consider that, although the Tribunal is only able to deal with the matters referred to it, it is open to the Tribunal to receive additional evidence in relation to those matters, not only from the person making the reference, but also from other persons directly affected or from the Regulator itself. The Tribunal is entitled to receive further evidence in order to put itself in the position properly to exercise the regulatory function which has been referred to it. It must, of course, act fairly and in particular must act with procedural fairness. But subject to that, I see no reason why the Regulator alone should be unable to adduce further evidence to support regulatory action, especially when it has to disclose evidence in favour of the target under paragraph 4 Schedule 3 to the Upper Tribunal Rules.

68. Suppose, for instance, that the target refers a determination of the Regulator (whether made by the Regulator itself or by the Panel on behalf of the Regulator) and is allowed by the Tribunal to adduce further evidence. It would be unfair if the Regulator was not allowed to adduce evidence in rebuttal. Or suppose that new facts come to the notice of the Regulator after the Panel has made a determination and the matter has already been referred to the Tribunal by the target. It would be wrong if the Regulator were not able to support the Panel's determination by reference to the new facts.

69. Clearly the Regulator is entitled to argue before the Tribunal that its own determination or that of the Panel should be upheld. But can it argue in favour of something different? In particular, where the Panel has determined that a contribution notice in a specified sum should be issued to a person, can the Regulator argue in favour of a larger sum, at least up to the amount specified in the warning notice?

70. In my view, the Regulator is entitled to argue that the Tribunal should depart from the determination of the Panel so as to exercise the relevant regulatory function in the way which it, the Regulator, considers appropriate at the time when the matter is dealt with by the Tribunal. The Panel, as we have seen, exercises powers on behalf of the Regulator; it is no doubt for that reason that the Regulator itself cannot refer the determination of the Panel to the Tribunal. But once the decision of the Panel has been challenged, there is no reason, in my view. why the Regulator should be bound by that determination. By referring the matter to the Tribunal, the target must accept that he becomes subject to the power of the Tribunal to determine the appropriate action. The Regulator must be allowed, in my judgment, to present to the Tribunal what it sees as the appropriate regulatory action at that time. It may be that it cannot go beyond the relief sought in the warning notice, but that issue does not arise in the present case.

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

72. None of this is to say that the Tribunal will start all over again as if the Panel had not considered the matter in the first place. This is particularly so when the Panel has heard live evidence and cross-examination of witnesses. The Tribunal will be slow to allow either the target or the Regulator to re-open the Panel's findings of fact. But that it has jurisdiction to do so in an appropriate case is, I consider, clear.

73. I have so far omitted from the discussion any mention of what the Panel itself is entitled to entertain since I have proceeded on the basis that it will be dealing with only with material contained in the warning notice and any representation made in respect of it. The contents of the warning notice are not prescribed by section 96: it simply requires the standard procedure to do so. The Procedure itself implements that requirement by specifying the contents of the warning notice under paragraph 14. That paragraph does not refer to "the regulatory action under consideration". It is nonetheless clear, in my view, that paragraph 14(a) does require the warning notice to identify what regulatory action the Panel is being asked to decide to exercise.

74. I have already addressed in some detail the provisions of sections 95 and 96. The provisions of sections 95(2)(a) and 96(2)(a) must, as I have said, be read together. They must also be read together with section 96(2)(f) and the Procedure itself. The result, in my view, is that the regulatory action identified in the warning notice is the same as the regulatory action under consideration referred to in section 96(2)(a). It is only that regulatory action which can be the subject matter of a determination for which the standard procedure must provide under section 96(2)(c).

75. Let me take another example. Suppose that in general terms the Regulator is discussing internally two forms of regulatory relief against a person, firstly the issue of a contribution notice under section 38 and secondly the issue of an FSD under section 43. In the event, the Regulator decides to press on with the contribution notice but, internally, is still considering the issue of an FSD. The Regulator gives a warning notice referring to the contribution notice but making no mention of an FSD. The regulatory action under consideration within section

96(2)(a) is restricted, in my view, to the issue of a contribution notice. Although the Regulator may, internally, still be considering the issue of an FSD, that is not part of "the regulatory action under consideration".

76. I reach that conclusion for two reasons. Firstly, the obvious policy of these provisions is to ensure that the target knows the case against him; he is entitled to know not only the facts on which the Regulator relies but also the relief which is sought.

77. The second reason is a narrower textual point. Section 96(2)(c) envisages a determination being made whether to exercise the regulatory action under consideration. Although literally, by reference to section 95(2)(a) this action refers to a function "which the Regulator considers that it **may be** appropriate to exercise" (my emphasis), by the time a warning notice is given, the Regulator must have decided that a particular regulatory action is and not simply may be, appropriate. Accordingly, section 96(2)(a) must be referring to regulatory action which the Regulator has decided ought, in its view, to be taken. It follows that if the Regulator considers that further regulatory action should be taken, a further warning notice must be given. This cannot, I consider, be dispensed with under a procedure adopted as the standard procedure (or, therefore, by the Panel in the operation of the Procedure). This is because section 95(1) states that the Regulator must comply with the standard procedure (and the same must apply to the Panel); and that procedure must provide for a warning notice which, as just explained, identifies the regulatory action which the Regulator wants the Panel to decide should be taken. If there is no warning notice in relation to a particular regulatory function, the Panel has no power to make a determination in relation to it.

78. In the example, it is not, in my view, open to the Panel to entertain the issue of an FSD even if the facts on which the Regulator relies are precisely the same facts as are relied on in relation to the issue of a contribution notice.

79. The next question is whether the Regulator can seek to rely on different arguments, or different elements of the evidence before the Panel, to support the determination which it seeks. It is not, I think, possible to answer this question in the abstract; a different argument might, on the one hand, raise a completely new case which is entirely outside the scope of the warning notice properly understood or it might, on the other hand, simply be a new way of putting something the essence of which is already included in the warning notice.

80. However, it is possible to give an answer in relation to reliance on difference elements of the evidence in some respects. Returning to the example, suppose that a warning notice relies on an act or failure within section 38(5) to justify a contribution notice. Suppose that the evidence within the scope of the warning notice reveals another act which might fall within section 38(5) but is not identified as such in the warning notice. Can the Panel take account of that act in making its determination? In my view it can do so as a matter of jurisdiction but it must act fairly, in particular in relation to the procedure to be adopted, in doing so. It might decline to entertain a case based on the newly identified act if it is something hidden away in the evidence. In contrast, if reliance on the supposedly

novel act is simply a new way of putting a case which is, in its essence if not its detail, already in issue, the Panel might well decide to deal with the new arguments. I think that the Panel in the present case adopted the correct approach at paragraph 8 of its reasons when it drew a distinction between

> "wholly new allegations, that is, allegations which were not contained in whole or in part in the Warning Notice, and allegations which, while superficially novel, were the development of an existing argument."

81. Thus, if the new acts are identified well in advance of an oral hearing and the target is given the opportunity (a) to adduce any further relevant evidence and (b) to prepare its case accordingly, there will be no procedural unfairness; in contrast, if the matter is sprung on the target the day before the hearing without any adequate opportunity to deal with evidence and preparation, the Panel ought not to take account of the new points unless it adjourns to provide that opportunity.

82. That sort of case is entirely different from one where the warning notice fails to identify and address the exercise of a regulatory power which the Regulator subsequently wishes to see exercised. In the case of a failure to identify and address a particular regulatory power, the effect of section 96 is to preclude a determination by the Panel to exercise that power for the reasons discussed above. In contrast, where it is sought to rely on a new act not previously relied on, the determination which the Panel is being asked to make remains the same, namely to exercise in a particular way a regulatory power which has been properly identified and addressed in the warning notice. The issue is not then, as I see it, one of jurisdiction but is instead one of discretion; a failure to state, in the warning notice, one of the grounds on which it is subsequently sought to rely to support the determination applied for does not preclude, as a matter of law, reliance on it.

83. The Panel will no doubt be slow to allow reliance on such other acts and, in practice, it will probably only be where there is an oral hearing that this question will arise.

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

Section 38

85. At this stage, I wish to say something more about section 38. That section authorises the issue of a contribution notice only if the conditions in subsection (3) are fulfilled. One of these conditions is that the Regulator is of the opinion that the target was a party to "an act or a deliberate failure to act" which falls within subsection (5). In this context, section 38(6)(a) provides that a party to an act or a deliberate failure to act includes persons who knowingly assist in the act or failure to act. An act or failure to act (the epithet "deliberate" is absent) falls within subsection (5) if the Regulator is of the opinion that the main purpose or one of

the main purposes of the act or failure to act falls within subsection (5)(a) (set out at paragraph 9 above).

86. Issues have arisen about the meaning of the phrase "deliberate failure to act" in this context and whether the purpose test is be viewed objectively or subjectively. It is important to understand the correct approach to section 38(5) not least because the Regulator needs to know precisely what it is that he must form an opinion about.

87. As to the use of the word "failure", Mr Ham says that it requires more than mere inaction. For there to be a failure to act, one must leave undone something that ought to have been done. He refers me to Lord Scott in *Hinchy v Secretary of State for Work and Pensions* [2005] 2 All ER 129, HL, at [39] where he said this:

> "One would not normally describe a person as having 'failed' to do something that the person in question had no reason to do. 'Failed' or 'failure' both in the context of [the statutory provision under consideration], and in normal speech, has a tendentious quality. It implies that something has not been done that should have been done."

88. I do not agree that a "failure" in the context of the phrase "deliberate failure to act" requires the leaving undone of something which ought to be done. In my view, the phrase means no more than that a person has perceived different possible steps and has decided not to take a step which he might, not necessarily ought, to have taken. His decision has resulted in "a deliberate failure to act".

89. So far as concerns the phrase "the main purpose or one of the main purposes" is concerned, there is case law in different contexts which show the words "purpose" or "purposes" being judged by reference to the subjective intention of the actor (or the person who fails to act) and other cases where the purpose or purposes have been judged objectively. I have been referred to some of them, but I would say that I have not found analysis of the words "main purpose" or similar words in different statutory contexts particularly helpful.

90. Mr Ham submits that section 38 has both a subjective and an objective element. He says that there is clearly a subjective aspect to the concept of main purpose. There is also an objective element in that the act or failure must at least be capable of achieving the purpose identified so that whatever the subjective intention of the actor was, the "main purpose" test cannot be satisfied if, objectively, the purpose could not be fulfilled. I do not think it is necessary to resolve, for the purposes of the present case, the extent to which there is a subjective element in the identification of a "main purpose" within section 38. There is, however, considerable force in the argument there is some subjective element. If my approach is correct, a "deliberate failure to act" involves a conscious choice by a person; it is reasonable to think that, in making that choice, the person has a purpose (as well as, perhaps, a motive), intending that the practical effect of his inaction will prevent a recovery within section 75(5)(a). If that is right, there must also be a subjective element to an act within the subsection; it would make no sense to distinguish between an act and a failure to act in that context.

91. But whatever the correct answer in relation to a subjective element, I agree with Mr Ham that there is also an objective element. It is the act or failure to act which must have as its main purpose or one of its main purposes the prevention of the recovery of the debt. Even if that introduces an element of subjectivity, it cannot be said, in my view, that the purpose of the act or failure to act is to prevent recovery if, as a matter of fact, it cannot do so. A person may act or fail to act intending that a certain result should occur so that his purpose in acting or failing to act is to achieve that purpose. But if that purpose cannot in fact be attained, it is not possible, I consider, to say that a main purpose of the act or failure to act was to achieve that purpose.

92. I now need to say something about what the purpose of the act or failure to act must be in order to fall within section 38(5) (in the former version of that subsection which applies in the present case). It must be to prevent "the recovery of the whole or any part of a debt which was or might become due from the employer in relation to the scheme under [section 75]" or otherwise than in good faith to prevent such a debt becoming due, to compromise or otherwise settle such a debt, or to reduce the amount of which debt which would otherwise become due.

93. The words "prevent" and "recovery" are ordinary words with ordinary meanings. There is nothing in the context of section 38(5) which persuades me that they should be given anything other than their ordinary meanings. To "prevent" something happening is, to put it simply, to stop it from happening or to escape something by taking timely action to prevent it. A "recovery" in the context of recovery of a debt means nothing more or less than to receive payment of that debt. It means, in my view, recovery (whether by legal action or some other process) from the person who is liable to meet the debt or against some property which stands as security for the debt. The debtor himself is the obvious person from whom a debt can be "recovered" but in some contexts it might include recovery of payment (albeit not of the debt itself) from a guarantor or surety; or it might include recovery as the result of the realisation of property given as security for the debt. In such a case, it is a perfectly ordinary use of language to describe action against the guarantor or to enforce the security as action to recover the debt. This approach to recovery of a debt is reflected in section 40(4): where a person has been made liable to the trustees or managers of a scheme under section 38, the Regulator may exercise the power of those trustees or managers "to recover the debt".

94. What it does not include is payment by a third party who is under no obligation itself to make payment of or in respect of the debt and cannot be made so liable. A man may choose to pay his brother's debt to preserve the good name of the family. But the creditor does not have to accept payment from the brother and if he does so, he accepts payment in discharge of the debtor's obligation to him but he does not receive payment of the debt itself. Indeed, the brother may be subrogated to the creditor's rights so that the debt has not been discharged, *vis a vis* the debtor, at all. Suppose the brother tells his bank that he about to pay off his debtor brother's debts by drawing on his overdraft facility. The bank, for good commercial reasons of its own, withdraws the facility before the payment is made. Has the bank prevented payment of the debt? I consider that it has not. It may

have prevented an arrangement which would have resulted in the creditor ceasing to have any claim against the debtor but that is something different.

95. Accordingly, for an act or failure to act to prevent payment of the whole or part of a debt within the ambit of section 38, that act or failure must prevent payment by the debtor or must prevent the exercise of a right possessed by the creditor (such as a right against a guarantor or the effective realisation of a security) in respect of the debt. If the debtor could not, apart from the act or failure to act, meet part of the debt and would never be in a position to do so, it cannot, in my view, be that the act or failure to act has prevented payment of that part of the debt by the debtor.

96. In that context, it is necessary to make one subsidiary point. Section 38(5) refers to the recovery of the whole or any part of the debt. If an act or failure to act prevents payment of only part of the debt, then the case falls within the subsection. The person preventing that payment is then exposed to the risk of a contribution notice being issued against him. But the liability which can be imposed is restricted, under section 38(3)(d) to the sum which the Regulator considers that it is reasonable to impose. Since payment of part only of the debt has been prevented by the act or failure to act under consideration, it is not easy to see how the Regulator could properly be of the opinion that it is reasonable to impose a liability for the whole debt. To take an extreme case, the act or failure to act might have prevented recovery of only £1,000. It would be very surprising if the Regulator was able to impose a liability under section 38 for £1,000,000 being the total section 75 debt.

97. The Regulator does not accept that approach to section 38. In addressing VDW's reply it says that it is "obviously wrong" to suggest that the fact that its subsidiary Bonas Machine Company Ltd ("**Bonas**") was insolvent necessarily means that the debt was irrecoverable which in turn means that the purpose of the acts cannot have been to prevent recovery of the section 75 debt. If that is VDW's suggestion, I would agree with the Regulator, but that is not quite the point. I can illustrate what I see as the real point by reference to an example.

98. Suppose that a company is insolvent and that its only creditors are the trustees of the pension scheme under which it is the sole employer. Suppose that the assets of the company are £2X and that the section 75 debt is £4X. Suppose that the parent of the company is a party to an act or failure to act within section 38(5)(a) which reduces the assets available in a winding up to £X. In the absence of that act or failure to act, the most which the trustees could obtain from the company would be £2X or 50% of its debt. The result of the act or failure to act is to reduce the available recovery to £X or 25% of its debt. The act or failure to act has prevented, and could only prevent, recovery of £X. It cannot be said that the act or failure to act has prevented recovery of £3X. Prevention of the recovery of £X is enough, however, to bring the case within section 38(5)(a) so that a contribution notice may be issued to the parent. But I find it very difficult indeed to see how it could be said be reasonable to to specify £3X as the amount in contribution.

99. It makes no difference to that analysis in that sort of example that the level of insolvency may change over a period of time or indeed that the employer might

actually have been solvent at the time of the act or failure to act in question. What needs to be identified, in my view, when it comes to assessing the reasonableness of the amount to be specified in the contribution notice, is the extent to which the act or failure to act has resulted or will result in a reduction in the amount available (whether from the employer or from any other person liable for the debt such as guarantor, or by way of reduction in the value of a security for the debt). In a different sort of case from that of the example, it may be that the impact of the act or failure which brings the case within section 38(5)(a) will depend on the level of solvency of the employer although it is not altogether easy to formulate an example of such a case. In such a case, it will be more difficult to assess what amount it is reasonable to specify.

100. My approach to section 38 is not an emasculation of the Regulator's regulatory functions. Section 38 in only one of the regulatory powers available to the Regulator. It provides for the imposition of a liability on a person who has, by his acts or failures, caused a detriment to a scheme by preventing the trustees from recovering that which they would otherwise have been able to recover in respect of the section 75 debt. The scheme can be compensated for that detriment. But it is not, as I see it, the purpose of section 38 to go further than that, so as to impose a penalty on the target for his behaviour. Recovery of further amounts is the domain of the FSD regime under section 43 imposing a positive obligation on an associate of an employer in certain defined circumstances to provide financial support for the scheme.

101. The next point under section 38 concerns identification of the debt within section 38(5)(a) which, to repeat, is "a debt which was or might become due from the employer in relation to the scheme under [section 75]". This includes, under section 38(8), a contingent debt under section 75 but there is no further statutory explanation or extension of the words in section 38(5)(a).

102. The Regulator suggests, however, that it goes further. Thus it is said to include:

(a) the price of obtaining clearance from the Regulator;

(b) a debt due by virtue of a contribution notice;

(c) a liability arising as a result of an FSD;

(d) ongoing contributions.

I will return to those in due course.

The facts in the present case

103. The case arises out of the "pre-pack administration" of Bonas, the sponsoring employer of the Scheme. A full narrative from the Regulator's perspective is set out in the warning notice and its statement of case. The following factual summary is taken largely from the skeleton argument of Mr Ham on behalf of VDW and Mr Beauduin. It contains some of his observations in passing. Where material, I will indicate where these facts are disputed on behalf of the Regulator.

104. On 5 December 2006, the directors of Bonas (one of whom was Mr Charles Beauduin) resolved to put it into administration and appointed an insolvency practitioner, Gerald Krasner, as administrator. On the same day the administrator agreed to sell the business and certain assets of Bonas to BMC (Engineering Solutions) Ltd, a newly formed subsidiary of Van De Wiele-IRO. Inc (the US arm of the VDW group) for £40,000 – that is, £10,000 for office furniture, and £30,000 for goodwill.

105. Mr Krasner had his own solicitors advising him. Bonas' case is that the documents show that he obtained valuations of Bonas' assets so far as capable of being valued, but this is disputed by the Regulator.

106. Before going into administration, Bonas was engaged almost exclusively in research and development ("**R&D**") for another member of the VDW group, Bonas Textile Machinery NV ("**BTM**") on, broadly, a cost plus 5% basis. (The cost recharged to BTM included ongoing pension contributions but not deficit repair payments.) Bonas' financial statements for 2005 showed a profit of £60,925 on turnover of £2.4 million. Following the implementation of FRS17, Bonas was balance sheet insolvent. The financial statements recorded that it was dependent on the continuing financial support of its parent VDW, but that there was no formal commitment from VDW to continue to give the necessary level of financial support. At all material times, the composition of the boards of Bonas and VDW were almost identical. The Regulator's case is that VDW effectively controlled Bonas and managed it during the events in 2006.

107. Effectively, Bonas' only customer was BTM. However, it had no contractual right to future work from that source. Moreover, it had no intellectual property rights of its own. The only significant asset shown in the 2005 financials was inter-group debt of £1.45 million; the written down value of fixed tangible assets was only £20,506.

108. The initial report dated 26 May 2006 of the Scheme actuary (M.A. Underwood of Barnett Waddingham LLP) on the actuarial valuation of the Scheme as at 30 November 2005 disclosed deficits of:–

(a) £7.747 million on the ongoing basis
(b) £8.088 million on the PPF levy basis
(c) £23.348 million on the solvency (*ie* estimated buy out) basis.

109. Based on 10-year or 15-year recovery plans, the report stated that deficit repair payments of £964,000 or £725,000 per year would be required. Those figures compare with the previous deficit repair payments of around £216,000 agreed as from 1 April 2003. Without financial support, Bonas could not afford to make those payments.

110. In the light of the figures set out above, there was no possibility of full payment of Bonas' contingent section 75 debt from Bonas' own assets. It was mostly irrecoverable, according to Mr Ham, before the occurrence of any of the matters upon which the Regulator relies. Nothing, he says, which VDW (or Mr

Beauduin) did in 2006 (or indeed at any other time) adversely affected the recoverability of the section 75 debt. The most that can be said is that VDW declined gratuitously to inject its own funds into the Scheme – but that is something quite different.

111. Bonas' insolvency was the end of a number of failed attempts by the VDW group to make a success of the Bonas business since the group acquired it in 1998. Bonas had been a company which performed both a manufacturing and R&D function. It was loss making and essentially remained in business due to the support provided by VDW. Its manufacturing business was closed down in about 2002 and moved to Belgium. The history of failure, extensive losses, and inexorable decline is summarised in VDW's reply to the statement of case, which in turn is mostly taken from the evidence upon which VDW relied before the Panel. The upshot is that by 2006 Bonas was a small business with around 26 employees, the rump of a once large manufacturing operation that had failed and been moved overseas. The benefits under the Scheme of active members represented only a small proportion of the Scheme's total liabilities (about 10%).

112. In anticipation of the actuarial valuation, legal advice was obtained from solicitors, Ward Hadaway, in January 2006. Although probably commissioned by Bonas, the 2006 Report dealt with options open to VDW and its interests. Once the valuation was to hand Bonas took further advice from that firm, who introduced it to Mr Krasner, and from its own actuary, Bucks Consultants Ltd:

(a) Ward Hadaway (Bonas' solicitors) produced a report dated 10 January 2006 ("**the 2006 Report**"). I will need to refer to this in more detail later. For the moment, I note that it showed that it was anticipated that the forthcoming valuation would show that the Scheme's funding position had deteriorated and that increased contributions would be required from Bonas. It considered various options, ranging from keeping the Scheme open, to liquidating Bonas and transferring the employees to a new company or a new group company (this last being similar to what actually occurred nearly 11 months later).

(b) The Regulator's statement of case devotes 3 pages of analysis to the 2006 Report, and relies on the fact that it referred to the Regulator's power to issue a contribution notice and to give clearance. The statement of case also relies on the suggestion in the 2006 Report that Bonas (not VDW) could invite discussion with the Trustees and the Regulator about the Scheme deficit. Mr Ham suggests that this seems to form the basis of the Regulator's case that VDW and Mr Beauduin later went ahead with the "pre-pack" knowing that the present contribution claim was likely to ensue and/or to avoid VDW having to pay money into the Scheme.

(c) But, Mr Ham says, a careful reading of the 2006 Report shows that it was simply giving unexceptionable, generic advice about the possibility of the Regulator's moral hazard powers being exercised where an employer "is attempting to avoid its liabilities to its final salary pension scheme". It was not considered advice on the effect of the later "pre-pack" administration, which was not even on the agenda at that stage. Moreover, the 2006

Report referred to the power to issue a FSD as well as the power to issue a section 38 contribution notice. The only opinion offered by the 2006 Report on the applicability of the moral hazard provisions was in respect of the power to issue an FSD where the employer is insufficiently resourced, where it said that:–

> "It is possible that if the position were analysed by the Regulator he would assess the Company as falling in this category"

ie as insufficiently resourced within the meaning of the FSD provisions.

(d) The 2006 Report then pointed out that failure to comply with an FSD could lead to the imposition of a "contribution notice". This was , Mr Ham says, a reference to a section 47 contribution notice in respect of an FSD rather than a section 38 contribution notice.

(e) Accordingly, Mr Ham suggests that no particularly clear or reasoned distinction was drawn between the two. The Regulator's attempt to rely on the fact that the contemporaneous legal advice referred to the possibility of a "contribution notice" does not, he says, in any way advance the analysis or have any relevance to the question of whether the facts now alleged do in fact fall within section 38.

(f) Nor in his submission does the 2006 Report come anywhere close to suggesting that VDW would have any obligations to apply for clearance (under sections 42 and/or 46), to contact the Regulator under the notifiable events regime (section 69), or enter into discussions with the Regulator about injecting its own funds into the Scheme.

(g) Indeed, the suggestion in the 2006 Report that Bonas (not VDW) might consider applying for clearance was on the basis that it would obtain comfort that none of the moral hazard powers would be applied. This is the opposite of the Regulator's present case, where it is contended that a clearance application would have resulted in the Regulator demanding £8 million "as the price of obtaining clearance" (as the Panel later seems to have held).

(h) Thus, Ms Agnello, in her skeleton argument, suggests that the documents make clear that VDW was aware that notifying the Trustees or indeed the Regulator of its plans would result in VDW having to pay towards the pension scheme, either as a sum required for the administration and buy back to be the subject of a successful clearance application or due to action which may well be brought against VDW. It is not immediately apparent to me why VDW would need a clearance at all let alone why it would need to pay for one. Nor is it immediately obvious why the risk of action which might be brought against it is relevant to the questions now at issue. Either VDW would be exposed to the risk of a section 38 notice or FSD or it would not be. Failure to notify the Regulator makes no difference to that. I observe that it is not immediately obvious, either, why VDW would have

injected a large sum of money into the Scheme. Commercially, it would have been better off simply putting Bonas into liquidation and not acquiring the R&D business at all if that was what was necessary to avoid any risk of regulatory action. But that is jumping ahead and it would be to prejudge some important issues in the case to express any view at this stage.

(i) From all of this Mr Ham concludes that the 2006 Report does not assist the Regulator's case.

(j) Bonas' general manager, Mr Bob Harding, took further legal advice after the actuarial report of 25 June 2006 was received and then drew up a memorandum dated 27 June 2006 considering the various options. Again, the Regulator relies heavily on this document in the statement of case and I will need to consider it more detail.

(k) That memorandum discussed, amongst other options, the possibility of putting Bonas into an insolvency process and buying back its business in a new company. The memo spoke of Bonas (not VDW) "walking away" from the pension deficit in large part or in total.

(l) Mr Ham submits that, contrary to the Regulator's assertions, the memo is not evidence of a plan to commit an act of the sort caught by section 38. The memo did not propose anything in the nature of stripping assets out of Bonas, or suggest that Bonas could actually pay the section 75 debt itself or that anything should be done to prevent recovery of the debt from Bonas.

(m) What Mr Harding wrote was:–

> "… we would liquidate [Bonas] and offer the current employees positions at a newly formed company. We would then negotiate with the liquidator to buy back the assets of the old company while avoiding taking on the remaining pension liabilities of the old company (emphasis added)."

Mr Ham submits that this is important. It shows, he says, that Mr Harding thought that there would be a negotiation with the insolvency practitioner as to the price to be paid for Bonas' business. Moreover, he spoke in terms of "*avoiding taking on*" the pension liabilities. He was not proposing to prevent the recovery of anything from Bonas; he was proposing that VDW should not itself take on the liabilities of Bonas.

(n) Mr Harding's memo of 27 June 2006 referred to the possibility of negotiating a compromise with the Regulator or the Trustees, which he said was unlikely to be acceptable to them at less than £7.7 million or £8 million (being the PPF deficit and the FRS17 deficit respectively). In reliance on this, the statement of case and the determination notice say that the putative "obligation" to pay around £8 million was what VDW sought to avoid by failing to "engage" with the Regulator and the trustees.

(o) However, by reference to the statement of case at paragraph 60, Mr Ham contends that the sum of £8 million appears to be have been based on the perception that the Regulator was in effect obliged by the PPF (Entry Rules) Regulations 2005 to set this sum as the arbitrary minimum for any negotiation. There is nothing to suggest that the Regulator or the trustees had a legal right to demand such payment – it was simply thought to be the case that they would not accept any less. Further, the sum of £8 million did not represent (and was not thought by Mr Harding, Mr Beauduin or VDW to represent) a reasonable amount. Indeed, it was and remains, Mr Ham submits, a wholly arbitrary and exorbitant amount, which VDW was and is justified in not wanting to pay. And as subsequent events have shown, the sum of £8 million bears no relation to the amount that Regulator was and is in fact determined to demand from VDW – over £20 million.

(p) Ward Hadaway arranged for Mr Harding to meet the potential administrator, Mr Krasner, at their offices on 17 August 2006. It is undisputed that Mr Krasner was an independent and experienced insolvency practitioner with no prior involvement with the VDW group or Mr Harding.

(q) The notes of the 17/8/06 meeting show:–

(i) Mr Krasner advised that in his view an administration was the appropriate course of action and that a "pre-pack" sale to another group company was appropriate in the circumstances.
(ii) Mr Krasner emphasised to Mr Harding that he was under a duty to ensure that Bonas' assets were sold for a reasonable price and that he would instruct a valuer to carry out a valuation.

(r) Further (and as found by the Panel at paragraph 56 of their reasons) Mr Krasner confirmed to Mr Harding at the 17 August 2006 meeting that in his view it was not necessary for Mr Harding to inform the Trustees about the intention to sell the Bonas business through a pre-pack sale until after the transaction had been completed.

(s) On 29 August 2006, the actuary instructed by Bonas (Bucks Consultants Ltd) issued a draft report on the Scheme valuation. This revealed that there was some limited scope for negotiation with the Trustees over the amount of contributions.

(t) On 30/8/06, Mr Beauduin attended meetings with Ward Hadaway and Mr Krasner to discuss the proposed "pre-pack". Ward Hadaway again advised on the Regulator's moral hazard powers but, once more, no clear distinction was drawn between a contribution notice and an FSD. Mr Ham says that it is clear from the advice that it was envisaged that Regulator would probably try to argue that the VDW group should make a payment to the pension fund "at some point", but that any claims would be vigorously defended. Ward Hadaway thought the risk of the Regulator

pursuing such proceedings was "low" and pointed out that facts existed (such as the lack of benefit flowing from Bonas to VDW and the history of losses) for defending any claim.

(u) Mr Ham concludes that in no sense did anyone think that they could "avoid" the Regulator taking action or conceal the "pre-pack" from the Regulator.

113. In the meantime, Mr Harding had examined the possibility of setting up a new operation in Belgium or the USA to take over the R&D role carried on by Bonas. In a memo dated 28 August 2006 he concluded that Bonas' R&D function could be provided outside the UK at lower cost and that the cost of start-up would for the most part be covered by the overall savings in salaries during the first year.

114. There were meetings with the trustees of the Scheme on 14 June 2006 and 4 October 2006. As the note of the latter meeting shows, Mr Harding explicitly told the Trustees that in VDW's view the Scheme should be financed by Bonas alone and that there was a risk of the parent company, VDW, walking away from Bonas. The Trustees indicated that that as a bare minimum they would be willing to accept a 15-year recovery plan with deficit repair payments (based on weaker assumptions suggested by Bonas' actuary) of £560,000 per year though they foresaw difficulty with the Regulator over a recovery plan of more than ten years.

115. The minimum of £560,000 was 260% of the existing level of deficit repair contribution, £216,000. This far exceeded the amount Bonas could afford from its own resources, as is confirmed by the undisputed expert evidence.

116. VDW's position is that it was not prepared gratuitously to inject further funds into Bonas to enable it to pay the increased contributions. This meant Bonas' financial position was unsustainable. Accordingly, after the meeting with the Trustees in October 2006, it was decided to go ahead with the "pre-pack" administration. On 20 October 2006 the board of VDW agreed to put Bonas into administration though it did not itself take that step. As already stated, the board of Bonas itself put it into administration, some 6 weeks later on 5 December 2006.

117. On 20 August 2007 Bonas was put into creditors' voluntary liquidation, and it was subsequently dissolved.

118. The Trustees/the PPF submitted a proof for the section 75 debt, and received a dividend of £1,272,000. In November 2008 the PPF assumed responsibility for the Scheme.

119. Ms Agnello puts a very different interpretation on the documents and events from Mr Ham. She says that VDW took a very deliberate tactical decision to strip out the pension liabilities in respect of its UK subsidiary, Bonas, by placing it into a pre-pack administration which VDW would control. This enabled the sale of Bonas' business for a nominal sum unsupported by any valuation evidence or any consultation with creditors coupled with the buy-back of the business by another company within the group. And all this was done without alerting the major creditor, the Trustees, or the Regulator. She says that the business of Bonas then

continued functioning exactly as before "the one and only difference being that the pension liability had disappeared". Counsel is entitled to forensic flourishes of that sort; but it is not right to say that the pension liability had disappeared. It was and remained a liability of Bonas and the fact that Bonas had insufficient assets to meet the liability does not mean that the liability has disappeared. Moreover, if the sale by the administrator was in fact for full value, Bonas' assets would not have been depleted in any way and the Trustees would not have been prejudiced, subject to the loss of future contributions as a result of the overall scheme.

120. In contrast, if the sale was at an undervalue, there might be a strong case for imposing a liability on VDW to make good the difference. It can then be argued that there was an act or failure to act on the part of VDW and Mr Beauduin within section 38(5). They are potential targets because VDW was the parent of Bonas and Mr Beauduin was the controlling mind, it is said, of both companies. Ms Agnello says this:

> "VDW on whom Bonas depended for its support,
>
> (i) took a very carefully considered tactical decision,
>
> (ii) being fully aware that this would or was highly likely to fall within s.38(5) and having deliberately opted (contrary to legal advice it obtained at the time) not to seek clearance from the Pensions Regulator,
>
> (iii) to rid the Bonas business of the pension liabilities in respect of it,
>
> (iv) by putting its subsidiary into a pre-pack administration that the parent (despite the stark conflict between its interests and those of Bonas' major creditor, the Scheme) would control, to the detriment of such creditors,
>
> (v) in order for the Group to retain the business and assets of Bonas for an extremely small sum (£40,000) and
>
> (vi) continue the same as before, the only difference being that the pension liabilities would have been avoided,
>
> (vii) (importantly) keeping the Trustees and Regulator in the dark in order to prevent any interference with this plan,
>
> (viii) (equally importantly) calculating that this would allow VDW to achieve its aims for the lowest price (as opposed to, for example, seeking a negotiated exit) and
>
> (ix) taking the chance that the Regulator would not have the stomach to seek a CN or attempt to enforce it in Belgium."

121. She has referred me to the findings of the Panel which heard evidence over 2 days including evidence from 5 witnesses including Mr Beauduin and Mr

Harding. The Panel was in no doubt the VDW controlled the process of Bonas' insolvency, took a calculated and deliberate risk in relation to the use of the Regulator's powers and had a purpose of minimising the amount it paid into the Scheme. That may all be so, but it must be remembered that VDW was under no legal obligation to contribute a penny to the Scheme. That was the obligation of Bonas. And whilst I can see that acting in such a way as to minimise the amount of Bonas' assets available for payment into the Scheme might expose VDW to liability for the diminution of funds available, it is important not to jump to the conclusion that VDW must therefore meet the entire shortfall as the result of a contribution notice under section 38. I say nothing about potential exposure as the result of an FSD. But the present application in not concerned with an FSD; it is only concerned with contribution notices under section 38.

122. The Panel, however, concluded that it was "plainly reasonable" to issue a contribution notice in the sum of £5.08 million not least because

> "VDW had been told that their realistic risk, had they negotiated openly with the Trustees and the Regulator, was to be required to contribute approximately £8 million, which was the sum then required in order to take the Scheme to a position of solvency on the PPF basis. It seemed reasonable, therefore, for the sum set out on the Contribution Notice to be the equivalent sum valued now"

123. I shall need to return to that conclusion which I am bound to say I find surprising and based on a proposition which I simply do not understand, namely that had there been an open negotiation, VDW would have been required to contribute about £8 million. It is frankly inconceivable on the evidence which I have seen that VDW would ever have agreed to contribute that much (or indeed £5.08 million) in order to avoid an administration or insolvency of Bonas which it, VDW, would not have controlled. It simply makes no commercial sense at all. Even if the purchase price paid for Bonas' business was at less than its market value, it is apparent that the business cannot, on any view of the present evidence, have been worth more than a few tens of thousands of pounds more than the price paid (a sum which can hardly be described as nominal in any event, as the Regulator does describe it). VDW would easily have been able to acquire the business in an open market sale for a sum which was a small percentage of the £8 million or the £5.08 million. It is certainly not what Ward Hadaway advised the outcome would be.

The procedural history

124. I again adopt with comments the helpful summary of the procedural history in Mr Ham's skeleton argument.

125. The Regulator began to investigate this matter early in 2007, and was supplied with all relevant internal documents including legal advice by April 2008. Written representations on behalf of VDW and Mr Beauduin were provided to the Regulator supported by a witness statement from Mr Beauduin dated 8 April 2008.

126. On 8 April 2009 the Regulator served a warning notice on VDW and Mr Beauduin seeking contribution notices for between £20,600,000 and £21,512,000,

being the shortfall sum minus the dividend of £1,272,000 received in the insolvency of Bonas. It required them to respond to the warning notice in less than three weeks.

127. Appendix C to the warning notice stated that the act or acts relied upon for the purposes of section 38(3)(a) were:

(i) the withdrawal of support by VDW to its subsidiary and the decision by the directors of VDW and Bonas to place Bonas into administration; both for the sole intention of avoiding having to fund the pension scheme deficit while retaining the Bonas business. Up to the point of administration Bonas was a viable trading entity, with all its costs (including pension scheme contributions) being recharged though a cost-plus invoicing arrangement with its parent company. [That may be true as far as it goes, but I observe that it wholly fails to recognise the need for a deficit repair contribution which VDW had never agreed to meet. It also fails to recognise that, taking account of the pensions liability, Bonas was only a viable trading entity because of the support provided by its parent, support which it was under no obligation to continue to provide.]

(ii) the manipulation of the insolvency process – in order to strip out the business and operation of Bonas without the burden of the pension scheme liability – which involved the following steps:

(a) VDW having selected the proposed administrator and pre-arranged with him the proposed course of action so as to ensure that VDW remained in control of the insolvency process and the Scheme was not in control of the process;

(b) Bonas being placed in administration by its directors;

(c) the pre-packaged business being transferred across to a special purpose new company in the VDW group with the prior agreement of the proposed administrator that the business would be sold for an agreed sum to the new VDW company;

(d) the pension liability being left behind with no ongoing support, but with all other creditors of Bonas having been discharged prior to the administration;

(e) Accordingly the new company would operate (and did indeed operate) in exactly the same way as Bonas had with the same employees but with the fundamental difference that neither it nor the parent VDW retained any liability for the Scheme. Liability for the Scheme remained with Bonas, which was in administration and had no prospects of being able to meet the substantial Scheme deficiency (with the exception of a dividend of approximately £1.2 million subsequently made from the administration).

128. This reveals three acts relied on:

(a) withdrawal of support;

(b) the decision to place Bonas into administration; and

(c) manipulation of the insolvency involving four specific steps.

What this does not reveal,Mr Ham submits, is a suggestion that the sale as part of the pre-pack was at an improper value (*ie* outside the range of possible values) or that it was at the bottom end of that range;

129. I note that the warning notice appears to rely on the suggestion that VDW had undertaken Bonas' liabilities, including its liabilities to the Scheme, as a matter of legal obligation. Thus we find this at paragraph 55:

> "VDW was prepared to commit to support the Scheme and therefore take on responsibility for the employer covenant. … Accordingly the employer covenant of Bonas was in reality a liability for which the parent VDW was responsible and/or had assumed responsibility by its actions and/or provided support for the same."

130. Paragraph 4 Appendix C continues this theme when it refers to Mr Beauduin's own statement where he has said this, in relation to the acquisition of VDW:

> "VDW nevertheless decided to continue to support the Scheme and took over the liabilities in the asset purchase. VDW put in place an increased contribution rate, which in the short term led to the scheme being over-funded."

131. On the basis of that, paragraph 5 Schedule C asserts that this decision "created a commitment on the part of VDW to support Bonas through the provision of such financial support as was necessary". I remind myself again that the present case is concerned with contribution notices under section 38 and not with FSDs. It is important not to allow language used to lead one in the wrong direction. So far as concerns taking over liabilities "in the asset purchase", I have not been taken to any contractual document creating such an obligation and know of nothing else which might establish a commitment in the sense of creating a legally binding obligation. If such a commitment had ever been undertaken, the Trustees would, presumably, be seeking to enforce it and there would be no need for a contribution notice in the first place.

132. Further, the withdrawal of support argument appears to be based on the view that support was withdrawn on a contrived basis. It was said that support was withdrawn on the basis of Bonas' insolvency when in reality, according to the warning notice, it was completely within the discretion of VDW to decide whether Bonas would commit to increased contributions (see warning notice paragraph 10 Appendix C) and the administration of Bonas did not occur because Bonas was insolvent but instead occurred as part of a plan the purpose of which was to avoid the pension liability while keeping the business (see paragraph 57 of the warning notice).

133. Mr Ham submits that the case advanced in the warning notice was legally and factually unsustainable. He suggests that the Regulator "appears to have realised this and abandoned the hopeless case in the warning notice", adding that it has belatedly attempted to find another (but still untenable) way of bringing the facts within the requirements of section 38, as set out in the statement of case. The Regulator denies that it has materially changed its case at any stage (see paragraph 106 of its statement of case). Mr Ham says that is simply not the case. He invites me to compare paragraphs 53–59 of the warning notice ("Summary of grounds for issuing a CN") and Appendix C to the warning notice ("Submissions in relation to the CN") with the statement of case.

134. On 7 July 2009 the targets (VDW and Mr Beauduin) lodged their response to the warning notice, supported by six detailed witness statements and three expert reports, addressing the case as set out in the warning notice.

135. On 10 February 2010 the Panel gave directions to prepare for a contested oral hearing of the claims on 30–31 March 2010. These included a direction to the parties to agree a list of undisputed facts, identifying the issues in dispute, by 11 March 2010. No agreement was reached.

136. On 4 March 2010, the Regulator served a long expert report from an insolvency practitioner, Andrew Tate, the purpose of which, as perceived by Mr Ham, appeared to be to criticise the conduct of the administrator of Bonas, Mr Krasner.

137. On 19 March 2010 skeleton arguments were served. Mr Ham sees this as a change of tack, describing it as relying on three acts allegedly falling within section 38(5)(a)(i) which he submits were different from those specified in the warning notice. They were:

(a) "minimising the sum paid by VDW for the buyback of the Bonas business" (paragraphs 67–70 of the Regulator's skeleton argument) the Regulator alleged that the Targets sought to prevent recovery of the section 75 debt by underpaying for the Bonas business or, as it was put elsewhere, achieving "a very cheap buyback" (paragraph 57(c) of the Regulator's skeleton before the Panel) or paying a "nominal price" (paragraph 80);

(b) "walking away without engaging openly with the Trustees or the Regulator" (paragraphs 71–79): the Regulator alleged that the Targets could and should have had a negotiation with it in 2006, which would have resulted in a compromise where VDW expected that it would have to pay at least £8 million to the Scheme; and

(c) "preventing the recovery of ongoing contributions" (paragraphs 80–86): the Regulator alleged that the prevention of the recovery of the section 75 debt took the form not of preventing recovery of the section 75 debt itself, but of the ongoing pension contributions.

138. On 29 March 2010 VDW and Mr Beauduin filed a supplemental skeleton argument responding to what is said to be the Regulator's new case and (amongst other things) objecting that the departure from the warning notice was a breach of the rules of natural justice and non-compliance with the procedure laid down in section 96 and the Procedure.

139. The Panel held an oral hearing on 30 and 31 March 2010, indicating at the outset that it did not propose to take the challenge to the Regulator's new case as a preliminary issue but would consider it as part of the whole case. The hearing was conducted in the manner of court proceedings. The Panel heard submissions from both sides, each of which instructed leading and junior counsel, and oral evidence (including cross-examination) from Messrs Beauduin, Krasner, Tate, Harding and Weerts.

140. On 22 April 2010 the Panel made an order to issue a contribution notice which, so Mr Ham says, apparently purports (contrary to section 96(5)(a) under which the Regulator must not exercise a regulatory function during the period during which the determination to exercise such a function may be referred to this Tribunal) to be a contribution notice. It stated that the acts which fell within section 38(5) were that:

(a) VDW chose to withhold from the Trustees and the Regulator its decision to place Bonas into administration; and

(b) VDW chose to conceal from the Trustees and the Regulator its strategy to retain (in the form of a new company) the assets of Bonas while dispensing with its main liability (the Scheme's deficit);

in circumstances in which Bonas, which was at all material times controlled by VDW, was under a duty to inform the Regulator about its decision to cease to carry on business in the United Kingdom.

141. A covering letter stated that the determination notice giving reasons for the decision would be sent as soon as possible. Although purporting to be a contribution notice, it is possible that on analysis this rather than the subsequent document so described was the determination notice.

142. On 14 May 2010 the Panel issued its reasons:

(a) It expressed the view that it was not reasonable to issue a contribution notice against Mr Beauduin.

(b) It also took the view that it would be a breach of natural justice to allow the Regulator to advance a case – which did not appear in the warning notice – that the sale of the business of Bonas was at an undervalue. This is now referred to as Act 2. In any event, there was in the Panel's view insufficient evidence to enable them to conclude that the sale had been at an undervalue and the Regulator's case based on that allegation failed accordingly.

(c) The Panel decided however to issue a contribution notice in the sum of £5,089,000 against VDW identifying the act falling within section 38(5) as being that VDW "walk[ed] away without engaging openly with the trustees or Regulator" (see paragraph 65.1 of the reasons). In other words, from (at the latest) 20 October 2006 until (at the earliest) 5 December 2006, VDW concealed from the Trustees the fact that VDW had decided to put Bonas into administration (see paragraph 70 of the reasons). This is now referred to as Act 1.

The Panel made no finding in relation to the remaining act that it said the Regulator relied upon, namely Act 3: "retaining the business while avoiding the pension liability".

(d) It is to be noted that the reasons do not contain any findings about Bonas being under the duty referred to in the order of 22 April 2010 that is to say a duty to inform the Regulator about its decision to cease to carry on business in the United Kingdom. The earlier "order" does so. That order bears the seal of the Regulator. It is signed by a member of staff of the Panel Support Team. There is no material before me to show whether (a) the Panel authorised the issue of this notice (in apparent contravention of section 96(5)) or (b) whether the Panel ever did in fact decide that Bonas was in breach of duty as alleged.

143. Mr Ham identifies the Panel's essential findings and reasons for deciding to issue a contribution notice to VDW as follows:

(a) By early 2006, VDW was considering placing Bonas into liquidation and transferring its employees to a new company or an alternative company within the VDW group, a course of action which would entail "leaving" the Scheme and its substantial deficit "behind".

(b) VDW and Mr Beauduin knew that any decision to "abandon" the Scheme by liquidating Bonas would involve a calculated and deliberate risk that the Regulator might use its moral hazard powers.

(c) VDW was informed about the risks of the Regulator taking action if a "pre-pack" administration went ahead, and that any negotiated settlement would be unlikely to cost less than £8 million.

(d) At all material times, Bonas was controlled by VDW, and VDW's conclusion that Bonas was unsustainable was driven exclusively by Bonas' pension liabilities. Implementation of the "pre-pack" had and was intended to have the result of retaining Bonas' business and assets in a new company that had no liability to the Scheme.

(e) VDW misleadingly gave the impression to the Trustees that there was some realistic prospect that VDW would continue to provide financial support to the Scheme, and avoided telling them or the Regulator about the "pre-pack" so that VDW could "walk away" from the Scheme, taking the

risk of a contribution notice being sought by the Regulator rather than face an FSD or a contribution notice being swiftly imposed.

(f) VDW so acted with a main purpose of avoiding having to pay around £8 million immediately or in the future; the obligation to make such a payment might have arisen as the price of obtaining clearance for the "pre-pack" (*ie* under sections 42 and/or 46), or pursuant to a contribution notice or FSD.

(g) This purpose was a qualifying purpose, which fell within section 38.

(h) Thus the Panel upheld a version of the "walking away" case (what has been called Act 1).

(i) Mr Ham notes in passing that the Panel's reasoning is different from the regulatory arm's present case, in that the statement of case alleges that VDW and Mr Beauduin wished to avoid "a negotiation with the Regulator about how much VDW should inject into the Scheme if it was to walk away from its subsidiary" (statement of case paragraph 114). He comments that the Regulator's case before the Tribunal accords with the essential reasoning of the Panel in almost no respects.

144. I think that that is a broadly accurate summary of the Panel's conclusions although I do not think that the Panel accepted that £8 million would have been the price to be paid for a clearance although it recorded Mr Harding's view in his memorandum that £8 million would be the likely starting point for negotiations. It is also worth recording what the Panel described in paragraph 75 as its primary basis for finding that the case of a contribution notice was made out.

> "….it is plain that one of the purposes of VDW (if not the only purpose) in refusing to engage with the trustees and [the Regulator] was to avoid incurring a liability to make immediate or future payment to the Scheme, in the case of either a CN [contribution notice] or a FSD. In the case of either a CN or a FSD, its liability would have been quantified by reference to a debt calculated on the section 75 basis, even if no section 75 debt was due at the time. It does no damage to the language of the section to hold that this was aimed at preventing the recovery of some or all of a section 75 debt which might become due. We do so hold…."

145. By reference notice dated 21 May 2010, VDW exercised its right of referral to this Tribunal.

146. In accordance with paragraph 2(3)(d) of Schedule 3 to the Upper Tribunal Rules the reference notice sets out the issues that VDW wishes the Upper Tribunal to consider as follows:

(a) As a matter of procedural fairness, was it open to the Panel to consider whether:

1. VDW had committed any of what were referred to as the "alleged acts" *ie* Acts 1 to 3;
2. the (or a) main purpose of any of those acts was:
    i. to avoid VDW itself having to make a payment to the Scheme whether:
        - as the price of obtaining clearance;
        - pursuant to a contribution notice; or
        - pursuant to a demand for payment following the imposition of an FSD; and/or
    ii. to minimise the amount that VDW would have to pay into the Scheme.

(b) Without prejudice to the generality of a., was it open to the Panel to make certain findings of fact specified in an appendix ("the specified findings")?

(c) To the extent that they are open for consideration, do any of the alleged acts fall within section 38(5)?

(d) Is it reasonable to issue a contribution notice?

(e) If so, should the amount of the contribution notice be less than £5,089,000?

147. On 22 June 2010 the regulatory arm of the Regulator sent the Regulator's statement of case to this Tribunal. The statement of case reflects in large measure the Regulator's skeleton argument before the Panel.

148. As already noted, in the statement of case the Regulator does not merely support the issue of a contribution notice to VDW in the sum of £5.089 million, but attempts to reopen other points that it pursued unsuccessfully before the Panel and fails to support other aspects of the Panel's reasoning.

149. Thus the Regulator:

(a) seeks the issue of a contribution notice to Mr Beauduin as well as VDW;

(b) seeks to revive what the Panel called the "sale at an undervalue" case (Act 2); and

(c) the sum to be specified in the contribution notice should be "considerably higher" than the sum of £5.089 million and indeed the full sum originally sought in the warning notice of over £20 million.

The three Acts

150. The Regulator's statement of case relies on the same three limbs (slightly differently worded in the case of Act 3) as its skeleton argument before the Panel (see paragraph 137 above):

(a) Act 1: walking away without engaging openly with the Trustees or the Regulator.

(b) Act 2: minimising the sum paid by VDW for the buyback of the Bonas business.

(c) Act 3: Retaining the business while avoiding the ongoing liabilities.

Act 1

151. As to Act 1, I want in the first place to address the question whether the Regulator can rely on Act 1 at all. Mr Ham says that Act 1, as with Acts 2 and 3 as well, is outside the scope of the warning notice and therefore cannot be relied on. I have considered at some length what it is, and is not, open to the Panel or the Tribunal to consider when an act is not expressly relied on in the warning notice. As I have said, Mr Ham has invited me to compare paragraphs 53–59 of the warning notice ("Summary of grounds for issuing a CN") and Appendix C to the warning notice ("Submissions in relation to the CN") with the statement of case. I have done so, indeed I have compared the whole of the warning notice with the whole of the statement of case. I am left with no doubt that the essence of the case which the Regulator now seeks to rely on was made in the warning notice. Both aspects of Act 1 were present in the warning notice – firstly, walking away (as I have said, simply a short-hand for the scheme to take the business and the employees leaving the pension liabilities with Bonas) and secondly secrecy and thus obviously not engaging with the Trustees or the Regulator. Even if that is a reading of the warning notice which is unduly favourable to the Regulator, I consider that the case which the Regulator now puts forward in its statement of case is no more than the development of arguments which were present in the warning notice (and the same development as was presented to the Panel). In accordance with my analysis of sections 96 and 103 and the Procedure, the Regulator is in my view entitled in principle to rely on Act 1.

152. That is not an end of the application in relation to Act 1, however. Mr Ham focuses on the words after "walking away". He categorises this as an allegation of a failure to act, namely to engage openly with the Trustees or the Regulator. The words "walking away" are of course only a metaphor. But a reading of the statement of case makes it clear that the words are intended to embrace the plan, or scheme, of VDW that the Scheme should be left without an active employer and that VDW would cease to support Bonas. The "walking away" it seems to me involved positive acts on the part of VDW including (a) the decision to cease to support Bonas and (b) the decision that Bonas should go into administration. I appreciate, of course, that the actual decision to place Bonas into administration was formally that of the board of Bonas and not of the VDW. It is, however, idle to suppose that the decision in principle was not that of the board of VDW and Mr Beauduin as much as of the board of Bonas itself.

153. Mr Ham focuses on the failure, as he identifies it, to engage with the Trustees and the Regulator because that enables him to argue that there was no deliberate failure to act. The statement of case rejects this focus, and says that Act 1 is not a case of inaction For reasons given in the previous paragraph, I think that is correct. But if Mr Ham is right to focus only on the alleged failure, his argument is that there was no deliberate failure by VDW to engage since it was not under any duty to do so. I have already addressed the meaning of "deliberate failure" in

the context of section 38(5). I concluded that there could be a deliberate failure to do something even where there was no duty to do it. Accordingly, the absence of any engagement with the Trustees and the Regulator is capable of being a deliberate failure to act even if there was no duty on Bonas to consult its creditors . On the facts of the present case, there can be no doubt that there was a positive decision by VDW and Bonas not to consult with the Trustees or the Regulator; this was not a case where the possibility of consultation had simply not occurred to anyone. Accordingly, I consider that there was a deliberate failure to act within the meaning of section 38(5) even if I am wrong in what I have said about "walking away".

154. I do not propose to consider any further the dispute between the parties as to whether Bonas was under a duty to consult with its creditors. Nor do I propose to say anything about the alleged failure to comply with the notifiable events regime under section 69. The obligation under that section is imposed on Bonas. If it applies, the sanction for non-compliance is a civil penalty of up to £50,000. An associate of the employer is not to be punished for non-compliance by the issue to it of a contribution notice far in excess of that penalty. That is by the way. The real point is whether, had there been such engagement as the regulator submits should have taken place, negotiations would have produced any more money for the Scheme than was received in the liquidation of Bonas (and if so how much). Assuming that VDW would have declined to inject £8 million or any significant sum into the Scheme, all that the Trustees could have done would have been to force Bonas into liquidation possibly resulting in a smaller dividend than they actually obtained.

155. At this stage, I turn to consider the four items mentioned at paragraph 102 above which are said by the Regulator to be capable of falling within section 38(5)(a) (the price of obtaining a clearance from the Regulator, a debt due by virtue of a contribution notice, a liability arising as a result of an FSD and ongoing contributions).

156. The argument in relation to the first three items (the price of obtaining a clearance from the Regulator, a debt due by virtue of a contribution notice, a liability arising as a result of an FSD) falling within section 38(5)(a) would have to be along these lines:

> Each item would result in a sum of money being owed by the person concerned to the Scheme. That amount, when paid, would reduce *pro tanto* the section 75 debt. Accordingly, payment of such an amount would represent "recovery" of the section 75 debt or part of it. To prevent payment of such an amount would therefore be to prevent payment on the section 75 debt.

157. Any argument along those lines would face great difficulties. It is unnecessary to address the argument because, on the facts of the present case, it does not arise. This is because, apart from the actual contribution notice issued to VDW, there is (and was when the matter was before the Panel) no amount payable in respect of any of those three items. There is no suggestion now, nor was there at the time the matter was before the Panel, that any liability on the part of any

person other than VDW and Mr Beauduin under any of those items might arise in the future, still less that there was any act or deliberate failure to act on the part of VDW which would result in the prevention of payment in respect of such liability. No such act or failure is relied on by the Regulator.

158. Nor is there, or could there be, any suggestion that either VDW or Mr Beauduin has been a party to an act or failure to act which would or might have prevented recovery of payment from either of them of any amount for which they could be liable as the result of contribution notice issued or FSD against either of them or which has prevented the Regulator from issuing an FSD when otherwise it might have done. Still less was there such an act which had such prevention as a main purpose.

159. The only liability of any relevance which might have arisen was a liability on the part of VDW itself to support Bonas or to make direct payments to the Scheme as the price of obtaining a clearance. But why, it needs to be asked, would VDW apply for a clearance? The answer can only be because VDW was proposing to take action which might bring it within the scope of some regulatory action and in particular section 38. Either its intended course of action would bring it within the scope of some regulatory action or it would not. If it would not have done so, then a clearance was unnecessary and nothing would have been paid for it. If, in contrast, the proposed course of action would have brought the case within the scope of an identified regulatory power, in particular section 38, then its actual implementation (as occurred) leaves the case within the scope of that action. But this has nothing to do with failure to apply for clearance and everything to do with the act or failure to act which fell within section 38.

160. In theory, it may have been the case that VDW would have been prepared to pay something for the certainty which a clearance would have given it. One might be forgiven for thinking that, even so, VDW would not have contemplated paying anything like the sum which the Panel determined let alone the sort of figure which the Regulator was seeking. However, whatever might have happened in theory, any figure whether large or small would have been reached as a matter of agreement. In my view, it is not open to the Regulator to argue that the loss of the opportunity for the Trustees and the Regulator to negotiate brings the case within section 38(5)(a). For either the proposals for which clearance is sought would, if implemented without a negotiated clearance, bring the case within section 38 or they would not. If they would, the Regulator has not been deprived of any opportunity to issue a contribution notice or take any other regulatory action; in contrast, if the proposals would not have brought the case within section, the proposed action needed no clearance and the failure to seek it is of no consequence. I do not consider that a failure to negotiate can bring with section 38(5)(a) acts which would not be within the section if there had been a negotiation. Nor can the mere failure to negotiate, of itself or taken with those other steps, bring the case within the section.

161. Further, if the Regulator's argument were a good one, I can see no reason why it should not equally apply where a person does negotiate with the Regulator but fails to reach an agreement because of their very different perceptions of the merits of the case. When negotiations fail, the Regulator can seek to obtain the

issue by the Panel of a contribution notice on the basis of the arguments it has been deploying in negotiations with the other person. But it cannot possibly argue, when negotiations fail, that a contribution notice can be issued based on the failure to agree, seeking the sum which it, the Regulator, says would have been what it considers would have been a reasonable outcome of negotiated agreement. I regard that result as clear. And being unable to detect any difference in principle when the target refuses to negotiate or even fails to reveal what he is about to do, I do not consider that there is an arguable case that the Regulator is entitled to issue a contribution notice on the basis that VDW has prevented the recovery of part of the section 75 debt by failing to negotiate.

162. As to the fourth item (ongoing contributions), it is said by the Regulator in paragraph 131 of the statement of case that one way of viewing the case is that that the avoiding of an ongoing liability "counts" for the purposes of section 38(5)(a). It is said that the reference to prevention of recovery of a section 75 debt that is or may fall due is referring to the totality of the pension liabilities in respect of the scheme, all of which are effectively a subset of the potential section 75 buy-out liability that always exists under a scheme. If I understand this view correctly, it treats the debt which would arise if future contributions became due as itself being a debt or part of a debt within section 38(5)(a). On that footing, preventing a future contribution becoming due would itself be preventing payment of a debt for the purposes of that subsection. Without deciding the point, I consider that this view is not correct and that it not right to see a debt arising as the result of an unpaid contribution as itself being part of the section 75 debt. The reason I do not decide the point is because I consider that the Regulator should be entitled to pursue an alternative view of the case (see paragraph 180-190 below) and that it would not be desirable to attempt to separate what are in reality overlapping arguments. The Regulator should be entitled to present its entire case on the issue of future contributions. This alternative view really sees the issue as part of Act 3 and I will deal with it when considering Act 3.

163. Returning to Act 1, my analysis of the four items which it is said are capable of forming part of the debt under section 38(5)(a) shows also that failure to engage with the Trustees or the Regulator is not of great significance. This is because the failure to engage does not prejudice in any way the power of the Regulator, through the Panel, to issue a contribution notice in relation to the act or failure to act to which the failure to engage relates. However, even if it is of little significance, that is not reason why the Regulator should be prevented from relying on the non-engagement together with the "walking away" as an act which falls within section 38(5)(a).

164. Moreover, the fact that the non-engagement is of little significance as an act or failure to act does not make it irrelevant. On the contrary, it may be very relevant in the context of establishing the subjective purpose of VDW and Mr Beauduin and thus relevant to whether the act or deliberate failure to act had the requisite purpose for the purposes of section 38(5)(a).

165. It follows from all of these considerations that the Regulator is entitled to rely on Act 1 as against VDW and that it is not to be barred from relying on its statement of case in that respect.

Act 2

166. Act 2 is the minimising of the sum paid for Bonas' business. This, in effect, is the "sale at undervalue" case which the Panel addressed in paragraph 8 of its reasons. It declined to allow this aspect to be raised by the Regulator and in any event concluded that there was insufficient evidence to enable it to conclude that he sale of Bonas had been at an undervalue. However, "sale at undervalue" in only a shorthand. The actual allegation was that the sale price was minimised.

167. When it comes to the sale price of a business, there is always scope for argument about its market value; different people, even valuers, can take different and reasonable views. In other words, there is a range of defensible values.

168. Mr Ham observes that the Regulator does not say anywhere in its statement of case that there was a sale at an undervalue in the sense that the sale price fell outside the range of reasonable values. To do so, it would have to allege, in effect, negligence or worse on the part of Mr Krasner, something it has not done. Indeed, it was not put to Mr Krasner in cross-examination before the Panel that he had deliberately sold the business for too little. According to Mr Ham, it appears to be the Regulator's case, therefore, that the sale price was minimised as a result of the conduct of VDW and Mr Beauduin rather than that they procured a price outside the range of reasonable prices.

169. There is certainly no evidence, apart from that of Mr Tate, even after the long period during which the Regulator has been investigating and prosecuting this case, that the sale was at an improper price (in the sense of being outside the range). However, Mr Tate's expert report is not, in any case, a valuation of the business and is, in any case, based on a misunderstanding of the ownership of the IP rights to Bonas' products, which rights were not owned by Bonas. His reports gets the Regulator nowhere on this point.

170. The Regulator suggests that expert evidence may well be adduced on the point of valuation at any final hearing and may be relevant to the question of the quantum of a contribution notice. One might have hoped that, by now, the Regulator would have produced such expert evidence as it intended to rely on to enable VDW to prepare its own case and to respond. But this is in a sense beside the point because the Regulator says that its case doe not depend on it. The Regulator's allegation is that the purpose of the acts was to minimise the sums paid by VDW for the buyback; it is not an argument about valuation but of the steps that VDW took to minimise the sums payable, shown by the lack of any consultation with creditors, the lack of any proper steps to market the business and the sale to a subsidiary of VDW. It is an argument based on the almost identical composition of the boards of VDW and Bonas allowing VDW to control the actions of Bonas even after the administration by its choice of administrator and instructions to him.

171. The Regulator's case on this issue therefore comes to this. VDW and Mr Beauduin were parties to a scheme which minimised the purchase price with the purpose of preventing recovery of the section 75 debt or part of it. This involves the proposition that the pre-pack was at a price which VDW and Mr Beauduin

knew and intended would be at the bottom end of the range and perhaps even improperly low. I accept Ms Agnello's submission that the Regulator has a case with a real prospect of success (indeed, it looks quite a strong case) that the pre-pack administration had as one of its main purposes preventing the payment of part of the section 75 debt within section 38(5)(a).

172. Further, although the case was not put precisely that way in the warning notice, it is essentially a development of the case which was put concerning manipulation of the insolvency process. The argument is that the reason why VDW would want to control and manipulate the process was to ensure that the business of Bonas could be kept within the group and could be acquired for the minimum price. Whether that argument can succeed as a matter of fact is a matter for the final hearing. But the argument is not so remote from the case which actually appears in the warning notice as to preclude the Regulator from now relying on it.

173. Accordingly, the Regulator is not to be barred from reliance on the "sale at undervalue" issue.

174. The amount of the alleged minimisation is not something which can be gone into on this application which is not, as I have said, a mini-trial. I accept that the extent of the minimisation of the sale price is a matter for the full hearing; and it will be for the Tribunal at a later stage to decide what evidence it will receive and what cross-examination it will allow consistently with this Decision. The Regulator has not, unfortunately, suggested so far what a proper price would have been.

175. Be that as it may, VDW must be entitled to know what the real case of the Regulator is. The Tribunal will certainly need to know the rival views about value before it can determine what amount should be specified in a contribution notice if one is to be issued at all. Further, if the "sale at undervalue" point had been specifically articulated in the warning notice, the Regulator ought to have produced all the material on which it relied to support the regulatory action under consideration, that is to say the issue of a contribution notice in a specified amount. In order to justify any particular amount based on the sale at undervalue point, the Regulator would have had to adduce evidence of the amount of the undervalue.

176. It will be for the Tribunal at some time in the future (whether at the final hearing or some earlier directions hearing) to decide whether the Regulator should, at this quite late stage, be permitted to adduce such evidence. An application to do so is not before me and, in any event, the Tribunal would want to know precisely what that evidence is before deciding to admit it. What I can do, however, and what I propose to do, is to direct that any evidence concerning diminution in value on which the Regulator wishes to rely should be provided within a period which I will specify after receiving submissions, which I now invite, on the appropriate period. I would have thought that a period of 28 days from the release date of this Decision would be appropriate, but I have an open mind on this. This material should, in any case, have been provided as part of the statement of case pursuant to paragraph 4 Schedule 3 to the Upper Tribunal Rules.

VDW will need to consider whether it wishes to reply to any evidence; indeed it might consider whether it would want to adduce any additional evidence about the value of the business to meet any argument which the Regulator is able to mount even on the present evidence.

177. If no application is made to adduce such further evidence, or if such an application is made but is refused, the Tribunal will deal with the "sale at undervalue" point on the existing evidence. As to that, the Panel expressed the view that the case was not made out on the evidence before it. However, my own view is that the Regulator has a real case for saying that the case falls within section 38(5)(a) on the basis of the sale at undervalue issue

178. It is a different matter, however, whether it would be reasonable to issue a contribution notice on that basis for a sum of £5.089 million let alone any higher figure. If no further evidence is adduced, the most that the Regulator could say is that the sale price was at the bottom end of the range. Even if one takes a very generous view in favour of the Regulator, it appears to me to be hard to contend on the evidence so far that the market value was more than £100,000. In that case, it is difficult to see how the Regulator could properly form the view, by reference to the sale at undervalue point, that it would be reasonable for the contribution notice to specify an amount more than the difference between that sum and the price actually paid.

179. My conclusion on Act 2 is that the Regulator's case should be allowed to proceed. But the Regulator must produce all of the valuation evidence on which it seeks to rely; unless VDW agrees that such evidence may be adduced, an application will have to be made to the Tribunal either at the final hearing or at a directions hearing.

Act 3

180. Act 3 is retaining the business while avoiding ongoing pension liabilities. I have already rejected (see paragraph 162 above) one view which the Regulator has put forward. But there is another approach. I can distil the argument in this way. By bringing about the pre-pack administration of Bonas, VDW has prevented future contributions being paid by Bonas. Such contributions would include an element of deficit repair and, by reducing the deficit, would reduce the amount of the section 75 debt. Accordingly, by bringing about a situation where no future contributions are payable as a result of the pre-pack administration and sale of the business, VDW has prevented collection of future contributions, and has thereby prevented the recovery of part of the section 75 debt. The point is not that the ongoing contributions would have formed part of the section 75 debt; rather, the point is that VDW has prevented collection of contributions which would have reduced the section 75 debt.

181. This argument faces two main difficulties. The first difficulty arises this way. Section 38(5)(a) requires an act or failure to act which has as a main purpose preventing the recovery of the whole or any part of a debt which was or might become due under section 75. It is looking at a debt which has already become due under section 75, or a debt which might become due under that section. In the latter case, the Regulator, in forming its opinion for the purposes of section

38(5)(a), is entitled to look to the future and to consider whether the act or failure to act in question has as a main purpose the prevention of payment of a section 75 debt at any particular time in the future. An ongoing contribution paid before a section 75 debt has been triggered will, *ex hypothesi*, not be paid in satisfaction of a debt under section 75; it will be paid in satisfaction of a contribution obligation. It will reduce the deficit if it includes a deficit repair element in its amount but that is something different.

182. It can then be argued that an act whose purpose is to prevent the ongoing contribution falling due in the first place does not disclose a purpose, let alone a main purpose, to prevent payment of a section 75 debt. The non-payment of the contribution does nothing to prevent payment of the section 75 debt itself if and when it falls due. On the contrary, the non-payment of the contribution only has an effect on the quantum of the deficit and thereby on the amount of the section 75 debt. It has no impact at all on the amount which can be recovered from the employer in respect of the section 75 debt.

183. A counter-argument is that the non-payment of the future contribution means that, when the section 75 debt is triggered, that debt will be larger than it would otherwise have been. Accordingly, the assets available to meet the section 75 debt will result in a smaller percentage payment of that debt than if the additional contribution has been paid. This argument, of course, has to assume that the additional contribution would have been funded by VDW; if it were not so funded, Bonas' own assets would have been reduced with less being available to meet the section 75 debt when it is triggered.

184. These rival arguments have not been fully developed before me. I do not consider that I should decide the issue on this application; it should be left to the full hearing. I would only add that even if the counter-argument is correct, it does not follow that it would be reasonable to issue a contribution notice in the amount which the Regulator seeks. That leads to the second difficulty in the Regulator's case.

185. The second difficulty arises in this way. To succeed on its argument, the Regulator needs to show that if VDW had not acted as it did, Bonas would have paid the ongoing contributions. If Bonas would not have paid ongoing contributions in any event, VDW's acts or failures to act will have had no impact on the deficit or any section 75 debt so that it cannot have been a purpose of those acts or failures to prevent payment of such a debt. In that context, it is perfectly clear that without VDW's support Bonas would not have been able to afford to make significant repair contributions. The Regulator has suggested in its statement of case that it might have been possible for it to have imposed a schedule of contributions providing for less than the minimum £560,000 pa which the Trustees were insisting on. I find the idea that the Regulator, which is now seeking over £20 million, would have agreed to that as a difficult one to accept. It is a proposition which sits very uncomfortably indeed with its stance in relation to Act 1 where the failure to engage has, according to the Regulator, enabled VDW to avoid making immediate payment of a very substantial sum – perhaps £8 million – as the price of a clearance.

186. The reality I suspect – although this will be a matter for the Tribunal to decide at a full hearing if a decision is needed at all – is that the Regulator would have imposed a schedule of contributions which Bonas would not have been able to afford without continued support from VDW. Without support, the Scheme would have had to be wound up and an actual section 75 debt would have been triggered. Without the pre-pack administration, Bonas would almost certainly have had to be put into liquidation.

187. As I have already said, there is nothing before me to suggest that VDW was legally bound to provide such support. Whether it is possible to issue a contribution notice to VDW on the basis that it could have chosen voluntarily to support Bonas and thereby the Scheme but chose not to do must be highly questionable. It is the territory of the FSD regime to impose liabilities on associated companies in such circumstances. To say that VDW has prevented payment by Bonas of part of the section 75 debt by declining to support Bonas when it was not obliged to do so would represent an extreme interpretation of section 38. As with the first difficulty, I do not consider that I can properly resolve this issue on this application. I consider that it should be resolved only after a full investigation of the facts. The facts may reveal that it would not be reasonable to issue a contribution notice at all based on the failure by VDW voluntarily to support Bonas in which case it may be unnecessary to rule one way or the other on this second difficulty. Reasonableness, however, is a matter which can only be dealt with at a full hearing.

188. It follows that the Regulator is not to be barred by either of those difficulties from pursuing it case in relation to future contributions.

189. As with Act 2, I consider that Act 3 is sufficiently identified in the warning notice; alternatively, the argument based on Act 3 is essentially a development of the case which was put, as with Act 2, concerning manipulation of the insolvency process.

190. It follows that the Regulator should be allowed to pursue its case based on Act 3.

Amount of contribution notice

191. The Panel noted, in paragraph 78 of its reasons, that "the sum stated in the CN issued in this case is £5.089 million". This was the amount needed to take the Scheme up to a position of solvency on the PPF basis. [A contribution notice should not, of course, have been issued since, even if the purported notice is to be treated as a determination for the purposes of section 96, an actual notice should not have been issued in the light of section 96(5).] The Panel stated that in its view that it "was plainly reasonable to issue" a contribution notice in that amount. This was on the basis that the "act" in question was the concealment by VDW from the Trustees of the imminent administration of Bonas coupled with the advice to VDW that its realistic risk was that, had they negotiated openly with the Trustees and the Regulator, it would required to contribute approximately £8 million, the sum then required to take the Scheme to solvency on the PPF basis.

192. My analysis of section 38 shows that this reasoning on the part of the Panel is unsustainable. VDW has not, by failing to negotiate openly, prevented payment of any part of the section 75 debt any more than if it had negotiated but failed to reach a negotiated settlement. If it had negotiated but failed to arrive at an agreed figure, it cannot be suggested that some sum, which the Regulator or the Panel or the Tribunal thinks would have been a reasonable negotiated figure, represents part of the section 75 of which VDW has prevented payment. Instead, the focus must be on what Bonas has been prevented from paying.

193. More generally, section 38(5)(a)(i) applies where the relevant act or failure to act has as one of its main purposes to prevent recovery of the whole or part of the section 75 debt. The purpose of this provision (in contrast with the different regime of FSDs) must, I suggest, be to enable the Trustees to recover from the persons concerned the amount which the act or failure to act has resulted in becoming, or possibly becoming, irrecoverable. It is no part of section 38 to make him liable for a large sum (£20 million in the present case, according to the Regulator) when, but for his acts, the section 75 debt would not have been recoverable, in whole or in part, quite apart from those acts. The section is concerned with recoverability and the extent to which the relevant act or failure to act prejudices that recoverability.

194. Without deciding that it would never be reasonable to issue a contribution notice in a greater amount than the amount by which the act or failure to act has prejudiced the recoverability of the section 75 debt falling within section 38(5)(a)(i), it would take the most exceptional circumstances, such as I am at present not able to envisage, to bring about that situation. The present case is not such an exceptional case. Accordingly, I do not consider that a contribution notice can be issued specifying a sum greater than that amount. The only acts relied on by the Regulator relate to the decision to put Bonas into a pre-pack administration with the resulting alleged sale at undervalue and failure to make ongoing contributions. This is not a case where it is suggested that the deficit has arisen as the result of earlier acts and decision of VDW, still less that those earlier acts were carried out with a main purpose of preventing payment of a section 75 debt. It is not suggested, for instance, that VDW procured Bonas to under-fund the Scheme. Nor is it a case where it is suggested that VDW has extracted benefit from Bonas (for instance by way of dividend) with the result that Bonas has become unable to meet its liabilities to the Scheme, let alone that it was done with a main purpose of preventing recovery of a debt within section 38(5)(a)(i).

195. This is not a case, therefore, where it is suggested that VDW caused to the irrecoverability of the section 75 debt by taking anything, other than the support necessary to make future contributions, away from Bonas. Accordingly, it might be thought that the most which it can be said that it has been prevented from paying is the greater of two amounts.

(a) The first amount is the amount by which the sum which should have been available in the administration exceeds the sum actually available. Even taking the most optimistic view from the Regulator's perspective, it is difficult on the present evidence to see how the figure could be greater

than £100,000, taking account both of a possible sale at undervalue and the payment in full of other creditors.

(b) The second amount is the amount of the future contributions which would have been met by VDW if VDW had acted openly and if Bonas has not gone into a pre-pack administration. This can only be determined after a detailed factual enquiry. That enquiry may, of course, reveal that the only real complaint against VDW was that it achieved the subsidiary's acquisition of the business of Bonas at a knock-down price, in which case it may be reasonable only to specify the first amount (under paragraph (a)).

196. I have thought it right to make these observations about reasonableness even though I do not do so as a matter of decision. I have heard a significant amount of argument on this aspect of the case and have had to consider the issue in addressing the barring application. The Tribunal which hears the reference at the final hearing will, I hope obtain some assistance from what I have said without in any way being bound.

197. There is an issue about whether it would be possible to increase the amount of the contribution notice beyond the level of the PPF deficit. The Scheme is now in the PPF and the benefits are PPF benefits. Provided that the PPF received assets sufficient to meet the PPF liabilities, that, according to Mr Ham, is enough. It would not be reasonable, he says, to give a windfall to the PPF – and PPF levy payers – by issuing a contribution notice of a larger amount. This issue was not fully addressed before me. It unnecessary to resolve it for the purposes of this application and I say no more about it.

The application

198. In the light of all that I have said, at undue length I regret, I can now deal with the relief sought by VDW in its application notice and with the position of Mr Beauduin as raised in Ward Hadaway's letter dated 12 August 2010.

199. I deal first with Mr Beauduin. In my view, a contribution notice cannot be issued to Mr Beauduin pursuant to any decision by the Tribunal on the reference to it by VDW. The Panel has ruled that no contribution notice should be issued to him and the Regulator cannot refer that determination to the Tribunal. The Trustees have not referred that determination to the Tribunal. There is accordingly no reference to the Tribunal which directly concerns Mr Beauduin. For the reasons given at paragraphs 44-66 above, I am of the view that the Tribunal has no jurisdiction to direct that a contribution notice be issued to him.

200. I turn now to VDW's application. I reject each of paragraphs 2(1) to 2(4) of the application. My conclusions, in the light of the extensive analysis above, are these:

(a) Each of Acts 1, 2 and 3 is either sufficiently identified in the warning notice or is sufficiently foreshadowed so as to be seen as developments of acts and arguments previously identified. Although the Panel may well have been right to refuse to entertain the "sale at undervalue" issue because the point was raised at a late stage and VDW had had inadequate

time to prepare, that is not a reason for the Tribunal declining to deal with the matter. However, procedural fairness requires that the Regulator identifies the evidence (if any) on which it will seek to rely at the final hearing about the amount of the alleged undervalue. I will make a direction for provision of such evidence as indicated in paragraph 176 above.

(b) It cannot, in my view, be said that the Regulator has no reasonable prospect of success in relation to any of Acts 1, 2 and 3 for the reasons discussed in paragraphs 150 to 190 above.

(c) However, I have serious reservations about whether the Regulator has a sustainable case that the amount to be specified in any contribution notice should be anything like the figure of £5.089 million which the Panel determined. Insofar as the Regulator relies on Act 2, it is difficult to see how it could be reasonable to specify a figure larger than the amount of the undervalue. It seems very unlikely indeed that the Regulator will be able to sustain an underpayment of more than some tens of thousands of pounds. Tempting as it is to make a barring order preventing reliance on the sale at an undervalue to support an amount of more than, say, £100,000, I do not think it would be right to do so until the Regulator has taken advantage of the opportunity to bring forward further evidence as indicated in paragraph (a) above.

(d) So far as the amount which could be justified by reference to Acts 1 and 3 is concerned, it is again not easy to see how it could be reasonable to arrive at a sum as large as £5.089 million. However, it is not possible without a full hearing of the evidence and decision on the facts to say that the Regulator has no reasonable prospect of success in maintaining a figure well above the £100,000 which I have mentioned in relation to Act 2. I cannot even say for sure that the Regulator would inevitably fail in a submission to the Tribunal after a full hearing that the £5.089 million figure (or even some larger figure) has no prospect of success, however strong my feeling that the evidence will not in fact support such a figure. Indeed, it is not appropriate to go into all of the evidence currently available in order to determine the maximum amount which could reasonably be specified. That would be to conduct just the sort of mini-trial which should not be carried out on a strike-out application.

201. In summary, the application is dismissed. But the Regulator is to be barred from pursuing the issue of a contribution notice to Mr Beauduin.

Mr Justice Warren, President

Release date: 17 January 2011