The Pensions Regulator	**Standard Procedure** **REASONS of the DETERMINATIONS PANEL of THE PENSIONS REGULATOR in relation to the Determination Notice issued on 21 December 2011** **The Box Clever Group Pension Scheme ("the Scheme")**	**The Pensions Regulator case ref:** **TM8495**

Introduction

1. By a Warning Notice dated 30 September 2011 the Pensions Regulator ("TPR") gave notice that it considered it appropriate to issue a financial support direction ("FSD"), or FSDs, under section 43 of the Pensions Act 2004 ("the Act")[1] to five companies that form part of the ITV Group. These five companies are listed below and referred to herein as the "Targets", a term that the Panel has not chosen but which has been used by all parties as a convenient shorthand. They are:
    a. Granada UK Rental & Retail Limited (company number 250311)
    b. Granada Media Limited (company number 3106798)
    c. Granada Group Limited (company number 290076)
    d. Granada Limited (company number 3962410)
    e. ITV plc (company number 4967001) ("ITV").

2. Pursuant to section 10 the Determinations Panel ("the Panel") exercises on behalf of TPR the power to determine whether to exercise reserved regulatory functions. Reserved regulatory functions include the power to issue an FSD (Schedule 2, paragraph 33).

[1] References to statutory provisions hereafter are to provisions of the Pensions Act 2004 unless otherwise stated.

3. As part of its process of determining whether to issue an FSD or FSDs to the Targets, and at the request of the parties, the Panel convened an oral hearing on 12 and 13 December 2011. We have considered the oral representations made at that hearing and all the evidence and representations submitted by the Targets, TPR, the Trustee of the Scheme ("the Trustee") and the one other party who submitted representations, Box Clever Technology Limited (in administrative receivership) ("BCT"). As we describe below, evidence was submitted until very shortly before the hearing began, not in compliance with the Panel's directions. However all parties agreed that the Panel should take account of this late evidence, and we have done so.

4. By a Determination Notice issued on 21 December 2011 in accordance with s.96(2)(d) the Panel gave notice of its determination that FSDs should be issued to the Targets. These are the reasons for that determination.

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Parties and Representation

5. The Warning Notice was issued to the Targets, the Trustee, BCT and the five participating employer companies in respect of the Scheme. These five companies ("the Employers") have all been in administrative receivership since late 2003. They are:
    a. UK Consumer Electronics Limited (company number 532857) ("Consumer Electronics")

b. Endeva Fulfilment Limited (company number 4140198) ("Fulfilment")
c. Endeva Service Limited (company number 3702429) ("Endeva Service")
d. Telebank Television Rentals Limited (company number 902414) ("Telebank")
e. TUK Holdings Limited (company number 308962) ("TUK")

6. TPR was represented at the hearing by Mr Nicolas Stallworthy QC and Mr James Walmsley, instructed by TPR. The Targets were represented by Mr Michael Furness QC and Mr Edward Sawyer, instructed by Hogan Lovells International LLP. The Trustee was represented by Mr Gabriel Moss QC, Mr Jonathan Hilliard and Mr Benjamin Faulkner, instructed by Eversheds LLP. BCT was represented by Clifford Chance LLP, who provided written representations and attended the hearing in an observational capacity. Observers also attended from PricewaterhouseCoopers LLP ("PwC"), the firm of the administrative receivers appointed to the Employers.

Shortage of Time and Change of Case

7. The Warning Notice in this matter was served on the Targets on 30 September 2011. In it, TPR determined that the "Relevant Time" for the purposes of section 43 in this case was 31 December 2009. The effect of s.43(9) is that the Determinations Panel had to reach its determination whether to issue FSDs before 31 December 2011. All parties were thus placed under considerable time pressure in preparing for the hearing.

8. The Targets submitted that the short period of time which they have had to respond to the Warning Notice (two months and two weeks from its service to the hearing), coupled with the very late service of significant materials by TPR and the long period of time that the Regulator has had to build its case, means that the Panel should not entertain TPR's case at

all. They further submitted that what they described as an attempt by TPR to change its case from that in the Warning Notice should not be allowed. We deal with these issues first due to the importance the Panel places upon them.

Correct approach to the shortage of time issue

9. The Panel was most concerned by the very short time afforded to the Targets by TPR's service of the Warning Notice on 30 September 2011. The Targets rightly reminded us of the words of the Panel in the Lehman case, at paragraph 70, that "*our process must comply with natural justice or, to use the more modern phraseology, we must act fairly and accordingly our processes must be fair. In order for our process to be fair it must be that the targets have a reasonable opportunity to respond properly to the case being brought against them - in other words, they must have the ability to make "meaningful and focused representations"; R v Secretary of State for the Home Department, ex parte Harry [1998] 1 WLR 1737 at 1748."*

10. In the Lehman case the target companies had a little over three months between receipt of Warning Notice and the hearing (save for one target, which had just over two months). TPR referred to the facts of that case as "instructive" when considering the Targets' submission that they had been afforded too little time.

11. We disagree that the facts of the Lehman case are instructive in this matter:

    a. Firstly, each case will turn on its own facts and circumstances. As an example, in this case there was dispute over both the Panel's jurisdiction and the reasonableness of issuing FSDs; in the Lehman case only reasonableness was in issue. Further, in this case some eight years have passed since the Targets had any

real involvement in the affairs of the Employers and the matters relied on by TPR. That was not true in the Lehman case;

b. Equally importantly, the Lehman case was one in which the Panel said it was "considerably troubled" by the question of whether sufficient time had been allowed and considered that the Targets "only just" had a fair opportunity to respond to the case against them (paragraph 71). The Lehman case is by no means representative of the Panel's view of how long Targets should be allowed to respond to a case against them.

12. The key question must be whether, in all the circumstances of this case, these Targets have been afforded sufficient time to make meaningful and focussed representations in response to the case against them.

Developing factual picture

13. The Targets seek to fortify their argument that they have not had sufficient time by saying that the case they had to meet has changed markedly since service of the Warning Notice. They note that paragraph 87 of the Warning Notice asserts that the Targets were "associates" of the Employers within the meaning of s.435(10) of the Insolvency Act 1986 ("IA 86") at the Relevant Time by reason of share ownerships that include BCT "owning" (through intermediates) 100% of the shareholdings of each Employer. They state that TPR's case by the time of the hearing before the Panel was significantly different.

14. The Targets' Reply Submissions of 30 November 2011 responded to the Warning Notice with filings from Companies House showing that by mid-2005 (the latest records available for these companies), Endeva Service, Fulfilment and Telebank[2] were all 100% owned by JP Morgan Chase Bank NA ("JP Morgan"). Other filings showed TUK as controlled by a company called THSP Properties Limited ("THSP") in mid-2005. This

[2] These three companies were referred to by the parties, and are referred to hereafter, as "the Trio".

position in mid-2005 followed a complex series of share transactions that the Targets described as having been procured by the administrative receivers of the Employers between 2003 and 2005. They exhibited the index to the transaction bible for this series, which is dated 3 June 2005 and comprises 10 pages listing numerous documents required to effect the 9 stages of the transaction covered therein.

15. In light of this new information TPR made further enquiries of its own as to share ownership, including by means of a notice under section 72, and served documents regarding this issue up until 6 December 2011. TPR's skeleton argument of 8 December 2011 presented a different factual position from the Warning Notice and an account of the share transactions that had occurred in 2005. In particular:

    a. As regards the Trio, TPR stated that BCT owned 100% of an intermediate company that had the beneficial interest in the shareholdings in the Employers, but that the shareholdings were legally owned by a third party, JP Morgan, pursuant to the terms of a debenture;
    b. As regards TUK, TPR gave more information of its case on TUK's ownership in December 2009 by stating that THSP had been interposed between TUK and an intermediate of BCT rather than being TUK's subsidiary at the Relevant Time as shown in the Warning Notice;
    c. As regards the fifth Employer, Consumer Electronics, TPR's skeleton argument stated that TPR would not be relying on association with this company for the purposes of the hearing before us.

16. In light of the different factual position regarding the Trio, TPR's skeleton argument advanced a different legal argument as to the association between the Targets and the Trio. This argument relied on the same provisions of the Debenture as had been set out in the Warning Notice, but applied them to the position of JP Morgan as legal owner.

17. The Targets submitted before us that TPR should not be allowed to run this changed case, and that TPR's changes made the shortage of time issue all the more acute. We consider first whether TPR should be allowed to run its case as currently formulated. We then consider whether (notwithstanding our conclusion on whether there has been an impermissible change of case), all of the circumstances mean that the Targets have not been given sufficient time to meet the case and evidence now relied on by TPR.

Change of Case

18. Pursuant to sections 93 and 96(2) TPR's procedure in cases such as this must provide for (i) "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")" and (ii) those persons to have an opportunity to make representations.

19. The Determinations Panel's Procedure of July 2008 ("the Procedure") provides at paragraph 14 (so far as relevant) that:

> "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" .

20. The Warning Notice in this case did not contain all the evidence now relied on by TPR. Nor did it set out TPR's arguments that are based on the new evidence. It seems to us therefore that two questions arise: (i) whether as a matter of principle and in light of the Procedure TPR may

depart from the arguments and evidence set out in the Warning Notice, and (ii) if so, in what circumstances can this be done. It is our view that the first question should be answered in the affirmative and that the second must be answered on a case by case basis by reference to considerations of fairness to the parties. In this case we do not consider that the Procedure means that the Panel should restrict TPR to the evidence and arguments set out in the Warning Notice. Our reasons follow.

21. Firstly, paragraph 14 of the Procedure is under the heading of "Determination on the papers". Although it must apply to Warning Notices whether an oral hearing occurs or not (since when the Warning Notice is issued TPR will not know whether the Panel will decide to hold an oral hearing), when a case proceeds to an oral hearing paragraph 20 of the Procedure also applies. This provides:

> "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 making of representations. .. 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."

22. The Panel's procedure in this and other cases has allowed for the submission of evidence after the service of the Warning Notice, as well as taking oral evidence at the hearing, and we would expect to allow all parties to make arguments on the basis of all the evidence that was properly before us. We would be very reluctant to restrict TPR to the evidence and arguments in the Warning Notice save where necessary as part of a fair process. That would "ossify" the case in the Warning Notice, rather than allowing the Panel the benefit of up to date evidence (where it can be admitted fairly) and argument on all sides that takes full account of all the evidence before it.

23. Secondly, we do not consider that conducting a fair procedure requires us to take this course. As the President of the Upper Tribunal stated in the case of *van de Wiele* ([2011] Pens LR 109), the Warning Notice must identify the regulatory action that the Panel is being asked to take. However he held that it is open to the Panel as a matter of jurisdiction to consider grounds that are not stated in the Warning Notice and matters that are not relied on expressly in the Warning Notice, but are revealed by evidence within it (paragraphs 79-82). The President referred to the possibility of TPR relying on a new act in support of a case for a contribution notice under s.38 of the Act:

> "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."

24. In our view the Warning Notice in this case does properly identify the regulatory power in question, and addresses the tests that must be met to exercise that power. One of those is whether the Targets are "associates" of the Employers within the meaning of s.435(10) IA86 at the Relevant Time. The Warning Notice gives proper notice to the Targets of that issue.

25. It is true that for the Trio the Warning Notice proceeds on an incorrect factual basis, and does not contain all of the evidence now relied on by TPR in support of its case. However as long as (i) evidence adduced after the service of the Warning Notice is adduced in circumstances where all parties can fairly take account of it, (ii) parties are given a fair opportunity to respond meaningfully to any new arguments that are raised on the basis of that evidence, and (iii) those new arguments remain within the scope of the Warning Notice, then we consider that TPR should be able to rely on such evidence and arguments before the Panel. In this case we consider each of the above tests is met. This is because:

a. the new evidence was not directed at a new area of argument, but comprised corporate documents on share ownership that shed light on what was already a live issue. All parties agreed the Panel should take account of it;
b. The Targets were able to make focussed written and oral submissions on the new evidence and arguments, and
c. the Warning Notice does include within its scope the statutory test and overall issues regarding "association".

26. Thirdly, in deciding whether to restrict TPR to the case in the Warning Notice we have also considered s.100 of the Act, which requires us to have regard to the interests of members of the scheme in question and the interests of directly affected parties (such as the Targets) when considering whether to exercise a regulatory function. We were conscious of the Trustee's submission that limiting TPR to the precise wording of the Warning Notice in this case would heavily prejudice scheme members. We agree, as it would entail limiting TPR to evidence and arguments on a question of jurisdiction that, as a result of new evidence arising during the process, it accepted were factually incorrect.

27. Mr Furness stated that the reason for not allowing TPR to change its case was not so much that the Targets had been prejudiced by their inability to meet it, as that the change was founded upon a state of affairs that had not been properly investigated. It seems to us that a lack of proper investigation will be relevant to whether TPR has discharged the burden on it to prove its case, but not to whether TPR should be allowed to run arguments based on that state of affairs. If there is insufficient evidence, those arguments will fail. We conclude this point by saying that when issues such as this are raised each case must of course turn on its facts, including whether an oral hearing is held.

Insufficient Time

28. Although we consider that TPR should be allowed to rely on the new arguments regarding "association" in its Skeleton Argument, we have no

doubt that the late developments in the factual picture regarding shareholding has added to the burden of responding to the Warning Notice in a very short space of time. The Targets also note their difficulty in obtaining relevant evidence due to their lack of involvement with the Employers for many years, and the need to obtain expert evidence in a short timeframe.

29. TPR responded to this argument by noting that Hogan Lovells had been aware of the risk of an FSD being sought against the Targets since 2007, that Hogan Lovells had made a clearance application on behalf of the Targets on 17 November 2009, and that there was evidence of Hogan Lovells researching the issue of "association" with PwC in February 2011. TPR also said that most documents exhibited to the Warning Notice originated from the Targets, had been previously provided to the Targets, or were publicly available (such as filed accounts).

30. It is clear that the Targets have known of the possibility of an FSD being sought against them since at least November 2007, when the Company Secretary of ITV wrote to the Trustee making an offer of funding that was conditional on the withdrawal of the Trustee's request to TPR for an FSD against ITV Group companies. The Targets have also had prior notice of the essential issues in the case. Hogan Lovells' letter of 4 June 2010 to TPR addresses in detail the separate tests under s.43 of the Act and several of the arguments that were canvassed before the Panel. It is also correct that significant parts of the evidence relied on by TPR in support of its Warning Notice were publicly available or were in the possession of the Targets long before September 2011 (including substantially all of the correspondence relied on).

31. We considered with care the submission that the Targets had not had sufficient time to obtain relevant evidence, both because expert evidence was necessary and because factual evidence was hard to obtain due to the Targets' lack of involvement with the Employers since 2003. As to this:

a. The Targets did submit expert reports from Ernst & Young LLP and Hymans Robertson. These had clearly been produced under time pressure, but seemed to the Panel to address the points asked of them. No area of expert evidence was identified by the Targets as one where lack of time had prevented any expert evidence being obtainable.;
b. The Targets' Reply Submissions contain a detailed description of the relevant facts of the case, and the Targets' submissions on those facts. The Targets also produced a detailed document on the morning of the first day of the hearing taking issue with the factual assertions made in witness statements adduced by the Trustee and (on the Friday before the hearing) a 25 page document outlining the transactions in 2005. It is also relevant that many of the factual issues before us on the question of "Reasonableness" had been canvassed in correspondence between all parties before the end of 2010.

32. Taking all these matters together the Panel considered that the Targets had been given reasonable time and opportunity to respond properly to the case being brought against them, albeit by a narrow margin. The Panel considered it unfortunate that TPR had left the service of the Warning Notice as late as three months before the expiry of the Panel's jurisdiction. That late service undoubtedly added to the burden of responding, as did the need for factual investigation of the "association" point. However the Panel bore in mind TPR's submissions identified above and concluded that in all the circumstances the Targets had been able to respond properly to the case being brought against them.

Background Facts

Commencement of the Joint Venture ("JV")

33. In late 1999 the Granada and Thorn groups decided to merge their consumer rental businesses, which dealt in the hire of television and

video equipment to consumers and the sale of ex-hire equipment. These businesses were carried on respectively by Granada UK Rental & Retail Limited (from the Granada group) ("Rental & Retail") and Rental Holding Company Limited (from the Thorn group) ("RHC").

34. The decision was formalised in a Contribution Agreement dated 17 December 1999 ("the Contribution Agreement"). This provided that:

    a. Rental & Retail and RHC would subscribe for 50% each of the share capital of a newly-created joint venture company, BCT, for £5 million each (clause 2.1);
    b. they would sell their respective rental businesses to BCT's subsidiary, Box Clever Finance Limited ("BC Finance") (clause 2.2 and 2.3); and
    c. the purchase by BC Finance would be funded by monies which it was envisaged would be borrowed by BC Finance from Westdeutsche Landesbank ("West LB") (see clauses 4.1(d) and 4.2).

35. Also on 17 December 1999 West LB wrote to Rental & Retail and RHC committing to provide banking facilities to the JV amounting to £860m in interim bridge facilities. The Heads of Terms attached to this letter made clear the purpose of the facilities was to finance the purchase by BCF of the "assets/shares" of Rental & Retail and RHC.

36. The JV Agreement completed on 28 June 2000. By that date:

    a. the consumer rental and retail businesses of the Granada group had been reorganised and largely consolidated within and/or under Consumer Electronics; and
    b. certain staff employed by Rental & Retail were transferred into the sole employment of Consumer Electronics.

37. The completion of the JV Agreement was effected by the purchase by BC Finance of all issued share capital in Consumer Electronics and TUK (the

Thorn entity holding the Thorn group's consumer rental business). The purchase was funded by a loan of £860m from West LB, together with £116.5m of loan notes issued by BC Finance to Rental & Retail and RHC and £5m in equity investment from the same two companies. These figures are taken from the completion statement exhibited by the Trustee and relied on by the Targets in their Reply Submissions. That completion statement shows the transaction valued the JV at £980m.

38. The borrowing from West LB was secured by a debenture dated 28 June 2000 ("the Debenture"). This was granted by a large number of Box Clever group companies defined as the "Chargors", including all of the then Employers, BC Holdings, THSP and BC Finance, but excluding BCT. The companies remaining in the Granada and Thorn groups were not Chargors, or parties to the Debenture, nor were they guarantors or otherwise liable for the borrowings from West LB. The facilities were thus "non-recourse" to the former owners of the consumer rental businesses. The Debenture created mortgages and charges that gave West LB wide-ranging rights over assets and shares of BC Holdings, BC Finance and its subsidiaries. It will be necessary to consider later in these Reasons the effect of the Debenture on entitlements to exercise and control the exercise of voting power at general meetings of the Employers.

39. As a result of the sale of its rental business to BCT, Rental & Retail received £528m, including some £352m in cash and the removal of liabilities that the Warning Notice states as £158m.

40. The Warning Notice asserts at paragraph 24 that at the date of its transfer to the Box Clever group, Consumer Electronics' net assets were only £12.196 million (already including £29.071 million of goodwill), but the consideration paid to Rental & Retail allowed for an assumed additional goodwill on acquisition of £416.5 million. The Targets have adduced evidence from Ernst & Young dated 2 December 2011 stating this level of goodwill is not surprising given that Rental & Retail's audited accounts were prepared under rules that did not allow account to be taken of

internally-generated goodwill. Ernst & Young add that this goodwill would have included significant intangible assets such as rental contracts.

41. In the year to 30 September 2000 dividends were paid by Rental & Retail and its parent companies as follows:

    a. £260m from Rental & Retail to Granada Media Limited;
    b. £252m from Granada Media Limited, of which 80% went to Granada Group Limited; and
    c. £369m from Granada Group Limited to Granada Limited.

42. Pursuant to a Shareholders Agreement between Rental & Retail, RHC and BCT dated 28 June 2000, it was agreed that:

    a. Immediately following execution of the Shareholders Agreement, a Board meeting of BCT should be held at which, inter alia, two former directors of Rental & Retail (Mr Mavity and Mr Neal) should be appointed CEO and Finance Director respectively. Another director of Rental & Retail (Mr Parrot) was to be appointed a non-executive director of BCT (clause 2.1);
    b. The board of BCT was to comprise up to 10 directors, 2 of whom would be the nominees of Granada and 2 the nominees of Thorn (clause 4.1(c) of the Shareholders' Agreement);
    c. All matters relating to the operation of BCT were to be decided by its board (clause 4.1(a));
    d. Certain specified matters required prior approval of the BCT Board, including approval by the nominee directors appointed by Granada and Thorn. These matters included "*the establishment of, or material amendment to, … any pension scheme for employees of* [BCT]" (clause 4.3(k);
    e. BCT was to conduct its business in the best interests of the Box Clever group in accordance with its business plan (clause 5.1);
    f. The Box Clever group should be self-financing and should obtain any additional funds from third parties without recourse to its shareholders (clause 3).

43. BCT's representations described it as a holding company and "a decision making body comprised of directors whose role was to determine the structure and strategy of the business", rather than a company running the business (paragraph 11).

44. We received further evidence of the role of Granada in the running of the Box Clever group from a witness statement of Mr Wakelam submitted by the Trustee. He was Financial Director of Endeva and stated that Nomura (ultimate owner of the Thorn group) and Granada were "very much hands on as shareholders and joint venture partners. All key decisions such as shop closures, pay rises, redundancies and other business change initiatives and matters relating to the pension scheme were taken by the executive management team only after consultation with the shareholders at the regular monthly operations meetings."

45. He also stated that he attended most monthly operations meetings of Box Clever, and that these were usually held at Granada's headquarters, not Box Clever's. In addition to the management of Box Clever these meetings were attended by representatives of Nomura and Granada, and were occasionally joined by Granada's CEO / Executive Chairman, Mr Allen. Mr Wakelam noted that once a quarter these operations meetings were followed immediately by a full board meeting.

46. The Targets declined the opportunity to cross-examine Mr Wakelam, citing insufficient time and lack of disclosure. However they provided written comments on his witness statement saying that it was unclear what the "consultation with shareholders" entailed and whether the Granada representatives referred to were representing Granada or fulfilling their roles as directors of BCT.

47. The Panel was unwilling to place less weight on Mr Wakelam's evidence simply as a result of these comments. To do this would in effect have entailed accepting the consequences of a cross-examination which did

not take place and casting doubt on the evidence without putting the comments to Mr Wakelam for his response. Instead we considered whether Mr Wakelam's evidence was contradicted by other evidence, or could otherwise be seen to be unreliable. We noted that the Targets did not dispute that the operations meetings in question occurred, nor where they occurred and who attended, nor that the consultation alleged by Mr Wakelam took place. Mr Wakelam's evidence on these points was uncontradicted. In these circumstances we accept Mr Wakelam's evidence as an accurate description of the meetings that he himself attended, and of the involvement of Granada in Box Clever's operational matters outside of the meetings of the Box Clever board.

The Scheme

48. By schedule 10 of the Contribution Agreement of December 1999 ("sch 10"), Granada and Thorn agreed that:

    a. Box Clever would establish its own separate Defined Contribution ("DC") pension scheme (sch 10 clause 1.1);
    b. for an interim period the Box Clever companies would participate in the Granada Scheme in respect of all Box Clever employees who had previously been members of the Granada Scheme and in the Thorn Scheme in respect of all Box Clever employees who had previously been members of the Thorn Defined Benefit ("DB") scheme (sch 10 clauses 2.1 and 4.1);
    c. this interim period of participation would be a maximum of 6 months from completion of the JV agreement (sch 10 clause 3.1 and 5.1);
    d. a transfer payment would then be made from the Granada Scheme and the Thorn Scheme to the Box Clever Scheme on a past service reserve basis (i.e. calculated by reference to the length of past pensionable service of the members concerned, but with present pensionable salaries being increased by an actuarially assumed rate of future salary growth) in order to equal

the actuarial value of the benefits prospectively and contingently payable under the Granada and Thorn Schemes (sch 10 clauses 3.4 and 5.4).

49. However by a Pension Proposal document of January 2001, some six months after the JV began operating, it was proposed that DB benefits would be offered to transferring employees. In particular it was proposed that ex-Granada group employees should be given defined benefits mirroring the benefits previously provided for them under the Granada Pension Scheme and that ex-Thorn group employees should be given defined benefits mirroring the benefits previously provided for them under the Thorn Pension Fund. Such benefits were said to be "useful from an employee relations perspective" (page 4).

50. TPR describes the Pension Proposal document ("the Pension Proposal") as a proposal of BCT, which in turn it describes as controlled by Rental & Retail. BCT does not accept this. However the Targets accept that Rental & Retail approved the Pension Proposal (albeit on a particular basis) and that Granada employees had a hand in drafting it (Reply Submissions, paragraph 53). The document describes itself as a proposal by Box Clever "and its shareholders" and makes clear the need for shareholder approval of it. Its cover sheet identifies Stephanie Monk (Granada), Richard Smelt (Nomura), Kevin Ringrose (BCT) and two individuals from William M Mercer, apparently as the authors of the proposal.

51. The Scheme was established with effect from 1 October 2001 by BCT as Principal Employer under the Interim Deed. It provides defined benefits for former active members of the Granada Pension Scheme, mirroring the defined benefits provided under that scheme and for former active members of the defined benefit section of the Thorn Pension Fund, mirroring the defined benefits under that scheme. Other sections of the Scheme provide DC benefits.

52. Accrual of defined benefits within the Scheme commenced with effect from 1 October 2001. On the same date the DB sections of the Scheme were closed to new members. It was only on 30 September 2001 that DB accrual of the Box Clever employees under the Granada and Thorn Schemes finally ceased. Fifteen months of DB accrual was therefore earned within the Granada and Thorn Schemes during the period of Box Clever's operations, rather than the six months envisaged by the Contribution Agreement. There is evidence from the Chairman of the Trustee that during this period £8.5m was paid to the Granada Scheme by Box Clever companies (paragraph 21 of Mr Herbert's witness statement). The Targets' evidence from the ITV actuary is that this, together with some £1.5m of employee contributions that ought to have been paid in, is now insufficient to meet a deficit in respect of that 15 month period that is some £45m on the buyout basis. This evidence is confirmed as to reasonableness by actuaries Hymans Robertson.

53. The Pension Proposal envisaged a transfer payment of £118m from the Granada Scheme for the proposed transfer of past service rights to the Scheme. Considerable discussions took place around this payment during the period September 2001 to September 2002. In the event the Trustee declined to accept the transfer because it considered the transfer values proposed could not prudently be relied upon to cover the DB liabilities which would be transferred into the Scheme. The past service liabilities of Granada members who became Box Clever employees have thus been left in the Granada Scheme.

54. On 28 November 2002 the Trustee and BCT agreed an alternative structure to ensure that mirror benefits were offered to transferring Granada and Thorn employees, and in light of the provision in the Interim Deed of October 2001 that members joining the Scheme from the Granada Scheme and DB section of the Thorn Pension Fund would have 'final salary' defined benefits based on both a) their Final Pensionable Earnings with their Employer within the Box Clever group; and b) "continuous" pensionable service (including pensionable service within

both their former scheme and the Scheme itself). The Warning Notice asserts that BCT's agreement to this revision of the structure of the Scheme required the approval of the BCT directors appointed by Rental & Retail, in accordance with clause 4.3(k) of the Shareholders' Agreement.

55. The new proposal was to offer a "top-up" structure, whereby past service benefits would be left in the Granada and Thorn Schemes, but the Box Clever Scheme would top up those benefits by paying for linkage to final salaries in Box Clever employment. It is common ground that because of the "top up" arrangement, the funding of the Box Clever Scheme was sensitive to increases in pensionable salaries. In particular, because of the length of pensionable service within the former schemes which some members had built up, a small increase in Final Pensionable Earnings could produce a large increase in the overall 'top up' because of the many years' past service which would be affected.

56. The first actuarial valuation of the Scheme was performed as at 30 September 2002 and showed a past service deficit of £8.5 million on an on-going basis or £15.2 million on a buy-out basis. BCT disputes TPR's statement that the Scheme was in deficit from inception. However there is no dispute that it was established with no assets and no guarantees from companies remaining in the Granada or Thorn groups. Indeed Granada made clear on several occasions to the Trustee that it would not underwrite the liabilities of the Scheme.

Failure of Box Clever Group

57. The Box Clever group's debt was refinanced in June 2002, through a securitisation of its rental income stream which raised £748 million to repay part of the bridging finance provided by West LB in June 2000. At the same time JP Morgan was appointed Security Agent under the Debenture, in place of West LB.

58. However, the group recorded a drop in revenues of over 20% in the year to 30 September 2002, which resulted in a loss after interest (and before extraordinary amortisation charges) of £40 million.

59. West LB and BC Finance executed a Suspension Agreement on 26 June 2003 to allow time for additional capital to be provided. This lasted until 1 September 2003, subsequently extended to 15 September 2003. The Targets state that Box Clever had an opportunity to prepare a revised business plan to satisfy West LB that it could solve its problems, that the plan was submitted to West LB's advisers and that in the meantime West LB made further finance available for Box Clever's continued trading.

60. However on 24 September 2003 West LB gave notice of default under its facilities with BC Finance. JP Morgan, as Security Agent under the Debenture, appointed administrative receivers to the main Box Clever subsidiaries from BC Finance downwards. The Targets asserted, and TPR did not disagree, that the administrative receivers have been in practical control of the Employers at all material times since their appointment.

61. In order to complete the chronology it should be noted that in January 2005 the business of the Box Clever group was sold to Fortress Investment Group, and in May 2005 the administrative receivers effected a reorganisation of the group in connection with certain capital losses. This reorganisation is relevant to the question of connection and association between the Targets and the Employers, and is considered in more detail in the following section.

62. Finally we note that the failure of the Box Clever group led to negotiations between the Trustee and ITV, focussing initially on whether ITV would be prepared for ex-Granada group members of the Scheme to be transferred back into what had since been renamed the ITV Pension Scheme. Negotiations as to the terms of any such transfer continued intermittently until 2008, when ITV replaced previous offers with an offer to augment ex-Granada members' benefits that had been retained in the ITV

Scheme. That was not accepted, and the Targets state that ITV withdrew from negotiations in 2009 due to its own financial difficulties.

63. Meanwhile, on 25 February 2009 TPR issued a letter of comfort to RHC, now named Carmelite, in response to its application for clearance on 8 December 2008. TPR stated that RHC had lost "control" of voting power in the Employers when the administrative receivers were appointed, such that no FSD could be issued. The Targets applied for a similar comfort letter by their clearance application dated 17 November 2009 but TPR refused clearance.

64. The Trustee's Representations state that the Scheme's assets as at 31 December 2009 were £14.4m and the buy-out liabilities were £76.5m, giving a deficit of £62.1m. Of this approximately £41.2m relates to the former Granada employees.

Statutory Tests under section 43 and Agreed Issues

65. Section 43 imposes four tests or conditions for the issue of an FSD to a target. They are:

    a. That the scheme in question is an occupational pension scheme and not excluded by s.43(1)(a) or (b) ("**the Scheme Test**");
    b. That the Regulator is of the opinion that the employer in relation to the scheme is either a service company or insufficiently resourced, both as defined in s.44. In this case the employers were not service companies and thus the test is whether they were insufficiently resourced ("**the Insufficiently Resourced Test**");
    c. That the target in question falls within one of the three categories set out in s. 43(6) at the Relevant Time (an employer; an individual associated with an employer who is also an individual; or a person other than an individual who is connected with or an associate of the employer) ("**the Target Test**"), and

d. That it is reasonable to impose the requirements of the FSD on the target (s.43(5)(b) & 43(7)) ("**the Reasonableness Test**").

66. In this case it is common ground that the Scheme Test is met.

67. It also common ground that in this case the Insufficiently Resourced test is met if the Target Test is met in relation to at least one Target. This is because the Insufficiently Resourced Test requires the employer to be insufficiently resourced by comparison to a "rich friend" who falls within s.43(6)(b) or (c) at the relevant time. It thus engages the same test of "connection" and "association" as does the Target Test. TPR has identified ITV as the "rich friend". The only dispute over whether the Insufficiently Resourced Test is met is whether ITV is a person falling within s.43(6)(c) at the Relevant Time.

68. It is common ground that the structure of the Granada Group at the Relevant Time means that if any of the Targets fall within s.43(6) at the relevant time, then all of them do. Thus the Insufficiently Resourced test and the Target Test will turn on whether any one of the Targets is connected with or an associate of "the employer". We consider this term in paragraph 71 below.

Target Test: Relevant Legislation: Pensions legislation

69. Section 43(6) provides that an FSD may only be issued to a target that was at the "relevant time":

> *"(a) the employer in relation to the scheme,*
> *(b) an individual who–*
> *(i) is an associate of an individual who is the employer, but*
> *(ii) is not an associate of that individual by reason only of being employed by him, or*
> *(c) a person, other than an individual, who is connected with or an associate of the employer".*

70. It is common ground that the relevant provision for this case is 43(6)(c). Pursuant to s.51(3), the meaning of "connected" and "associate" in

s.43(6)(c) is to be taken from sections 249 and 435 of the Insolvency Act 1986 respectively. We turn to these definitions below.

71. The effect of Regulation 16 of the Pensions Regulator (Financial Support Directions etc) Regulations 2005 is that for a multi-employer scheme such as the Scheme, the reference to "the employer" in s.43(6)(c) is to be read as "any employer in relation to the scheme".

72. On TPR's case this would include BCT as well as the Employers, since it states that BCT was a statutory employer in relation to the Scheme. BCT's representations deny that it was such a statutory employer. It is unnecessary for us to resolve this dispute since, even if the Target Test could be met by use of BCT as an employer, the Insufficiently Resourced Test could not be. This is because BCT never admitted any employee or director to membership of the Scheme and will therefore have a nil liability share of any debt under section 75 of the Pensions Act 1995. BCT therefore could not have resources less than 50% of its share of the section 75 debt, as required by the Insufficiently Resourced Test (in particular s.44(3)).

Target Test: Relevant Legislation: Insolvency Act 1986

73. Section 249 of the Insolvency Act 1986 provides that a person is "connected with" a company if he is a director or shadow director of it, or an associate of such a director or shadow director, or is an associate of the company.

74. The term "associate" is defined in section 435 of the same Act. The relevant parts of s.435 are s.435(7), which provides that one of the situations where a company will be an associate of another person is where that other person has "control" of the company, and s.435(10), which provides (insofar as relevant) that:

"*a person is to be taken as having control of a company if-*

(b) he is entitled to exercise, or control the exercise of, one third or more of the voting power at any general meeting of the company or another company that has control of it;

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

75. Section 435(10)(b) of IA 86 thus provides two circumstances in which a person is to be taken to have control of a company:

    a. where he is entitled to exercise at least one third of the voting power of the company;
    b. where he is entitled to control the exercise of at least one third of the voting power of the company.

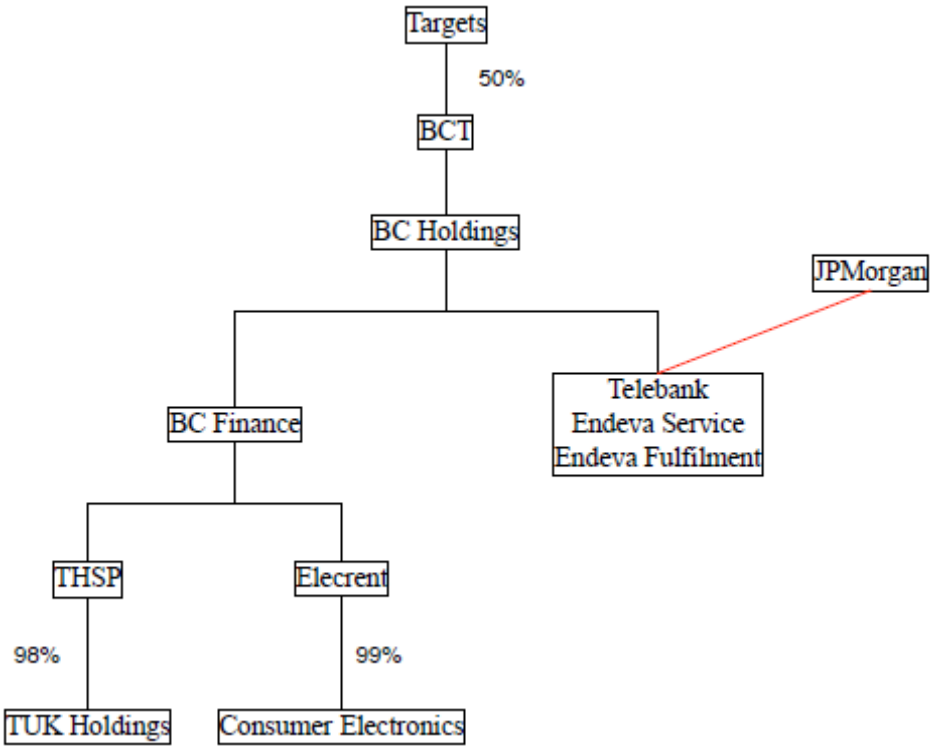
76. Mr Moss noted that s.435(10) is a deeming provision: a person is to be "taken" as having control in certain circumstances, regardless of whether he has "actual" control of the company in question. TPR and the Trustee both pointed out that this imposes a relatively low threshold (or "a minimum nexus" as TPR put it) for falling within it. They submitted that this was unsurprising given that the requirement for association or connection in s.43(6) was only a threshold jurisdictional requirement, merely opening the door to the Panel's consideration of whether, in all the circumstances, it is reasonable to impose an FSD.

77. These submissions appear to us correct. However the Targets also argued that the question of whether the Target Test is met, and thus whether the Panel has any jurisdiction to issue an FSD, is not a matter of opinion (unlike the Reasonableness Test). We must be satisfied as a matter of fact and law that we have the jurisdiction we are being asked to exercise. The Targets added that the responsibility of establishing jurisdiction was on TPR, rather than for the Targets to disprove it. We accept those submissions also, although we note that while the burden of establishing jurisdiction is on TPR, the burden of proving any particular fact will be on the person seeking to rely on it (Determinations Panel Procedure, paragraph 24).

Evidence of share ownership at the Relevant Time

78. It is key to an assessment of whether the Targets were associated with the Employers at the Relevant Time of 31 December 2009 to establish the ownership of shares in the Employers as at that time. As noted above, the available evidence as to this changed between the service of the Warning Notice and the hearing before us.

79. TPR's and the Trustee's case on the relevant share ownerships in mid-2005 was presented to us as follows:



80. In this diagram the line from JP Morgan to the Trio represents legal ownership only, by way of security. The line from BC Holdings to the Trio is said to represent beneficial ownership. Other lines represent legal and beneficial ownership.

81. TPR and the Trustee assert that the above also reflects the position at the Relevant Time, with the exception of the dissolution of Elecrent in 2007

and consequent uncertainty over share ownership in Consumer Electronics.

82. The Targets agree that this diagram reflects the position in mid-2005, but say that there is a fundamental uncertainty about the ownership of all the Employers at the Relevant Time which precludes any hard and fast conclusions being drawn about control as at that date. This is because evidence for the period from May 2005 to 2010 is inadequate and on occasion contradictory.

83. The key evidence on this issue is in the exchange of communications that TPR had with PwC in early December 2011 regarding share ownership of the Employers. By a s.72 Notice dated 1 December 2011 PwC were asked, among other matters, for details of all transfers of shares of the Employers, BC Finance, BC Holdings, Elecrent and / or THSP following the appointment of administrative receivers to the Employers.

84. PwC replied the following day, making clear they had had a very limited time to reply and had therefore been unable to review all of their records or consider TPR's questions fully. They referred to "two principal transactions which took place after the start of the receivership, namely the disposal of the business in January 2005 and the capital loss reorganisation which took place in May 2005". They provided a copy of the index to the transaction bible for the capital loss reorganisation.

85. As regards details of share transfers they replied stating "Please see the index referred to above. We do not believe there was any reason to transfer shares within the group other than in respect of the two transactions mentioned above. We are not able to make any further comment on this." They then stated their understanding that JP Morgan had a security interest in the shares in the companies TPR had asked about, but that beneficial interest in these shares "was within the Box Clever group". They provided copies of stock transfer forms of 12 January 2005 showing the shares in the Trio were transferred to JP Morgan on that date "by way of security for a loan".

86. On 2 and 5 December 2011 PwC provided answers to further questions from TPR. They confirmed that as far as they were aware:

a. there had been no transactions after May 2005 which changed the shareholder of TUK from THSP,;
b. there had been no transactions after May 2005 which changed the shareholder of THSP from BC Finance;
c. there had been no transactions between May 2005 and March 2010 which changed the beneficial owner of shares in the Trio from BC Holdings.

87. The Targets submitted that TPR could not discharge the burden of proving a connection between the Targets and the Employers at the Relevant Time. TPR's assumption was that nothing had changed from May 2005 until 2010, but that assumption was no more reliable than the assumption in the Warning Notice (now disproved) that nothing had changed between 2003 and December 2009. In particular they submitted:

a. There are no records at Companies House covering the period from May 2005 to December 2009;
b. The situation shown in the diagram above was the result of a complex series of share transactions in early 2005 effected in connection with capital losses. These transactions are evidenced at Companies House, but this evidence is what the Targets describe as an "outcrop" of relevant documentation as to share ownership. Apart from the implementation of these transactions, the administrative receivers did not file notice of changes of shareholdings with Companies' House, despite separate evidence showing such changes did occur. Thus a lack of returns showing shareholding movements cannot be relied upon as evidence that there were no such movements;
c. No copies of the Employers' registers of members are available;
d. PwC's information was provided with extensive caveats, and they made clear that the structure charts they provided and hoped

would be helpful had not been updated for 6 years and did not reflect the conclusion of any insolvency processes or corporate dissolutions;

e. As regards TUK Holdings, a report from Dun & Bradstreet showed THSP as a subsidiary of TUK, not as its owner.

88. In response to this argument of fundamental uncertainty, such that TPR had not discharged the burden on it, the Trustee relied on a presumption of continuity, which it described as “a common sense presumption that a certain factual state of affairs will continue unless proved otherwise”. TPR asserted that on the balance of probabilities its case on the facts was made out.

89. Although authority was cited for the existence of the Trustee’s presumption we did not find it particularly helpful. We considered it more relevant that:

a. There was no evidence at all that anything had changed regarding the relevant share ownerships after May 2005 that altered the position from the diagram above;
b. There was some evidence, from PwC, that nothing had changed regarding the relevant share ownerships;
c. PwC ought to be aware of any relevant share transfers. Administrative receivers from that firm have been in office throughout the period from 2003 to date;
d. There was no obvious reason for any such transfers to occur, given that the shares were worthless, the Employers were all in administrative receivership, and they had not been dissolved by the date of the hearing;
e. The report from Dun & Bradstreet that showed THSP as a subsidiary of TUK was said to be based on media reports from earlier years and unlikely to be a useful source.

90. Taking these matters together, and acknowledging the Targets' submissions listed in paragraph 87 above, the Panel considered that there was sufficient evidence before it to find as a fact on the balance of probabilities that the relevant shareholdings as at the Relevant Time were as set out in the diagram above (save for Consumer Electronics, which was not relied upon by TPR). We therefore proceed on the basis that at the Relevant Time the registered shareholder of shares in the Trio was JP Morgan, with beneficial ownership in BC Holdings, while TUK was owned by THSP, in turn owned by BC Finance.

Analysis: (i) the Trio

91. TPR and the Trustee argued that the Targets were entitled to control the exercise of voting power in respect of all of the shares in the Trio at the Relevant Time, notwithstanding that JP Morgan was the registered shareholder. They argued that the terms of the Debenture, pursuant to which JP Morgan had become the registered shareholder, made clear that the "Chargor" in respect of the shares in the Trio (at the Relevant Time this was BC Holdings) had retained the right to exercise all voting rights attached to the shares, and therefore it had "control" for the purposes of s.435(10)(b). BC Holdings was in turn wholly owned by BCT, which was itself owned by the Targets.

92. The Targets disagreed that the terms of the Debenture had this effect. They did not argue that the appointment of administrative receivers over the Employers in 2003 automatically resulted in a loss of "control." However they argued that BC Holdings' only right to control voting power in the Trio was granted by the terms of the Debenture, and that under those terms BC Holdings had lost that right when a "Declared Default"

occurred by reason of BC Finance defaulting on its banking facilities in late 2003.

93. BCT's representations note the disputed legal opinions on what they describe as the "question of technical control" under s.435 IA 86 and acknowledge that the Panel must make a ruling on this matter. BCT does not advance an analysis in answer to this question, but submits that there has been no commercial or practical ability for it to control the Employers since the commencement of the administrative receiverships of the Employers. BCT then states that it and the Targets were not connected or associated with the Employers at the Relevant Time and relies on a statement by one of the administrative receivers that by 27 November 2003 the Employers were under his control.

94. We consider these submissions by BCT may be relevant to the Reasonableness Test, which we deal with below. As regards the Target Test and the application of s.435(10) IA 86 we consider the effect of the appointment of the administrative receivers as part of the overall question of control within the meaning of s.435 IA 86. We commence with the effect of the terms of the Debenture.

95. The relevant terms of the Debenture provided as follows:

a. The Security Agent and Senior Agent was West LB;
b. Under Schedule 1, the Chargors included BC Holdings and BC Finance;
c. Under Clause 1.1,

i. "Declared Default" meant "*an Event of Default which has resulted in the Senior Agent serving notice under any provision of Clause 24.2 of the Senior Bridge Facility Agreement...",*
ii. "Group Shares" meant "*all shares specified in Schedule 4 or … when used in relation to a particular Chargor, such of those shares as are specified against its name in Schedule 4*

…, together in each case with all other … shares … now or in the future owned by any or (when used in relation to a particular Chargor) that Chargor from time to time"; and

iii. 'Security Shares' meant "*the Group Shares and the Related Rights and, in the case of each Chargor, means such of the Group Shares as are held by it at the relevant time, together with all Related Rights in respect thereof.*"

d. Clause 4.2(b)(iii) provided that:

"*Subject to Clause 10.2, whilst no Declared Default exists, all voting rights attaching to the relevant Group Shares may be exercised by the relevant Chargor or, where the shares have been registered in the name of the Security Agent or its nominee, as the relevant Chargor may direct in writing and the Security Agent and any nominee of the Security Agent in whose name such Group Shares are registered shall execute any form of proxy or other document reasonably required in order for the relevant Chargor to do so*" ;

e. Clause 7.2(b)(i) recited a warranty by each Chargor that:

"*Each Chargor is and will (save as otherwise permitted by the Senior Bridge Facility Agreement and the Subordinated Bridge Facility Agreement) remain the sole beneficial owner of the Security Shares which it purports to charge pursuant to the Security Documents to which it is party …*"

f. Clause 10.2 provided, so far as relevant, that:

"*The Security Agent and its nominee may at any time after a Declared Default has occurred or in any other instance where the Security Agent is of the reasonable opinion that it is necessary for the avoidance of an Event of Default or necessary for the protection of its material interests*

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

96. It is clear that a Declared Default has occurred, and the papers contain a notice of Event of Default dated 24 September 2003 from West LB (as Senior Agent) to BC Finance. The key dispute between the parties is whether that Declared Default has resulted in the loss of Chargors' rights to control voting in circumstances where the Security Agent was the registered shareholder.

97. There was a preliminary dispute as to whether a registered shareholder in the position of JP Morgan was entitled to vote the shares that it held as it pleased, subject only to the terms of any contract restricting that entitlement. Mr Furness submitted this was the position at law, and relied on the case of *Musselwhite v Musselwhite* [1962] Ch 964 at 981ff.

98. Mr Moss argued that this case dealt with the situation as between a company and shareholder, and not the situation as between registered shareholder and beneficial owner. He said it was the latter that was the focus of s.435(10) IA 86.

99. The Trustee's skeleton argument also relied on the Court of Appeal case of *Re Wells* ([1933] 1 Ch 29 at 52), which held that in the context of a mortgage of land a mortgagor is still regarded as the owner, subject only to the mortgagee's charge.

100. We prefer the submissions of Mr Furness on this point, and consider that JP Morgan was entitled to vote the shares that it held as it pleased, subject only to the terms of the Debenture. The plaintiffs in *Musselwhite* had agreed to sell certain shares to the defendants and had executed share transfers, but had not been paid in full. They remained on the company's register. An annual general meeting was purportedly held, but its validity was disputed. Russell J noted at page 981 of the case report that the question for the purpose of the case "is whether, as between the plaintiffs and the individual defendants, the plaintiffs have the prima facie right to direct in all cases how those votes are to be cast".

101. In answering that question he examined the position of a mortgagee of shares who is on the register. This is the position of JP Morgan vis a vis the Trio at the Relevant Time. Russell J upheld previous case law to the effect that such mortgagees are, "in the absence of any contract restricting their rights, entitled as the legal owners of the shares, to exercise the voting rights in respect of them in such manner as in their judgment they may deem best" (Ibid).

102. It is therefore crucial to determine the proper construction of the Debenture, being the contract that is alleged to restrict JP Morgan's rights.

Construction of Debenture: Arguments

103. Before the Declared Default of 24 September 2003, the effect of clause 4.2(b)(iii) is that although the shares in the Trio were charged to the Security Agent and registered in its name, voting rights in those shares were to be exercised as the Chargor might direct.

104. Mr Furness submitted that the effect of the Declared Default is that the right to control voting conferred on the Chargor by clause 4.2(b)(iii) comes to an end. He noted that clause 4.2(b)(iii) begins with the words "Subject to clause 10.2, whilst no Declared Default exists…". Although there is reference to clause 10.2 in this opening, he argued that clause 10.2 has no application where the Security Agent is the registered shareholder, and where there has been a Declared Default. This is because clause 10.2 is a clause authorising the Security Agent to exercise voting rights and other powers which would otherwise be exercisable by the registered shareholder. Where the Security Agent is already the registered shareholder it will have no need, following a Declared Default, of the rights given to it under the first part of clause 10.2. As the registered shareholder it will already control the relevant voting rights and its duty to comply with the Chargor's instructions on how to vote, imposed by clause 4.2, would have come to an end upon the occurrence of the Default.

105. Mr Furness added that the consequence of clause 10.2 having no application where the Security Agent is the registered shareholder is that the words of the proviso in clause 10.2 ("the Proviso") also do not apply. The Proviso states "*PROVIDED THAT in the absence of notice from the Security Agent each Chargor may and shall continue to exercise any and all voting rights with respect to the Group Shares subject always to the terms hereof."* These words had nothing to bite on if clause 10.2 did not apply. He further prayed in aid the lack of evidence that such a notice

under the Proviso was ever given. He stated that it would have been an extraordinary oversight on the part of the Security Agent not to serve a notice if one were needed, and noted the care which was otherwise taken to ensure that the Debenture was properly enforced. The lack of notice thus suggested that the Security Agent thought none was needed, since clause 10.2 did not apply where it was the registered shareholder.

106. In conclusion on this point Mr Furness explained the opening words of clause 4.2, making the clause subject to clause 10.2, as necessary to give effect to the right of the Security Agent to exercise voting power in either of the circumstances other than a Declared Default described in the first part of clause 10.2 (e.g. in the event that it is of the reasonable opinion that it is necessary to avoid an Event of Default). Such an assumption of power by the Security Agent would occur before an Event of Default, and therefore while the Chargor's rights under clause 4.2 would, but for clause 10.2, still be subsisting. Clause 10.2 might therefore need to be invoked by the Security Agent whether or not it was the registered shareholder, as clause 4.2 places control over voting rights with the Chargor whoever is the registered shareholder. Mr Furness argued that the purpose of the first part of the Proviso was to make clear that the Chargor's rights, both under clause 4.2 and, where applicable, as registered shareholder, would continue to be exercisable until the Security Agent gave notice that he had formed the opinion referred to in the first part of clause 10.2.

107. Mr Moss, who argued this point on behalf of TPR and the Trustee, suggested a different construction of clauses 4.2 and 10.2. He submitted that when one read the two clauses together, as was necessary given the opening words of clause 4.2, their effect was that the Chargor's right to direct the Security Agent how to vote the shares continued until two events occurred. The first was a Declared Default or one of the other two circumstances described in in the first part of clause 10.2. The second was the giving of notice by the Security Agent to the Chargor in

accordance with the opening words of the Proviso. He submitted that the first event had occurred in this case but the second had not.

108. Mr Moss disagreed that clause 10.2 had no application where the Security Agent was the registered shareholder and a Declared Default had occurred. He noted that the clause expressly referred to the exercise of rights in the name of someone other than the Chargor (at line 6), which might well be the Security Agent. A reference to like effect was in line 10-11 of the clause. He also argued that the clause applies in two circumstances other than Declared Defaults, and that it would be anomalous for it not to apply in the same way in all three circumstances.

109. He finally submitted that a reading of the two clauses as requiring two events before the Security Agent gained voting rights from the Chargor made commercial sense. The Security Agent and Lenders would not wish the Security Agent automatically to gain the right to control voting on the occurrence of a Declared Default for fear of being seen as shadow or de facto directors. That would explain the lack of a notice under clause 10.2 (although in any event he argued that events subsequent to the Debenture could not be relied on in interpreting it).

Construction of the Debenture: Panel's conclusions

110. The principles applicable to the construction of a commercial contract such as the Debenture are clear and were not in dispute before us. The aim is to determine what the parties meant by the language that they used. That involves ascertaining the meaning that the language used would have conveyed to a reasonable person who had all the background knowledge that would reasonably have been available to the parties at the time of the contract. If the language is unambiguous effect must be given to it. But if there is more than one possible construction, we are entitled to prefer the construction that best accords with business common sense, even though another construction would not produce an absurd or irrational result. All parts of a contract should be given effect wherever possible (*Rainy Sky S.A. v Kookmin Bank* [2011] UKSC 50,

paras 15 – 30 and *Dŵr Cymru Cyfyngedig (Welsh Water) v Corus UK Limited* [2007] EWCA Civ 285).

111. If the principles of construction are clear, the result of their application frequently is not. We have not found clauses 4.2 and 10.2 easy to construe. Having considered the arguments however we have come to the conclusion that clause 10.2 was intended to apply both before and after a Declared Default and whoever is the registered shareholder. Its effect is thus to require two events before control of voting rights transfers to the Security Agent, namely (i) a Declared Default or other circumstance described in the opening of clause 10.2 and (ii) a notice from the Security Agent confirming that they wish to assume control over voting rights in the shares held as security. Our reasons follow:

    a. The Targets construe clause 10.2 as having no effect when the registered shareholder is the Security Agent and a Declared Default has occurred, but as having effect when the registered shareholder is the Chargor and a Declared Default has occurred. No words in the clause itself or the remainder of the Debenture draw this distinction. The natural meaning of the words used is that the clause applies in all circumstances. This is supported by the fact that clause 10 when read as a whole sets out the particular provisions relating to the "Security Shares." Clause.10.1 deals with the rights of the Security Agent to arrange for transfer of title of the shares held as security at any time. Clause 10.2 deals with the power to exercise voting rights over such shares. Clauses 10.3 and 10.4 deal with calls and obligations arising under those shares at any time. There is no obvious reason to conclude that clause 10.2 alone amongst the provisions of clause 10 is only intended to apply where the Security Agent is not the registered shareholder and after an event of default has occurred.;

b. In fact, the Targets' construction is based on the premise that after a Declared Default the Security Agent does not need the right to exercise voting power that is granted by clause 10.2, since it is the registered holder and clause 4.2(b)(iii) no longer restricts its rights to vote. Yet this ignores the fact that 4.2(b)(iii) is a proviso to the mortgage and charge of the shares under clause 4.2 (a) of the Debenture. It also appears to ignore the effect of the words "Subject to clause 10.2" at the beginning of clause 4.2(b)(iii) and thus begs the question of whether clause 4.2(b)(iii) has effect after a Declared Default;

c. In either of the circumstances other than Declared Default where clause 10.2 operates the Security Agent will have to give notice before exercising voting rights that would otherwise be exercisable by the Chargor. This is clearly necessary since the circumstance will be triggered by the Security Agent's opinion (i.e. an opinion that it is necessary to exercise or refrain from exercising voting rights which, during the period prior to a Declared Default, are subject to the proviso in clause 4.2(b)(iii) and are thus under the control of the Chargor). The Chargor will thus need to be informed of the Security Agent's opinion on the exercise of voting rights. There is nothing in the clause to suggest the parties meant the requirement for notice not to apply to a Declared Default occurring when the Security Agent had become the registered shareholder pursuant to clause 10.1 or otherwise. In such a circumstance it would still be necessary to know whether the Security Agent was taking over any voting rights that the Chargor had up to that point retained;

d. In circumstances where the meaning of the clause is not clear, we are entitled to prefer a reading that best accords with business common sense. In our view there is considerable business common sense in the Debenture requiring two events before voting power transfers to the Security Agent. There will be

circumstances where the Lenders wish to enforce powers under the Debenture following a Declared Default, including appointing an administrative receiver, but have no need for the Security Agent to gain control of voting rights of a Chargor's shares. This may be unnecessary in order to realise relevant assets. In such circumstances the Lenders and Security Agent will wish to avoid any allegation of controlling subsidiary companies or becoming shadow directors. The possible interpretations of clause 10.2 that the Panel is asked to choose between would either automatically place the Security Agent in a position of control and potential responsibility (even where it has elected not to take legal ownership of the shares under clause 10.1) upon a Declared Default, or would permit the Security Agent the discretion whether to exercise the right to assume control or not.

112. The Targets' raise two further and separate arguments in support of their submission that the Chargor (BC Holdings) no longer had any rights over the voting power of the shares in the Trio by December 2009. They argue:

a. The reference to "notice" from the Security Agent in the Proviso means notice of the act of default or other circumstance relied on by the Security Agent under the first part of the clause. They allege that it would be impossible for a Chargor in December 2009 to claim not to have been given notice of a default which had occasioned the appointment of administrative receivers over its own business more than 6 years earlier (regardless of whether formal notice of an act of default was ever given to each Chargor); and

b. the mere ability of the Security Agent to serve such a notice at any time renders any rights which the Chargor might otherwise have over the shares illusory.

113. We do not accept these arguments:

a. “Notice” in the Proviso must mean notice of an intention to take over voting rights. This is clear for the two circumstances other than Declared Default that may trigger use of clause 10.2; there is no reason to construe it differently for a Declared Default. Further, clause 29.1 of the Debenture requires notices under the Debenture to be given by letter or fax showing that a formal written notice is required.;
b. Although the Security Agent had the ability to serve such a written notice at any time after the Declared Default, on the facts before us it did not. Unless and until such notice was served the Chargors’ rights to control voting of the shares were real and not illusory.

114. For all of these reasons we consider that at the Relevant Time BC Holdings was entitled to control the exercise of the voting power at any general meeting of the Trio and that accordingly BC Holdings is to be taken as having control of the Trio within the meaning of s.435(10) IA 86. It is common ground that this means that the Targets are also associated with the Trio, since BCT has not charged its shares in BC Holdings under the Debenture, and thus that the Target Test and Insufficiently Resourced Test are met.

Analysis (ii): TUK

115. It is strictly unnecessary to consider whether the Targets were also associated with TUK at the Relevant Time, since our finding in respect of the Trio means there is jurisdiction in this case to issue an FSD if reasonable to do so. However in deference to the arguments raised we set out briefly our conclusion on this Employer also.

116. We have found on the balance of probabilities that at the Relevant Time the shares in TUK were legally and beneficially owned by THSP (as to 99%). However THSP was also a Chargor under the Debenture. It is therefore necessary to consider whether the effect of the Debenture is

that THSP has lost the ability to control the exercise of voting power at a meeting of TUK.

117. TPR and the Trustee assert that it has not, and rely on the terms of the Proviso to argue that THSP retains the ability to exercise any and all voting rights in TUK shares until notice is given under that Proviso.

118. Mr Furness noted that the arguments set out at paragraph 112 above were equally relevant to TUK as to the Trio. For the reasons given we do not consider them correct.

119. The Targets also relied on the case of *Unidare plc v Cohen* [2006] Ch 489 to argue that as a matter of economic reality control over the exercise of voting power in TUK was with the Security Agent not THSP. That case considered the application of s.435 IA 86 to a situation where shares in company C were held by a registered shareholder (H) on bare trust for a third company (K). H had agreed not to exercise any powers in relation to the shares without K's consent, and K was entitled to act in H's name in its absolute discretion (see paragraph 21 of the judgment).

120. The court considered whether H was entitled to exercise or control the exercise of the voting power in C, within the meaning of s.435(10) IA 86. The judge, Lewison J, derived the following propositions from the cases cited to him:

> ***"****i) In the vast majority of cases, whether a person is entitled to exercise voting rights is to be determined simply by looking at the register of shareholders and the company's articles of association;*
>
> *ii) In such cases, it is not permissible to look outside those materials and to inquire whether there are contractual or fiduciary restraints, as between the registered shareholder and others, which inhibit him in exercising those rights;*
>
> *iii) In general there is no warrant for distinguishing between different degrees of trusteeship;*
>
> *iv) The Court of Appeal has expressed the view that where the question is whether a person has a controlling interest in a company an exception may be made in the case of a bare trustee (or nominee or "dummy"). In*

such a case control resides in the beneficial owner to the exclusion of the trustee;

v) In the case of a shareholder which is itself a corporation, in determining how its voting rights as shareholders are exercised it is permissible to look outside the register of shareholders and inquire whose voice is heard when its votes are cast."

121. The judge continued "*since I have held that, following execution of the power of attorney, Holdings held its shares in the company on a bare trust for Kozo, the question left open by the House of Lords must be decided*." This was a reference to the question of whether, in the case of a bare trustee shareholder, it was the shareholder or beneficial owner who could properly be described as having a controlling interest in the company.

122. In deciding that question the judge construed s.435(10)(b) IA 86 and considered, at paragraph 58, that:

a. The verb "entitled" in the subsection must mean entitled as between registered shareholder and controller of voting power, not between registered shareholder and company;
b. The use of the phrase "voting power" as opposed to "voting rights" encouraged him to look at the economic reality of the situation;
c. The above points, together with the fact that H was a corporate shareholder, allowed him to ask "whose voice would be heard" if H were to cast the votes attached to the shares in C. The only answer to that question was the voice of K.

123. The Targets accept that the position of TUK is not on all fours with *Unidare*. As Mr Moss stated in argument, in this case THSP did not hold the shares in TUK as bare trustee. Instead it held them subject to the terms of the Debenture. The answer to the question "whose voice would be heard" if shares in TUK were voted depends entirely on the terms of the Debenture. If no notice has been given under the Proviso then THSP remains entitled to control the exercise of voting power in the shares in TUK. As indicated above, on the evidence before us no such notice was given. Thus we find that TUK is associated with the Targets.

124. The same argument answers BCT's point that control of voting power in the Employers lies with the administrative receivers after their appointment. On a proper construction of the terms of the Debenture that argument is incorrect.

Reasonableness

125. Section 43(7) sets out a non-exhaustive list of matters to which the Panel must have regard, where it considers them relevant, when considering whether it is reasonable to issue an FSD to a target. The Panel must also have regard to matters not specified in s.43(7)(a)-(e) if it considers them relevant, and need not have regard to matters that are listed in the subsection if it considers them irrelevant.

126. The Panel's task, we consider, is to have regard to all relevant matters in the round and to decide in light of them all whether it is reasonable to issue an FSD to a target.

127. It was impressed upon us that there does not need to be evidence of "fault" on the part of a target in order that the Regulator can issue an FSD to it. We agree; the presence or absence of "fault" may be relevant to reasonableness, but evidence of misconduct is not required for the issue of an FSD.

128. The Targets submitted that the passage of time between the relevant events in this case and the hearing made it unreasonable to issue an FSD in reliance upon them. TPR relies on matters that occurred between eight and ten years ago, commencing with the setting up of the JV and the payments to Granada and concluding with the administrative receiverships. BCT states that reliance on such events may amount to impermissible retrospective application of the legislation and / or otherwise be unreasonable. The Targets argue that by seeking to impose FSDs in this case TPR is in effect seeking to give the legislation retrospective effect. The Targets accept that if the Target Test is met then

the legislation can be construed to have that effect, but they argue that the presumption against retrospection makes it unreasonable to take this course.

129. The authority cited by the Targets on this point in fact suggests caution before recourse to the presumption against retrospection. In *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 at 524-5 Lord Mustill stated:

> *"The real contest on the present appeal was not whether section 13A was retrospective in the ordinary sense, but whether a provision which was undeniably prospective in the conferring of powers enabled those powers to be exercised by reference to acts or omissions which had taken place before the new section came into force.*
>
> *My Lords, it would be impossible now to doubt that the court is required to approach questions of statutory interpretation with a disposition, and in some cases a very strong disposition, to assume that a statute is not intended to have retrospective effect. Nor indeed would I wish to cast any doubt on the validity of this approach for it ensures that the courts are constantly on the alert for the kind of unfairness which is found in, for example, the characterisation as criminal of past conduct which was lawful when it took place, or in alterations to the antecedent national, civil or familial status of individuals. Nevertheless, I must own up to reservations about the reliability of generalised presumptions and maxims when engaged in the task of finding out what Parliament intended by a particular form of words, for they too readily confine the court to a perspective which treats all statutes, and all situations to which they apply, as if they were the same. This is misleading, for the basis of the rule is no more than simple fairness, which ought to be the basis of every legal rule. True it is that to change the legal character of a person's acts or omissions after the event will very often be unfair; and since it is rightly taken for granted that Parliament will rarely wish to act in a way which seems unfair it is sensible to look very hard at a statute which appears to have this effect, to make sure that this is what Parliament really intended. This is, however, no more than common sense, the application of which may be impeded rather than helped by recourse to formulae which do not adapt themselves to individual circumstances, and which tend themselves to become the subject of minute analysis, whereas what ought to be analysed is the statute itself."*

130. In construing section 43 and the matters that may be taken into account when deciding on reasonableness there is no temporal limit imposed by the statute. This is in contrast to sections 38 and 52, both of which prevent those reserved regulatory functions being exercised in respect of events before April 2004. Indeed, s.43(7)(a) refers to the relationship that

a target “has or has had” with the employer, with no temporal restriction imposed. In these circumstances we consider it clear that Parliament intended the Regulator to have regard to all relevant matters when deciding upon reasonableness under s.43, no matter when they occurred.

131. In this case it can fairly be said that the die was cast by the date of the administrative receiverships in 2003. While it might be unreasonable to rely on events before 2003 if intervening events had superseded them, in this case the reasons for the current deficit in the Scheme were all in place by 2003.

132. Finally we note that until 2009 the Trustee and ITV had been in negotiations regarding the deficit in the Scheme. Were we to hold that it was now unreasonable to rely on events before 2003 in seeking an FSD we risk either encouraging potential targets to draw out negotiations over potential solutions to pension shortfalls as long as possible in order to reduce the potential for regulatory action against them or encouraging TPR to commence regulatory action when an agreed solution may still be possible. We see no reason to cast doubt on the appropriateness or good faith of those negotiations and the time they took. We do not consider it appropriate that the length of the negotiations should now affect the regulatory position.

133. With that introduction we turn to the matters we have considered when determining whether it is reasonable to issue FSDs to the Targets. It has not been suggested that there are material differences between the five Targets that mean we should consider them individually for these purposes, and the arguments deployed by all parties in written representations and orally before us drew no distinction between them. Nonetheless it is relevant to note that ITV was formed on 2 February 2004 and that it therefore did not contemporaneously receive benefit from the Employers or have any relationship with them or the Scheme during the events relied on by TPR. However TPR’s case is that ITV effectively stands in the shoes of Granada Limited as the ultimate parent company

of the group which benefited from the formation of the JV. We have considered the case for an FSD to be issued to it on that basis.

134. We consider in turn the following matters:

a. The Targets' relationships with the Employers;
b. The value of benefits received by them from the Employers;
c. Their connection or involvement with the Scheme;
d. Their financial circumstances;
e. The financial support already provided by the Targets to the Scheme's members;
f. The Targets' assumption of no responsibility for Scheme liabilities;
g. Whether the Scheme deficit was caused by matters outside the Targets' control;
h. The Targets' conduct;
i. Unfairness (including the grant of clearance to Thorn and lapse of time)

Relationships with Employers

135. S.43(7)(a) provides that the Panel must have regard, where relevant, to the relationship which the Targets have or have had with the employer (including, where the employer is a company within the meaning of subsection (11) of section 435 IA 86, whether the Targets have or have had control of the employer within the meaning of subsection (10) of that section).

136. We have found that the Targets had control of the Employers within the meaning of s.435(10) IA 86 at the Relevant Time. We do not consider this finding is of particular assistance to the question of reasonableness.

137. More relevant is the degree to which the Granada Group had actual influence over the Box Clever joint venture. The starting point is to note that the JV was conceived and structured by Granada and Thorn. It was

their choice to sell their consumer rental businesses to a joint venture, their choice what price the joint venture would pay, their choice what finance would be taken out and what left in to support the JV, and their choice to make the JV's borrowings non-recourse to them as shareholders. We note the Trustee's allegation that Granada and Thorn's decision in 1999 that the JV should freeze prices for existing customers is evidence of the JV's lack of independence over matters such as pricing. We understand that the Office of Fair Trading required this price freeze as a condition for the merger. Nonetheless we considered this relevant, since the shareholders made the decision to proceed with the merger despite this requirement and this decision impacted directly on the JV's ability to set prices. At the commencement of the JV therefore the relationship was very close indeed.

138. The Targets describe their relationship with the Employers from the creation of the JV as an arm's length relationship. They stress that the JV was set up as a standalone business with no links to that of Granada such as by seconded employees. They also state that the existence of former Granada directors on the board of BCT is irrelevant, since there is no evidence that such individuals acted other than in accordance with their directors' duties to act in the best interests of BCT.

139. We consider it relevant that the board of BCT contained directors appointed by Granada, and that this is important due to the matters listed in the Shareholders Agreement that required approval of these directors. Such matters include material amendments to the Scheme but also extend to the approval of BCT's statutory accounts, the acquisition of real property, assignment or factoring of book debts and the entry into certain service or consultancy agreements. We take account of the evidence of Mr Wakelam that we have considered above.

140. It is also relevant that Granada was a 50% shareholder in the joint venture, with an entitlement to and hope of profits as a result.

Value of benefits received from Employers

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

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

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

144. On this issue the Trustee quotes from:

a. Granada Group meeting minutes of 16 November 1999: "*[t]he basis of a deal with Nomura [the Thorn owners] is to extract [the value of the existing businesses] in cash now and to share equally with them in any additional value created thereafter*"; and
b. A Deutsche Bank memo of 14 June 2000, two weeks before the creation of the JV, "*The cash has effectively been paid out to the two shareholders by way of dividend, leaving the underlying cashflows of the now leveraged Box Clever to repay the debt over time. Granada Media received proceeds of £450 million in cash plus loan notes of £65-70 million which constitute additional leverage of Box Clever and an investment for Granada Media*".

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

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

147. The Targets do not deny that they received financial benefit from the creation of the JV. However they assert that the sale was at market value, supported by sophisticated due diligence, and that as matters have turned out they have written off a significant investment in the Employers and borne the burden of certain pension benefits of Box Clever employees.

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

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

in return for the rental businesses, and we therefore have regard to it in this context.

Connection with the Scheme

150. One of the matters which section 43(7)(c) indicates we must consider if relevant is “any connection or involvement ” which the Targets have had with the Scheme. In this case this is a relevant matter.

151. As mentioned in paragraph 48 above the Contribution Agreement provided that Box Clever would establish its own pension scheme on a DC basis, with other ancillary provisions. However within a few months of the JV commencing operations it was decided that providing DC benefits to transferring employees who had previously been part of a DB scheme was unlikely to promote staff harmony and was not a satisfactory solution. There is a handwritten record of discussions at a BCT board meeting of 7 March 2001 at which it was agreed to set up a DB rather than DC scheme for reasons that include the benefit to be obtained in negotiations with unions. This meeting was attended by, among others, Charles Allen, a BCT director appointed by Granada and the Executive Chairman of the Granada Group.

152. The Pension Proposal of January 2001 provided for the establishment by BCT of a defined benefit scheme. Pursuant to the terms of the Shareholders’ Agreement Rental & Retail approved this proposal. As identified in paragraph 50 above a Granada representative had been involved in preparing the proposal for, inter alia, the approval of BCT’s shareholders.

153. As described in paragraph 54 above, in 2002 the Trustee and BCT agreed to change the benefits under the Scheme to mirror fully the benefits a transferring member enjoyed under the Granada or Thorn scheme. Pursuant to the Shareholder’s Agreement any material amendment to pension scheme benefits required the approval of the

directors of BCT appointed by Granada and Thorn. This change in 2002 appears to have been approved in that way.

154. The above matters make it clear that the Granada Group had a relatively close connection and involvement with the inception and development of the Scheme. The shareholders of BCT, being Rental & Retail and RHC, clearly regarded it as important that there be pension provision for employees transferring to the joint venture, which would encourage good employee relations and the profitable operation of the new joint venture vehicle.

<u>The fact that the Scheme deficit was caused by matters outside the Targets' control</u>

155. The Targets argued strongly that the deficit in the Scheme was caused by matters over which they had no control in any real sense and that it was thus unreasonable that an FSD should be issued. As we have already indicated the FSD jurisdiction is not fault-based. We accept that the deficit was not caused, directly at least, by factors over which Granada had control. We note however that the structure of the Scheme, and the "top up" provisions agreed in 2002, are relevant to the existence and scale of the deficit and were implemented with the approval of Granada and Thorn. We also note that BCT was less able to support a deficit in the Scheme because of Granada and Thorn's decision that the purchase of their consumer rental businesses be funded entirely by borrowing by BCT.

156. It is clearly relevant to our decision that there is now a very substantial deficit in the Scheme. This has come about by virtue of the failure of the Employers within a short time of the commencement of the JV. We make no findings as to the causes of that failure, nor do we place reliance on them as a reason to issue an FSD.

157. We recognise that the Scheme's technical provisions are calculated using assumptions which were first applied after the time that the administrative receivers were appointed. We also recognise the role that investment returns and mortality assumptions will have had in the current scale of the deficit. We also accept that salary increases of certain members were made after the appointment of the administrative receivers, to retain their services and thus for good reason, which increased the scale of the deficit to an extent. We do not consider those matters as relevant in this case to the question whether the Targets should be required to provide financial support to the Scheme.

Financial circumstances

158. The evidence shows that the Targets have significant assets, particularly taken together. We do not consider this makes it more reasonable to issue FSDs, although any lack of financial assets may well have been relevant to this issue.

The financial support already provided by the Targets to the Scheme's members, and the Targets' assumption of no responsibility for Scheme liabilities

159. The Targets rely on the 15 months from June 2000 during which Box Clever employees continued to accrue benefits in the Granada scheme, resulting in a present deficit of some £45m on the buyout basis and contributions of only £10m (plus investment returns). They state that this deficit already sits with the Targets. They also note that the failure to make the transfer of past service benefits has saved the Scheme from far larger liabilities, and that they repeatedly made clear they were not guaranteeing or underwriting the benefits promised to Scheme members.

160. We consider all of these points are correct and are relevant to our consideration of reasonableness and we have taken full account of the fact that the Targets were not seeking to escape any of their pre-existing

pension liabilities when setting up the joint venture. However they must be balanced by the other matters identified as relevant to the question of reasonableness.

The Targets' conduct

161. The Targets state that the Trustee and TPR wrongly seek to criticise the Targets' conduct regarding:
    a. The sale of the Granada rental business and arranging of the West LB loan in 2000;
    b. The proposed transfer payment for the transfer of liabilities to the Scheme;
    c. The failed negotiations between the Targets and Trustee since 2004.

162. To the extent that any such criticisms are made in the representations before us we have not placed reliance on them. In particular we agree with the Targets that the fact that the transfer payment did not occur makes it difficult to see how the case for an FSD can be strengthened by it.

Unfairness

163. The Targets say that unfairness to them has been caused by TPR's decision not to pursue Carmelite for an FSD and by the difficulties in responding to the Warning Notice due to the lapse of time since 2003, shortness of time since its service and the alleged change of case.

164. We do not consider the failure to pursue Carmelite is relevant to the reasonableness of issuing FSDs to the Targets. The comfort letter to Carmelite was not issued to the Targets and they did not argue they had changed their position in reliance on it. We do not consider that it would make it more or less reasonable to issue an FSD to the Targets were FSDs also to be issued to members of the Thorn group.

165. We have considered above the submissions made on lapse of time, shortness of time since service of the Warning Notice and change of case. We have decided that they do not give rise to procedural unfairness such that the case cannot continue. We have also considered difficulties that the lapse of time has caused to the evidence on association. We do consider these matters are relevant to the reasonableness of issuing FSDs, but they must be balanced with all other relevant matters.

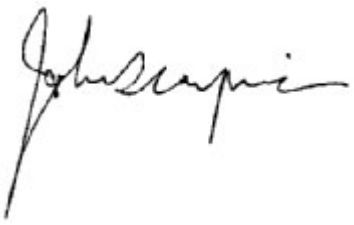
Conclusion

166. For the reasons set out above we consider that the Target Test and Insufficiently Resourced Tests are both met in this case. There is no dispute that the Scheme Test is also met. We therefore turn to the Reasonableness Test.

167. The preceding section of these Reasons identifies those factors that we consider relevant to the question of whether it is reasonable to impose the requirements of FSDs on the Targets. We must have regard to all of those factors.

168. Having done so it is our view that it would be reasonable to issue FSDs to the Targets and to require them to secure that financial support is put in place for the Scheme, within six months of the issue of the FSDs. The factors that have weighed most heavily with us are the value of benefits received by the Targets from the Employers and the Targets' relationship with those Employers. Overall it seems to us that this is a case where the Scheme's principal employer, BCT, was set up by the Granada and Thorn groups as part of a transaction that aimed to extract value from the consumer rentals businesses of those groups, but leave them able to share in any future profit. A requirement of that transaction was that a pension scheme be set up for transferring employees; no value could have been extracted without this. Valuable financial benefits were received by the Targets, while the structure used to obtain them required

BCT to borrow £860m from West LB, left all of BCT's assets charged to secure that borrowing, and left the Scheme with a weak employer as a result. It is also relevant that this borrowing was not secured on any assets of Granada or Thorn group companies, insulating them from financial difficulties of BCT. We do not find misconduct on the part of the Targets, but consider the issue of FSDs to be an appropriate and reasonable response to the events of 1999 to 2003 in relation to BCT and the Scheme.



Signed::

Chairman: ***John Scampion***

Dated: 26 January 2012