UT Neutral citation number: [2023] UKUT 00183 (TCC)

Case Number: FS/2020/0004

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing Venue: The Rolls Building, London EC4A 1NL

PENSIONS REGULATOR-contribution notice-whether applicant party to act or series of acts causing material detriment to pension scheme-yes- whether reasonable to impose on the applicant the sum specified in the contribution notice-yes-reference dismissed

Heard on: 9,10,11,15 & 16 May 2023
Judgment date: 28 July 2023

Before

JUDGE TIMOTHY HERRINGTON
MEMBER MICHAEL HANSON
MEMBER PETER FREEMAN

Between

MR ANANTKUMAR MEGHJI PETHRAJ SHAH

Applicant

and

THE PENSIONS REGULATOR

Respondent

Representation:

The Applicant in person

For the Respondent: James Walmsley and Nicholas Macklam, Counsel, instructed by The Pensions Regulator, for the Respondent

DECISION

Introduction

1. This decision concerns a reference made under s 103 Pensions Act 2004 ("PA 2004"). The reference relates to a determination ("the Determination") made on 10 June 2020 by the Determinations Panel ("DP") of the Respondent. The Pensions Regulator ("the Regulator") contends that a contribution notice ("CN") should be issued under s 38 PA 2004 to the Applicant, Mr Anantkumar Shah ("Mr Anant Shah").

2. The amount specified in the Determination to be paid was £3,688,108. The DP determined by a majority that a CN should be issued to Mr Anant Shah and his nephew, Mr Rohin Shah, on a joint and several basis for the amount so specified.

3. Both Mr Anant Shah and Mr Rohin Shah referred the Determination to the Tribunal by separate reference notices dated 7 July 2020. Mr Rohin Shah withdrew his reference on 7 March 2023 after a settlement was reached between Mr Rohin Shah and the Regulator. Accordingly, Mr Rohin Shah is no longer a target of regulatory action and this decision deals purely with the determination of Mr Anant Shah's reference.

4. The background facts set out at [5] to [14] below are undisputed.

5. The Regulator's case for a CN case relates to the Meghraj Group Pension Scheme ("the Scheme"). The Scheme is a defined benefit occupational pension scheme which was founded by Meghraj Group Limited ("MGL") by a declaration of trust dated 1 July 1987. MGL was the UK holding company for the Meghraj group of financial services companies.

6. One of the companies in the Group, Meghraj Financial Services Limited ("MFSL"), became the principal employer of the Scheme on 1 January 2001. Mr Anant Shah was a director of MFSL as from MFSL's incorporation on 27 March 2000, having been one of a number of directors from 27 March 2000 and its sole director from 9 August 2010.

7. The Scheme is currently being assessed by the Pension Protection Fund ("PPF") following MFSL's entry into creditors' voluntary liquidation on 9 October 2014. As at that date the debt to the Scheme owed by MFSL under s 75 of the Pensions Act 1995 ("PA 1995") has been estimated by the Scheme Actuary at £5.85 million.

8. From at least 31 December 2001, MFSL was the sole legal owner of a company called Meghraj Properties Limited ("MPL"). MPL in turn owned shares in a joint venture company in India ("the Indian JV"). MPL employed five members of the Scheme. Mr Rohin Shah, who is the nephew of Mr Anant Shah, was a director of MPL from March 1995.

9. Between 2007 and 2011 MPL received large sums of money from the disposal of its shares in the Indian JV, as well as sums from dividends on those shares. Most of these sums were paid to MFSL and accounted for in MPL's accounts as paid out by way of dividend.

10. Most of those payments were then paid by MFSL to its parent company, M.P. Group Limited (a company incorporated and registered in the Isle of Man) ("MPGL"). Of those payments to MPGL, some were used to fund payments to an offshore foundation called the Animegh Foundation and others were paid by MPGL to a company registered and incorporated in Jersey, called Whiteoak Investments Limited ("Whiteoak"). This was a

nominee company of Mr Rohin Shah and the money paid to Whiteoak was paid to it for the benefit of Mr Rohin Shah.

11. The Animegh Foundation has been described by Mr Anant Shah as a discretionary settlement for the wider Shah family, settled by his brother, Mr Vipin Shah, and from which he says he has received no distribution.

12. On 18 May 2012, MFSL (acting by Mr Anant Shah) and MPL (acting by Mr Rohin Shah) entered into an agreement (the "2012 Agreement") which provided that the final tranche of the proceeds of MPL's sale of the Indian JV were to be paid to Paramount Properties Limited ("PPL"), a Jersey company which was the nominee vehicle of Mr Rohin Shah.

13. In January 2014, MPL received the last tranche of proceeds from the sale of its shares in the Indian JV. The sum paid was £3,688,108 ("the 2014 Payment"). It was not paid by way of dividend through MFSL and MPGL, but paid directly by MPL to PPL at the direction of Mr Rohin Shah.

14. Following the settlement with Mr Rohin Shah, in these proceedings the Regulator asks that the Tribunal direct the issue of a CN pursuant to which Mr Anant Shah is required to contribute £1,844,054 to the Scheme (this being 50% of the 2014 Payment), plus an uplift for the passage of time since 2014. The Regulator contends that Mr Anant Shah was party to a series of acts which engage the CN jurisdiction under s 38 PA 2004 by causing the Scheme to suffer material detriment (alternatively, by having the main purpose of preventing recovery of s 75 PA 1995 debts from MFSL and/or MPL).

15. The series of acts relied on by the Regulator is the entry into the 2012 Agreement ("the 2012 Act") and the making of the 2014 Payment (the "2014 Act"). Alternatively, the Regulator relies upon Mr Anant Shah being a party, not to a series of acts, but to the 2012 Act and/or 2014 Act taken individually, and the material detriment caused by and/or the main purpose of each of the relevant act or acts.

16. The Regulator's primary case that the series of acts caused material detriment to the Scheme is based on a contention that arrangements entered into between Mr Rohin Shah and Mr Anant Shah in 2004 ("the 2004 Agreement") pursuant to which they agreed that the benefit of the profits earned from MPL, primarily derived from that company's interest in the Indian JV, should belong 80% to Mr Rohin Shah and 20% to Mr Anant Shah did not create a legally binding arrangement whereby ownership of the interest in the Indian JV had effectively left MPL at that point. Mr Anant Shah's position on the 2004 Agreement is that it created a legally binding contract and accordingly the 2012 Agreement simply restated the position that had been agreed back in 2004.

17. Mr Anant Shah contends that no CN should be issued against him. He denies that the 2012 Agreement led to Mr Rohin Shah making the 2014 Payment in the manner alleged as a matter of causation. He also says that the 2014 Payment was made without his knowledge or consent.

18. Mr Anant Shah denies that it was a consequence of the 2012 Agreement or the 2014 Payment that none of the proceeds of sale from the final tranche of shares in the Indian JV were used to fund the Scheme's deficit. He says that as at 18 May 2012 MFSL was the sole statutory employer in relation to the Scheme. MFSL had no entitlement to the proceeds of

sale in relation to the remaining shares in the Indian JV as a consequence of the 2004 Agreement.

19. Mr Anant Shah therefore denies that the "material detriment" test in s 38A PA 2004 has been satisfied.

20. Further or alternatively, in any event, he says, "the reasonableness test" in s 38(3)(d) PA 2004 has not been met. Accordingly, it is not reasonable to impose liability on him to pay the sum specified in the notice (or any sum) for the purposes of s 38(3)(d) of the Pensions Act 2004.

21. This is because:

(1) Mr Anant Shah received no benefit in respect of either the 2012 Agreement or the 2014 Payment, and was unaware of the latter until over three months after it had occurred; and

(2) his financial circumstances are limited.

22. As regards his financial circumstances Mr Shah says that commensurate with his Jain faith he has, for in excess of a decade, been living in accordance with the principles of non-acquisition (Aparigraha). He says he no longer has any property interests. Nor does he have any interest in any discretionary trust or settlement. He is largely retired; his income is limited to his state pension and his pension from the Scheme. Most of his time is devoted to advising charities for which he received an OBE in 2020. He says he now has only some £32,000 in liquid assets. He has asked his family members to lend him funds to continue to instruct solicitors to act for him in respect of these proceedings, but they were unwilling to do so, in the absence of him having any property on which such borrowing could be secured. The gap between his income and his expenditure is being met by the disposal of his wife's jewellery.

23. Accordingly, Mr Anant Shah says that he would have no means of paying any CN issued against him so that the enforcement of a CN issued would be likely to result in his bankruptcy with little or no gain to the financial position of the Scheme and/or the PPF and no effect on the benefits receivable by members of the Scheme.

Applicable legislation

24. Section 38 PA 2004 sets out the powers of the Regulator to issue a CN. So far as relevant, at the time which is relevant to these proceedings, it provided:

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

(a) a money purchase scheme, or

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

(2) The Regulator may issue a notice to a person stating that the person is under a liability to pay the sum specified in the notice (a "contribution notice")–

(a) to the trustees or managers of the scheme, or

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

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

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

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

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

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

(c) …

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

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

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

(4) …

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

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

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

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

(b) …

(c) it is either–

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

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

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

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

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

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

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

(7) The matters within this subsection are—

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

(b) the relationship which the person has or has had with the employer (including, where the employer is a company within the meaning of subsection (11) of section 435 of the Insolvency Act 1986 (c. 45), whether the person has or has had control of the employer within the meaning of subsection (10) of that section),

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

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

(e) all the purposes of the act or failure to act (including whether a purpose of the act or failure was to prevent or limit loss of employment),

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

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

(f) the financial circumstances of the person, and

(g) such other matters as may be prescribed.

(7A) In subsection (7)(eb) "relevant creditors" means—

(a) creditors of the employer, and

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

(8) …

(9) …

(10) For the purposes of this section–

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

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

(c) section 229 of the Bankruptcy (Scotland) Act 2016] 8 (associated persons) applies as it applies for the purposes of that Act.

(11) …

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

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

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

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

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

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

25. Section 38A PA 2004 explains what is meant by the "material detriment test" referred to in s 38(5)(a) PA 2004. So far as relevant, at the time which is relevant to these proceedings, it provided:

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

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

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

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

(b) in the case of a failure—

(i) the time when the failure occurred, or

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

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

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

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

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

(c) the scheme obligations of any person,

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

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

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

(g) such other matters as may be prescribed.

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

(a) the scheme, or

(b) …

(6) …

(7) …

(8) In this section—

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

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

(9) …

(10) …"

26. Section 39 PA 2004 explains what sum may be specified in a CN. So far as relevant, at the time which is relevant to these proceedings, it provided:

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

(2) Subject to subsection (3), the shortfall sum in relation to a scheme is–

(a) in a case where, at the relevant time, a debt was due from the employer to the trustees or managers of the scheme under section 75 of the Pensions Act 1995 (c. 26) ("the 1995 Act") (deficiencies in the scheme assets), the amount which the Regulator estimates to be the amount of that debt at that time, and

(b) in a case where, at the relevant time, no such debt was due, the amount which the Regulator estimates to be the amount of the debt under section 75 of the 1995 Act which would become due if–

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

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

(3) Where the Regulator is satisfied that the act or failure to act falling within section 38(5) resulted–

(a) in a case falling within paragraph (a) of subsection (2), in the amount of the debt which became due under section 75 of the 1995 Act being less than it would otherwise have been, or

(b) in a case falling within paragraph (b) of subsection (2), in the amount of any such debt calculated for the purposes of that paragraph being less than it would otherwise have been, the Regulator may increase the amounts calculated under subsection (2)(a) or (b) by such amount as the Regulator considers appropriate.

(4) For the purposes of this section "the relevant time" means (subject to subsection (4A)) –

(a) in the case of an act falling within subsection (5) of section 38, the time of the act, or

(b) in the case of a failure to act falling within that subsection–

(i) the time when the failure occurred, or

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

(4A) In the case of a series of acts or failures to act, "the relevant time" is determined by reference to whichever of the acts or failures in the series is, in the Regulator's opinion, most appropriate.

(5)…"

27. As Mr Walmsley helpfully summarised in his skeleton argument, s 38 PA 2004 imposes five tests or conditions for the issue of a CN to a target. They are as follows:

(1) ***The Scheme Test:*** the scheme in question must be an occupational pension scheme other than a money purchase scheme or a prescribed scheme or a scheme of a prescribed description: see s 38(1).

(2) ***The Connection Test*****:** the target must, at any time during the relevant period (being the period beginning with the time when the act or failure to act falling within s 38(5) first occurs and ending with the giving of a warning notice), either be the employer or a person connected with or an associate of the employer: see s 38(3)(b)(ii).

(3) ***The Party Test:*** the Regulator must be of the opinion that the target or targets were a party, having regard to s 38(6)(a), to an act or a deliberate failure to act which falls within s 38(5): see s 38(3)(a).

(4) ***The Act Test:*** the act or failure to act must fall within s 38(5). This requires either the "material detriment" test or the "main purpose" test to be satisfied, and the act or failure to act must have occurred within certain time limits.

(5) ***The Reasonableness Test:*** the Regulator must be of the opinion that it is reasonable to impose liability on the target to pay the sum specified in the contribution notice: see s 38(3)(d).

It is common ground in this case that the Connection Test is met on the basis of Mr Anant Shah being connected with the principal employer, MFSL, by virtue of him being at the

relevant time a director of that company. Mr Anant Shah does not accept that the other conditions are satisfied.

Role of the Tribunal

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

29. According to s 103(3) PA 2004 on such a reference the Tribunal may consider any evidence relating to the subject matter of the reference, whether or not it was available to the Regulator at the material time. Section 103(4) provides that on a reference, the Tribunal must determine what (if any) is the appropriate action for the Regulator to take in relation to the matter referred to it.

30. In this case, the matter referred is whether a CN should be issued to Mr Anant Shah. As this Tribunal made clear in *Re Bonas Group Pension Scheme* [2011] Pens. LR 109 (*"Bonas"*) the basis of the Tribunal's jurisdiction is that it considers the matters in dispute *de novo* rather than as an appeal. Warren J said at [37] of that decision:

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

31. Accordingly, once a reference has been made the Tribunal's function is to provide the final stage in the regulatory process to determine what is the appropriate action for the Regulator to take, having considered all the evidence relating to the subject matter of the reference. In effect, it stands in the shoes of the DP and therefore in this case must decide whether it is appropriate for the Regulator to issue a CN. Having made that determination, as provided by s 103(5) PA 2004, the Tribunal must remit the matter to the Regulator with such directions as it considers appropriate for giving effect to its determination which, by virtue of s 103(6) may either confirm, vary, or revoke the Regulator's determination or substitute a different determination. Section 103(7) provides that the Regulator must act in accordance with the determination of, and the directions given by, the Tribunal.

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

Evidence

Approach to witness evidence and contemporary documents

33. Not unusually, in this case much of the oral evidence was directed to memories of matters that occurred some years ago.

34. Consequently, in this situation it is important for the Tribunal to have regard to the contemporaneous documents and the overall probabilities. As has often been said, the contemporaneous documents are usually more reliable than the content of witness statements, prepared with the assistance of a legal team after the event and for the purpose of proving a case or meeting a case against them. We refer to a number of helpful observations in the case law on this point as follows.

35. In *Simetra Global Assets Ltd & Anor v Ikon Finance Ltd & Ors* [2019] EWCA Civ 1413, Males LJ stated the following at [48] to [49]:

> "48. In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence. The classic statement of Robert Goff LJ in *The Ocean Frost* [1985] 1 Lloyd's Rep 1 at p.57 is frequently, indeed routinely, cited:
>
> > "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth. I have been driven to the conclusion that the Judge did not pay sufficient regard to these matters in making his findings of fact in the present case."
>
> 49. It is therefore particularly important that, in a case where there are contemporary documents which appear on their face to provide cogent evidence contrary to the conclusion which the judge proposes to reach, he should explain why they are not to be taken at face value or are outweighed by other compelling considerations."

36. Whilst *The Ocean Frost* and *Simetra* were cases concerning fraud, in our view the principles are equally applicable to proceedings in this Tribunal.

37. In *Grace Shipping v Sharp & Co* [1987] 1 Lloyd's Rep 207 (Privy Council) Lord Goff said at p. 215:

> "It is not to be forgotten that, in the present case, the Judge was faced with the task of assessing the evidence of witnesses about telephone conversations which had taken place over five years before. In such a case, memories may very well be unreliable; and

> it is of crucial importance for the Judge to have regard to the contemporary documents and to the overall probabilities."

38. In *Gestmin SGPS S.A. v Credit Suisse (UK) Limited, Credit Suisse Securities (Europe) Limited* [2013] EWHC 3560 (Comm) Leggatt J (as he then was) said this at [22]:

> "…the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events."

39. However, that is not to say that all the evidence including the oral evidence should not be taken into account. The Court of Appeal in *Kogan v Martin* [2020] EMLR 4 said this at [88] :

> "88. …First, as has very recently been noted by HHJ Gore QC in *CBX v North West Anglia NHS Trust* [2019] 7 WLUK 57, *Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay The Judge as Juror: The Judicial Determination of Factual Issues (from The Business of Judging, Oxford 2000). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence."

Evidence for the Regulator

40. The Regulator called no witnesses of fact, relying for its case on the contemporary documents.

41. In accordance with the Tribunal's directions, the Regulator filed an expert accountancy report from Ms Kate Hart, a Fellow of the Institute of Chartered Accountants in England and Wales and an experienced forensic accountant. Ms Hart's report concludes that the various arguments raised by Mr Anant Shah in this case as to the status of the arrangements regarding the Indian JV that Mr Anant Shah and Mr Rohin Shah came to in 2004 were inconsistent with the accounts of MFSL and MPL over the relevant period, in particular because the accounts would not give a true and fair view of the companies' affairs and trading performance if Mr Anant Shah's arguments were found to be correct.

42. Ms Hart's report was unchallenged and we have accepted it in full.

Evidence for Mr Anant Shah

43. Mr Anant Shah filed a witness statement on which he was cross-examined. There were important aspects of his evidence that were either not credible or which were unreliable. There were a number of occasions where he contradicted himself. One example was regarding the question as to whether an annotation to the handwritten note dated 17 June 2004 referred to at [95] below stated on the document to have been made on 19 July 2004, was in fact added in 2011, which he ultimately accepted to be the case. Another example was where he initially asserted in cross examination very strongly that the arrangement made with Mr Rohin Shah in 2004 was "not just a loose business arrangement", despite being taken to a note of a meeting recording him using those very words, following which he purported not to remember using those words. However, to his credit he did show candour from time to time in giving answers which were adverse to his interests.

44. We have therefore not been able to rely on Mr Anant Shah's evidence except where it was either against his interests or corroborated by the contemporaneous documents.

45. Mr Anant Shah also filed a witness statement from his older brother, Mr Vipin Shah. That witness statement supported Mr Anant Shah's interpretation of the arrangements entered into between Mr Anant Shah and Mr Rohin Shah regarding the sharing of sums generated by the Indian JV. The statement also dealt with Mr Anant Shah's rights under the various Shah family trusts and settlements and expressed the view that Mr Anant Shah was not a wealthy man.

46. In accordance with the Tribunal's directions, Mr Vipin Shah should have been made available for cross-examination at the hearing.

47. In correspondence with the Regulator regarding the preparations for the hearing, Mr Anant Shah, who since 5 April 2023 had been acting in person, stated on 10 April 2023 that he intended "to call Vipin Shah to attend the Hearing".

48. However, following the Tribunal's decision rejecting Mr Anant Shah's application that the reference be determined on the papers without a hearing, in response to a request from the Regulator on 24 April 2023 that Mr Anant Shah confirm whether he intended to call Mr Vipin Shah, Mr Anant Shah replied:

> "Mr Vipin Shah will not attend; he is almost 80, not in good health and not able to travel for the hearing from Jersey."

49. The Regulator then enquired as to whether Mr Vipin Shah would be willing and able to give evidence from Jersey by way of remote video link, on the basis that the problem with Mr Vipin Shah attending appeared to be his inability to travel because of his health situation.

50. Mr Anant Shah replied late on the same day saying that he had hoped that his brother would feel able to attend the hearing but, from his conversations with him over the last few days, it had become apparent that it would be far too stressful for him to attend the hearing, whether in person or by video link.

51. We do not consider that Mr Anant Shah has given a good reason why Mr Vipin Shah could not attend the hearing, bearing in mind that Mr Anant Shah provided confirmation on

10 April 2023 that Mr Vipin Shah was in a position to attend the hearing. No medical evidence has been provided to substantiate Mr Anant Shah's assertion that his brother's state of health was such that he could not even give evidence by video link.

52. In the circumstances, we have not been able to place any significant weight on Mr Vipin Shah's witness statement unless corroborated by the contemporaneous documents.

Documentary evidence

53. We received a large amount of documentary evidence, only a small proportion of which we were referred to at the hearing. As we have indicated, our findings of fact have been made primarily by reference to this documentary evidence.

Summary of the issues to be determined on the reference

(1) ***The Scheme Test:*** the scheme in question must be an occupational pension scheme other than a money purchase scheme or a prescribed scheme or a scheme of a prescribed description: see s 38(1).

(2) ***The Connection Test*****:** the target must, at any time during the relevant period (being the period beginning with the time when the act or failure to act falling within s 38(5) first occurs and ending with the giving of a warning notice), either be the employer or a person connected with or an associate of the employer: see s 38(3)(b)(ii).

(3) ***The Party Test:*** the Regulator must be of the opinion that the target or targets were a party, having regard to s 38(6)(a), to an act or a deliberate failure to act which falls within s 38(5): see s 38(3)(a).

(4) ***The Act Test:*** the act or failure to act must fall within s 38(5). This requires either the "material detriment" test or the "main purpose" test to be satisfied, and the act or failure to act must have occurred within certain time limits.

(5) ***The Reasonableness Test:*** the Regulator must be of the opinion that it is reasonable to impose liability on the target to pay the sum specified in the contribution notice: see s 38(3)(d).

54. In order to determine this reference, we must make findings as to whether the Regulator has made out its case on each of (i) the Scheme Test, (ii) the Party Test, (iii) the Act Test and (iv) the Reasonableness Test, it being common ground that the Connection Test is satisfied. We now set out the position of the parties on the disputed issues.

The Scheme Test

55. The Regulator contends that the Scheme Test is met because it is an occupational pension scheme within the definition provided by section 1 of the Pension Schemes Act 1993.

56. We had in evidence a copy of a declaration of trust dated 1 July 1987, the attestation clause of which shows it being executed by a director and the secretary of MGL. The declaration provides that the Scheme was established with an object of providing benefits for directors and employees of MGL and other associated companies that may become participating employers. The director who signed the declaration was eligible to join the

Scheme. The Scheme's main administration is in the United Kingdom. Accordingly, subject to the point referred to below, it was common ground that the Scheme meets the definition provided by section 1 of the Pension Schemes Act 1993.

57. In his Reply to the Regulator's Statement of Case, Mr Anant Shah has put the Regulator to proof on whether the declaration of trust was validly executed in accordance with the provisions of the Companies Act 1985 in force at the material time, because the copy in the bundle "appears to lack the company seal".

58. We determine this issue in favour of the Regulator. As Mr Walmsley observed, the declaration states in terms that "IN WITNESS WHEREOF the Founder has caused its Common Seal to be hereunto affixed the day and year first before written" and it is signed by a director and secretary next to the words "The COMMON SEAL … was hereunto affixed in the presence of". The seal imprint is not visible on the copy document, but in the absence of a wafer seal that is not surprising. In the absence of evidence to the contrary, we presume that the common seal was affixed to the document and the fact that the copy of the document in the evidence bundle does not appear to include the company's seal is, as Mr Walmsley submitted, no reason to go behind that.

59. Accordingly, the Scheme Test is satisfied.

The Party Test

60. The Regulator relies on a series of acts consisting of the act of entering into the 2012 Agreement, that is the 2012 Act and the subsequent act of the 2014 Payment, that is the 2014 Act. Those two acts together are referred to as the "Series".

61. The Regulator contends that Mr Anant Shah was a party to the act of entering into the 2012 Agreement on behalf of MFSL. That is not disputed.

62. The Regulator contends that Mr Anant Shah was also a party to the Series (and/or to the 2014 Act), for reasons which insofar as necessary include (per s 38(5) PA 2004) the fact that Mr Anant Shah knowingly assisted Mr Rohin Shah in the making of the 2014 Payment. This is because:

(1) He entered into the 2012 Agreement on behalf of MFSL, the purpose of which was to ring-fence assets away from MFSL.

(2) He did not notify the Regulator of MFSL's entry into the 2012 Agreement, notwithstanding his obligation to do so.

(3) He attended a conference with Counsel in August 2013 during which advice was given which put him on notice that the 2014 Payment ought not to be made.

(4) He was aware that Mr Rohin Shah intended to procure that the final tranche of the proceeds of sale from MPL's shares in the Indian JV would be removed from MPL.

(5) Anant Shah did nothing to stop Rohin Shah from acting in that manner including by:

(a) using his powers as sole director (at that time) of MFSL to remove Mr Rohin Shah as a director MPL or to direct Rohin Shah not to remove the final tranche of the proceeds of sale from MPL;

(b) informing the trustee of Rohin Shah's intentions;

(c) informing the Regulator of Rohin Shah's intentions;

(d) causing MFSL to exercise its power under the Scheme's rules so as to require contributions to be paid by MPL.

(6) On the contrary, Anant Shah actively made suggestions as to how Rohin Shah might proceed with removing the final tranche of the proceeds of sale from MPL.

63. Mr Anant Shah denied that he was a party to the Series because he denies that the 2012 Act and the 2014 Act together constitute a series and he contends that he was not a party to the 2014 Act.

64. In relation to the question as to whether the two acts constitute a series, Mr Anant Shah denies that the two acts are sufficiently related in order to be treated as a "series" for the purposes of s 38 PA 2004.

65. Mr Anant Shah contends that he was not a party to the 2014 Act because, he says:

(1) He had understood that the 2014 sale would have taken place in March or April 2014.

(2) He was unaware of Mr Rohin Shah having made the 2014 Payment until late April 2014.

(3) He at no stage expected Mr Rohin Shah to act unilaterally by (i) failing to inform Mr Anant Shah that the sale of the final tranche of the Indian JV shares had completed (ii) making the payment out from MPL direct to PPL, as opposed to in accordance with the mechanism in clause 2.4 of the 2012 Agreement; and/or (iii) failing to inform Mr Anant Shah that PPL had received the proceeds of sale.

66. Accordingly, we need to determine whether Mr Anant Shah was a party to the 2014 Act and also whether the 2012 Agreement and the 2014 Act can be regarded as a series of acts to which Mr Anant Shah was a party.

67. We set out below at [182] to [210] our findings in relation to the Party Test.

The Act Test

68. The Regulator contends that if the Tribunal finds that Mr Anant Shah has failed to establish that his arrangements with Mr Rohin Shah in 2004 amounted to a binding agreement the Series plainly satisfies the material detriment test. We deal in detail below with the question as to whether the 2004 Agreement was a legally binding agreement.

69. In short, the Regulator contends that in the absence of a binding agreement made in 2004, at the time of the execution of the 2012 Agreement, the final proceeds from the Indian JV would have been prospectively available for the purposes of improving the funding position of the Scheme. The implementation of that agreement extracted the value to MFSL of that valuable asset with the result that none of the 2014 sale proceeds were made available for the benefit of the Scheme.

70. Mr Anant Shah denies that the 2012 Agreement caused material detriment by itself. He contends that because the 2004 Agreement was legally binding, the entry into the 2012 Agreement had no substantive effect on the financial resources of MFSL or those of the Scheme.

71. Mr Anant Shah also advances a causation argument to the effect that, even if there was no binding contractual agreement entered into in 2004, he believed that there was such an agreement and, accordingly, would have permitted the proceeds of the 2014 sale to be paid to PPL in any event. Accordingly, he argues that as a matter of causation, the series of acts / acts complained of did not cause material detriment.

72. Accordingly, we need to determine whether or not the 2004 Agreement was legally binding. If we decide that it was not legally binding, we will need to consider Mr Anant Shah's causation argument.

73. We set out below at [211] to [248] our findings in relation to the Act Test.

The Reasonableness Test

74. The Regulator's position is that Mr Anant Shah acted wholly unreasonably in the circumstances. The Regulator contends that the effect of Mr Anant Shah's acts has been to force the Scheme into the PPF with a significant deficit, without benefiting at all from the final tranche of the 2014 sale proceeds.

75. The Regulator also relies on the following matters:

(1) Mr Anant Shah misled the trustee of the Scheme ("the Trustee") in relation to MFSL's financial position in a letter of 8 February 2011.

(2) Only a tiny fraction of the millions of pounds received by MFSL in respect of the Indian JV was used to fund the Scheme.

(3) As at May 2012 to January 2014, when MFSL was bordering on insolvency, Mr Anant Shah owed duties as a director of MFSL to act in the interests of the creditors of that company. Mr Anant Shah could not reasonably have believed that the act of causing MFSL to enter into the 2012 Agreement, or the act of the 2014 Payment, were compliant with those duties. The 'ring-fencing' of the 2014 Payment, the granting of a contractual right to PPL in respect of that sum and the making of the 2014 Payment to an offshore entity were quite obviously not acts undertaken for the benefit of the creditors of MFSL.

(4) Mr Anant Shah's responsibility for the chronic under-funding of the Scheme, thus placing it in a particularly vulnerable position during the acts complained of.

(5) The high degree of the involvement of Mr Anant Shah in the acts which are the basis for this regulatory action.

(6) His role as a director of the statutory employer, MFSL in which capacity he was solely responsible for the negotiation and agreement of the 2010 valuation, which involved him misleading the Trustee as to the value of MPL's interest in the Indian JV and being involved in the negotiations with the Trustee in 2012 and 2013.

(7) The fact that both the act of entering into the 2012 Agreement and the act of the 2014 Payment were notifiable events for the purposes of s 69 PA 2004. That provision requires (among other things) the employer to notify the Regulator of any "notifiable event", including "any decision by the employer to take action which will, or is intended to, result in a debt which is or may become due to the scheme not being paid in full".

(8) Mr Anant Shah's receipt of benefits under the Scheme, that is a cash lump sum of £141,349 and an annual pension of approximately £24,000.

(9) There is no likelihood of MFSL's creditors being paid. The dividend to unsecured creditors of MFSL in its liquidation was 0.43p in the £1.

76. Mr Anant Shah advances a number of arguments against the reasonableness of issuing a CN to him as follows:

(1) He has limited means to satisfy a CN and the imposition of a CN in the amount sought by the Regulator would bankrupt him.

(2) He did not directly benefit from the 2014 Payment.

(3) He paid sums to the liquidators of MFSL notwithstanding that any claims against him were statute-barred.

(4) He is now in his 70s and his health is impacted by various ailments commensurate with his age.

77. It is well-established in cases of this kind, where the court or tribunal is asked to decide whether a particular course of action is reasonable, that it is necessary to undertake a multi-factorial assessment and arrive at a value judgment. This means that we should treat all the relevant circumstances as facts which have to be balanced together to reach an assessment or evaluation in relation to this particular case, using our expertise as a specialist tribunal.

78. We set out below at [249] to [333] our findings in relation to the Reasonableness Test.

Findings of Fact: Background, The Party Test and The Act Test

79. It is convenient to take these matters together as these matters are interlinked.

General

80. Our findings set out at [81] to [93] are taken from Mr Anant Shah's unchallenged evidence in his witness statement and from the documents which were before us and which were also not in dispute.

81. The Meghraj Group was founded in 1922 by Meghji Pethraj Shah ("MP Shah"), the father of Mr Anant Shah and his brother, Mr Vipin Shah. Mr MP Shah became a very wealthy man who gave away the vast majority of his money. However, he was able in 1964 to put £900,000 each in trust for Mr Anant Shah and Mr Vipin Shah and also gave gifts to his 5 daughters. The trust funds were invested for Mr Anant Shah and his brother which over the years enabled both of them to become wealthy and, in common with their father, make significant charitable donations. The shares in the ultimate holding company of the Meghraj Group, MPGL, were held by a Liechtenstein foundation, called Animegh Foundation, a name which came from the amalgamation of the names of Mr Anant Shah's children, Anish and Meghna.

82. In 1972 Mr Vipin Shah and Mr Anant Shah established Meghraj Bank Limited ("Meghraj" is derived by combining their father's two names, Meghji and Pethraj). Mr Anant Shah's responsibility was the development of Meghraj Bank and its financial subsidiaries and associated businesses in the UK. Mr Vipin Shah moved to Jersey in 1976, where, in 1979, he founded and ran Kingsridge Trustee Company (Jersey) Limited, which later became Minerva Trust Company Limited (Minerva). Minerva was sold for £30 million in late 2018.

83. The business of Meghraj Bank and its financial subsidiaries was to offer a one-stop-shop in financial services predominantly, but not exclusively, for members of the Oshwal community, of whom the Shah family were prominent members, who wished to settle in the UK.

84. Mr Anant Shah explained that members of the Oshwal community are Jains. One of the tenets of the Jain faith is the principle of Aparigraha, which embraces non-acquisition and the disposal of surplus possessions. When Mr Anant Shah turned 50 in 1998, he decided to devote his wealth and time to charitable work and follow the principle of Aparigraha. Accordingly, Meghraj Bank was wound down by the end of 1999.

85. Mr Anant Shah made a general comment about how business is done in the Oshwal community. He said that in the Oshwal community the adage "my word is my bond" is adhered to steadfastly and transactions are based on trust.

86. Mr Anant Shah remained involved with the Meghraj Group after the closure of Meghraj Bank. His main role was acting as a director of MFSL between 27 March 2000 and October 2014. He became the sole director after 9 August 2010.

The Scheme

87. It was not in dispute that the statutory and contractual connection between MFSL (and MPL) on the one hand and the Scheme on the other establish that MFSL (and MPL) had material obligations for the purposes of s.38A(4) PA 2004. In summary:

(1) MFSL adhered to the Scheme and became the principal employer under the Scheme's governing documentation on 1 January 2001 MFSL had contractual contribution obligations under the Scheme's contribution rule.

(2) In addition to contractual obligations under the Scheme's contribution rule, MFSL was also a statutory employer for the purposes of s.75 PA 1995 and Part 3 of PA 2004.

(3) MPL became a participating employer on 1 July 1987 It therefore had contractual contribution obligations under the Scheme's contribution rule, like MFSL.

(4) MPL also became a statutory employer and there is no dispute that it remained a statutory employer until at least 31 December 2004.There is a dispute as to whether MPL remained a statutory employer, but for reasons that will become apparent we do not need to address that issue.

88. The Scheme had a surplus in 2002, but by 2005 it had gone into deficit. The deficit increased significantly thereafter, from £3.8 million on a buyout basis in January 2005 to £5.85 million in October 2014. Over the same period, MPL received benefits totalling £14.5 million from the Indian JV. In particular, the sum of £5.6 million was received in 2011 when the scheme had deficit of £4.8 million and the 2014 Payment amounted to £3.7 million at a time when the deficit was £5.85 million.

89. As far as contributions are concerned, these were agreed at a level of £51,000 per annum in 2006, rising to £56,400 in 2008 and £180,000 per annum (with increases in line with the retail price index) in 2011.

Arrangements concluded in 2004 between Mr Anant Shah and Mr Rohin Shah regarding MPL

90. By 2000 the only business left in the Meghraj Group in the UK was that of MPL, which had become a property investment business which at that time was wholly owned by a company called Meghraj Holdings Limited. Mr Rohin Shah, the son of Mr Anant Shah's sister, was at all material times a director of MPL and was responsible for its management. In 1995 MPL and Chesterton International Plc ("Chesterton") established the Indian JV, each party owning 50% of the venture. In 2004 Chesterton's share was bought out by MPL and a business partner of Mr Rohin Shah. Over time the Indian JV became enormously valuable.

91. By 2000 Mr Rohin Shah was pressing for his contribution to MPL to be recognised through MPL's remuneration arrangements. A profit share arrangement was recorded in Heads of Terms that were drafted without the involvement of lawyers in 2000. This document was entered into between Meghraj Holdings Limited (as MPL's 100% shareholder at that time) and Mr Rohin Shah and Mr P K Bhalla (a colleague of Mr Rohin Shah who worked for MPL at that time), who were described in the document as "Management". The agreement related to bonus allocations and working arrangements in relation to MPL.

92. The Heads of Terms provided that MPL's profits were to be shared 80:20, with Management receiving 80% and Meghraj Holdings Limited receiving 20%.

93. The Heads of Terms were expressed to cover only the UK business of MPL, which excluded the existing overseas businesses of MPL, including the Indian JV. However, the document mentioned MPL's existing overseas joint ventures (including the Indian JV), stating that capital and income arising therefrom would be credited to an interest free debt account which had been established to record an interest free loan of £130,000 to be made by Meghraj Holdings Limited to MPL.

94. Following the changes to the shareholdings in the Indian JV in 2004 referred to at [90] above, Mr Anant Shah and Mr Rohin Shah had discussions regarding MPL and the Indian JV. Mr Anant Shah says that he was acting in these discussions in his capacity as a director of MFSL which was then the sole shareholder in MPL and that he had agreed a negotiation framework with his brother Mr Vipin Shah, who was a director of both MPGL and MFSL at that time, under which MFSL was to secure a minimum of 20% share in the profits of MPL.

95. Following these discussions Mr Anant Shah prepared a handwritten note addressed to Mr Rohin Shah and dated 17 June 2004 which read as follows:

> "OUR ARRANGEMENTS
>
> I have been deliberating on the way we have been working at MPL and [the Indian JV]. I have seen that your role has been a very active one, whilst I spend most of my time on PR – I am satisfied that our interaction has worked. So, I thought we should formalise our arrangement from the time we started this new arrangement early last year. My suggestion is that you and I work on a 76% / 24% division of profits (both income and capital) from MPL + [the Indian JV]. Let me know what you think."

96. Subsequently, an annotation was added to this note, again in Mr Anant Shah's handwriting. The annotation bears the date 19 July 2004 and reads as follows:

> "Met Rohin – he had certain reservations re the split. Finally agreed 80/20 from 1/1/2003 with a prior return to MFSL for 2003 + 04 of £30,000 then straight split of the remainder, i.e. 80/20. He also said this should apply to anyone or entity he designates – I said OK."

97. Until 25 September 2020, Mr Anant Shah denied that the annotation bearing the date 19 July 2004 was added to the note of 17 June 2004 other than contemporaneously. However, on 25 September 2020, in a response to a notice issued by the Regulator under s 72 PA 2004 Mr Anant Shah stated that:

> "… he is uncertain as to the date upon which he added the annotation. He believes he either made the annotation was either made [sic] in 2004 or in 2011."

98. This issue was explored extensively with Mr Anant Shah in cross examination. Having initially maintained the line that he could not remember whether the annotation was added in 2004 or 2011, he accepted that the question of whether Mr Rohin Shah's profit share could be paid to another entity, which was referred to in the annotation, was not discussed in 2004. Accordingly, Mr Anant Shah then accepted that the note of 17 June 2004 had been annotated by him in 2011.

99. On the basis of that admission, it is clear that annotation was added shortly before the decision to record the arrangements for the sharing of the profits of MPL in a more formal agreement, that is the 2012 Agreement, was taken. That clearly had the effect, when the annotated note came to be annexed to the 2012 Agreement, as we mention later, of giving the impression that the annotated note had been created in 2004 and was recording a prior agreement that had been entered into at that time.

100. The position taken by both Mr Anant Shah and Mr Rohin Shah in the regulatory proceedings before the DP and in their respective witness statements filed in the Tribunal proceedings was that the 2004 Agreement, as evidenced by the note of 17 June 2004, was not, in any sense, an informal and non-binding agreement but was a legally binding agreement reached between MFSL, represented by Mr Anant Shah in his capacity as a director of the company on the one hand and MPL, represented by Mr Rohin Shah in his capacity as a director of that company on the other hand, pursuant to which the benefit of the Indian JV had been disposed of by MPL so as to be shared between Mr Rohin Shah and Mr Anant Shah in the agreed proportions.

101. Mr Anant Shah has not formally abandoned his contention that the 2004 Agreement was legally binding on both MFSL and MPL as previously described, but the evidence he gave at the hearing is clearly a belief on his part that the 2004 Agreement was not intended to be legally binding. Nevertheless, we will later in this decision deal with the question as to whether, objectively, the 2004 Agreement could be construed as being a legally binding agreement but at this stage confine ourselves to findings arising out of Mr Anant Shah's evidence.

102. In his cross examination Mr Anant Shah accepted that there was no need for a legally enforceable agreement between himself and Mr Rohin Shah when the arrangements were concluded in 2004. The following exchange took place:

> "Q. But if you had intended it to be a binding agreement, you would have at least had something in writing passed between you, wouldn't you?

A. The reason why we put the other agreement in writing was because of Mr Bhalla. He insisted that it be recorded, where as far as Rohin and I were concerned, that wouldn't have been necessary if they hadn't been there, Mr Bhalla hadn't been there, and it wasn't necessary as far as this was concerned, because it was between uncle and nephew.

Q. And that's because you had an understanding and trust between you?

A. Correct.

Q. There was no need for some sort of binding oral -- or binding arrangement?

A. Binding agreement, yes.

Q. There is no need for anything that was legally enforceable if you trusted each other between uncle and nephew?

A. Yes, because this was enough for us.

Q. So, as between uncle and nephew you trusted each other. You didn't need some kind of legally enforceable arrangement. You didn't contemplate going to court against your nephew?

A. No.

Q. So you didn't need a legally enforceable arrangement, is that right?

A. Correct.

Q. You just could trust each other, amongst the family?

A. As I said earlier, yes.

Q. Yes. So there was no binding contract between you and your nephew, was there?

A. As far as I was concerned, we had an agreement.

Q. Because you trusted your nephew?

A. And he trusted me.

Q. So there was no need for a legal contract?

A. According to me, this was the legal agreement. It was sufficient for us.

103. A little later in his evidence, Mr Anant Shah accepted that there was no need for MFSL to be technically a party to the understanding reached between himself and his nephew:

"Q. And what you mean by that is that an understanding reached between the two of you, you are confident that then the affairs of the corporate structure would be managed in such a way that -- they'll be managed so that the output of the process will reflect the understanding reached between you and your nephew?

A. Correct.

Q. Practically speaking, in practice?

A. In practice, that's exactly what happened.

Q. And it's the practical situation that mattered from your point of view, wasn't it?

A. Correct.

Q. So as long as you trusted on your advisers managing a corporate structure in a way, the outcome was in practice split 80/20, that's what mattered?

A. Correct."

[…]

Q. One of the advantages of leaving it as an arrangement between yourself and your nephew is that with your advisers' assistance, you can manage the way in which the 80/20 spoils are split in a tax-efficient way, yes?

A. As far as MFSL was concerned, it was very simple, because we would receive dividends from MPL, and those would be sent up to MP Group Limited. As far as MPL/Rohin was concerned, it was for him to determine how he wished his 80% to be distributed.

Q. And because the understanding was that it was for him to determine, that left it

flexible?

A. As far as he's concerned, yes, oh, yes.

Q. He could take it out of the bottom as a bonus, or he could choose to arrange for it to flow up, provided the advisers said it could work that way, and out the top?

A. Yes.

Q. And what actually happened was a mix of the two?

A. Correct.

Q. That all reflects the fact that this was an arrangement between you and your nephew that could be implemented in accordance with how your advisers said it could be made to work within the corporate structure?

A. Correct.

Q. Now, you described it as a loose business arrangement in 2013,18 and that ties in with what you said about the principles of Jain in practice, doesn't it? You rely on trust and understanding among the members of the community?

A. Yes.

Q. Yes?

A. Yes.

Q. Can you speak up?

A. Sorry, yes.

Q. And because you rely on trust and understanding, you don't need an enforceable contract as such?

A. Yes.

Q. Yes, you agree?

A. Yes."

104. Those answers clearly demonstrate that, consistent with the values of the Oshwal community, referred to at [85] above, Mr Anant Shah regarded the arrangements that were agreed with Mr Rohin Shah as being binding on him as a matter of trust and honour, without the need for them to be recorded in a legally binding contractual agreement. Insofar as the arrangements had to be implemented through the corporate structure, that is so that the payments were routed through MPL and MFSL for onward payment as envisaged in the note recording the arrangements, it was understood that Mr Anant Shah would procure that MFSL would implement the arrangements when the sums to be shared were received by that company.

105. This is consistent with what is recorded in the minutes of a meeting held with the Trustee of the Scheme on 23 January 2013, at which Mr Anant Shah was present. Mr Anant Shah is recorded as explaining that he had originally had a "loose" business arrangement with Mr Rohin Shah which had led to the requirement for "the subsequently formalised Agreement…", that is what became the 2012 Agreement. Although Mr Anant Shah says he cannot remember making that statement, and could not confirm that he believed the minutes to be accurate, he confirmed that he did not object to that description of the arrangement at the time he received the minutes. Accordingly, we accept that what was said in those minutes was an accurate record of what Mr Anant Shah said at that meeting on this issue.

106. That indeed was what happened in practice. Mr Anant Shah confirmed that the arrangements were designed to be flexible. He said that as far as MFSL was concerned "it was very simple, because we would receive dividends from MPL, and those would be sent up to MP Group Limited. As far as MPL/ Rohin was concerned, it was for him to determine how he wished his 80% to be distributed."

107. As we shall see, in practice until the 2014 Payment, all the profits from the Indian JV, to be received by Mr Anant Shah, including proceeds from the sale of shares in the Indian JV, were distributed by way of dividend to MFSL and they were subsequently passed on up the ownership chain within the Meghraj Group. As Mr Anant Shah confirmed in his evidence, payments to Mr Rohin Shah were made more flexibly, some of his share could be paid to him by way of bonus or he could choose to arrange for it to flow through the corporate structure.

108. Furthermore, as evidence that the arrangement was one between uncle and nephew, rather than involving the corporate entities, Mr Anant Shah confirmed that he had no interaction with the other directors of MPGL about the arrangements and did not think it necessary to obtain the approval of another director of MFSL, in particular Mr Michael Howell. He only thought it necessary to proceed with the approval of his brother, Mr Vipin Shah, consistent with the trust between them as family members.

109. Similarly, Mr Anant Shah confirmed that Mr Rohin Shah did not seek to involve the co-director of MPL, that is Mr Bhalla, in the discussions.

Events during 2005 to 2009

110. In 2006 Mr Anant Shah and Mr Rohin Shah were aware of the potential exposure of MPL as regards the Scheme.

111. On 1 July 2006, an option agreement, expressed to be non-binding, was entered into between a vehicle of Mr Rohin Shah, MFSL, MPGL and MPL. This agreement stated that (i) it was the (non-binding) intention of MFSL to covenant to grant an option to a vehicle of Mr Rohin Shah to buy from MFSL its shareholding in MPL and that (ii) it was the (non-binding) intention of MFSL and MPGL that when the option was granted and then exercised, Mr Rohin Shah's vehicle would be indemnified in respect of any claims made against MPL or Mr Rohin Shah's vehicle in respect of pension liabilities.

112. In 2007, Jones Lang LaSalle Inc ("JLL") agreed to purchase the shares in the Indian JV from MPL in various tranches, which happened over the next few years. It was agreed that JLL would buy the entirety of the shares in the Indian JV over three phases, in 2007, 2010 and 2012. The timing of the latter two phases was subsequently adjusted in 2009 and again in 2010, resulting in sales over four phases: 2007, 2010, 2011 and 2014. The 2007 sale generated net proceeds for MPL of £1.48m.

113. During this period statutory accounts were prepared for MPL and MFSL each year. As Ms Hart's unchallenged expert's report confirms, the contents of these accounts and for all subsequent years that are relevant to these proceedings are inconsistent with the proposition that Mr Rohin Shah personally had any contractual or trust-based rights giving him a financial interest in funds generated by the Indian JV. Mr Anant Shah's evidence was that the existence of the 2004 Agreement was well known to MPL and other companies in the Meghraj Group, but there is no evidence that any challenge was made to the basis on which the accounts were being prepared and approved.

114. Ms Hart examined the evidence available regarding the flow of funds following the various tranches of the sale of MPL's shares in the Indian JV. In relation to the 2007 sale, Ms Hart described how funds were received by MPL in respect of the divestment of its shares and the sequence of transactions that arose in order to discharge the alleged liability to Mr Rohin Shah in respect of the arrangements recorded in the 2004 Agreement.

115. Ms Hart's opinion was that had MPL ceased to be entitled to the economic benefit of the Indian JV, whether that was because the 2004 Agreement created a binding contract or a trust over the proceeds of the sale, then MPL should have disclosed in its accounts that the right to the economic benefits of the shares in the JV had, following the 2004 Agreement, been transferred to Mr Rohin Shah. Ms Hart observed that no such disclosures were made.

116. Ms Hart also said that the accounts did not disclose remuneration in respect of cash paid to Mr Rohin Shah under the profit-sharing agreement. The accounts show that MPL made dividend payments which do not, in her view, represent the satisfaction of remuneration.

117. Ms Hart also observed that the accounts did not show any impairment of the shareholding in the Indian JV to reflect only the proportion of the assets which would generate future economic benefits to which MPL was entitled. Neither did the accounts show Mr Rohin Shah as a creditor of MPL in relation to any sums due to him under any contractual arrangements made pursuant to the 2004 Agreement.

118. What the accounts do show is a transfer of cash to MFSL by way of dividend. That is clearly inconsistent with Mr Rohin Shah having any beneficial interest in or having any contractual right to the sums concerned. In relation to the first tranche of the share sale in 2007, the accounts show the payment of a dividend from MPL to MFSL and from MFSL to MPGL. Subsequently, there was a payment in 2008 by way of dividend from MPGL to the Animegh Foundation (MPGL's ultimate owner).

119. This is consistent with Mr Anant Shah's own evidence. In his witness statement he said that after around 2006, payments were made up through the corporate chain in the form of dividends paid to MPGL which then paid the profits to Whiteoak Investments Limited ("Whiteoak"), Mr Rohin Shah's nominated company in Jersey, or elsewhere, at his direction.

Events during 2010 to May 2012

120. In 2010 the Indian JV continued to generate significant sums for MPL. In the financial year ended 31 December 2010, MPL received a dividend of £964,084 from the Indian JV, having also received a dividend of £575,236 from the Indian JV in the previous financial year.

121. In 2010 MPL sold part of its shareholding to JLL and received a net amount of £1.57 million. As confirmed by Ms Hart in her expert report, of this, £1,037,776 (66%) was paid to Mr Rohin Shah's nominated company, Whiteoak, during the same financial year, the year ended 31 December 2010. The flow of the funds was via a dividend from MPL to MFSL, a dividend from MFSL to MPGL and payment of consultancy fees by MPGL to Whiteoak.

122. Also in 2010, Mr Anant Shah attended various meetings at which it was made clear that the Scheme was in a difficult financial position. At a meeting with the Trustee on 16 April 2010 Mr Anant Shah was informed that initial estimates indicated that the deficit had increased; in January 2007 assets were £5.1m and liabilities were £5.4m, whereas as at April 2010 the assets were valued at £4.5m and the liabilities at £7m. The minutes record that "the trustee will be meeting with AS to discuss the covenant in greater detail".

123. At a meeting on 11 June 2010, Mr Anant Shah was told that the deficit contributions likely to be required were either £75,000 or £150,000 per year for 10 years.

124. On 22 October 2010, in advance of a meeting with Mr Anant Shah to discuss the Scheme's valuation, and in the context of the Trustee "giving some further thought to the covenant issue", the Trustee asked Mr Anant Shah for "the latest available accounts" for MFSL and MPL.

125. Mr Anant Shah spoke to Mr Rohin Shah on this issue and reported to Mr Howell that Mr Rohin Shah thought it would be in order to send the abbreviated accounts required to be filed at Companies House and which omitted the profit and loss account rather than the full accounts. Mr Anant Shah was told by Mr Howell that such a course "may just achieve a delay", since the Trustee may ask for full versions, and that as the Trustee had previously seen full MFSL accounts it may "seem 'unhelpful' to just be offering the abbreviated format". Abbreviated accounts were then sent to the Trustee for MPL and MFSL for the financial year ended 31 December 2009. At this stage, the value of the Indian JV was only shown in MPL's accounts at its book value of £80,000, which Mr Anant Shah accepted was an inaccurate picture of the true value of the Indian JV.

126. As Mr Walmsley observed, the relevance of abbreviated accounts is that MPL's full accounts for the financial year ended 31 December 2009 showed dividends receivable of £575,236 whereas the abbreviated accounts for that period did not as they omitted the profit and loss account. Mr Homer of the Trustee confirmed in response to an information request from the Regulator in 2018 that the financial statements provided by Mr Anant Shah "do not reflect any income from JLL JV" and that he was not informed about the sale of shares in 2010. In his oral evidence, Mr Anant Shah did not accept that it was unreasonable of him not to have sent the full accounts to the Trustee on the basis that he would have sent them if asked. Similarly, he said that he thought it was reasonable not to inform the Trustee of large inflows of sums from the Indian JV unless asked.

127. On 26 November 2010 Mr Anant Shah attended a meeting with the Trustee at which the Scheme's actuary made a presentation on the Scheme's funding position. The Scheme's assets were estimated to be £4.48m and its liabilities were estimated to be £7.32m. A slide headed "Recovery plan" included annual contributions over a 10-year period of between £220,000 and £370,000 (depending on assumptions).

128. On 29 November 2010, Mr Anant Shah emailed the Trustee for clarification on why "the required contributions are now SO much higher" as compared to the figures discussed at the 11 June 2010 meeting. The Trustee noted that the figures were now based on more prudent assumptions.

129. Therefore, against a background of the generation of significant sums by the Indian JV and a deterioration in the finances of the Scheme, Mr Anant Shah and Mr Rohin Shah took various steps.

130. First, in April 2010 a "Consultancy Service Agreement" was entered into between MPGL and Whiteoak. As explained above, of the £1.57m received by MPL in respect of the share sale in 2010, the entirety was paid to MFSL via dividends, £1.46m was paid by MFSL to MPGL via dividends, and MPGL paid £1.04m to Whiteoak as so-called "consultancy fees". It is clear that the consultancy agreement was a sham because Mr Rohin Shah admitted in a later disclosure to HMRC that in reality Whiteoak did not provide any services to the Meghraj Group and the consultancy agreement was purely mechanism by which his share of the sale proceeds were transferred out of the Meghraj Group.

131. Both Mr Anant Shah and Mr Rohin Shah now wished to release monies from the Indian JV as soon as possible. As a result of changes in the timing of JLL's acquisition of MPL's shares in 2009 and 2010, the final phases of that acquisition would not occur until May 2011 and March 2014 at the earliest.

132. On 8 February 2011, Mr Anant Shah wrote to the Trustee referring to discussions that had taken place regarding the covenant, that is the support from MFSL to the Scheme and its ability and willingness to make good any deficit and in general provide support to the Scheme into the future. The letter made no mention of the Indian JV or the very significant sum due to be received by MPL as a result of the next sale to JLL in 2011, but said that MFSL was broadly reliant on its shareholder (MPGL) to introduce funds to meet its pension commitments.

133. On 26 March 2011, Mr Anant Shah agreed a schedule of contributions with the Trustee which required MFSL to pay contributions of £180,000 per annum over the next ten years, payable monthly and increasing with RPI. Mr Anant Shah confirmed in his oral evidence that monies were held back in MFSL to meet these obligations for a period of 3 years, that is until the next tri-annual valuation. At the same time, he had been having discussions with Mr Rohin Shah about MFSL receiving the rest of its 20% share in the profits of the Indian JV as soon as possible. The Trustee was not informed about the possibility of MFSL receiving this sum at the time the contribution schedule for the next 3 years was agreed.

134. In around late June 2011, the next phase of JLL's acquisition took place. MPL received a net amount of £5.24m of which £5.22m was paid to MFSL by dividend and £4.78m was paid by MFSL to MPGL by dividend, thus MFSL retained about £440,000. MPGL paid £2.81m to Whiteoak as "consultancy fees".

135. This division of the sale proceeds involved MFSL receiving a greater portion of the 2011 sale proceeds as compared to previous sales, and was treated by Mr Anant Shah and Mr Rohin Shah as 'buying out' MFSL's remaining interest in the proceeds of sales to JLL, with Mr Rohin Shah later receiving the entirety of the 2014 sale proceeds. Mr Anant Shah and Mr Rohin Shah have contended that this division of the 2011 sale proceeds occurred pursuant to an alleged binding contractual variation to the 2004 Agreement which they allege occurred in either June 2010 or March 2011. There is, however, no documentary evidence to support a contention that either Mr Anant Shah or Mr Rohin Shah intended or sought to enter into a binding agreement to vary the 2004 Agreement in 2011 or at any time before then.

136. A meeting took place on 29 June 2011, called by Mr Rohin Shah, at which Mr Anant Shah and various advisers were present. Draft minutes of the meeting were in evidence which record that Mr Rohin Shah had arranged the meeting to explore ways of extracting MPL from "the MFSL Group".

137. After discussing the Scheme's deficit, which Mr Anant Shah is recorded as stating had increased to approximately £3m as at December 2010, the draft minutes record that the attendees were aware that "The pension fund trustees could question the flow of the dividends from MPL to MFSL to MPG" and that the next valuation update would be in March 2014. The draft minutes also record Mr Anant Shah noting that if MPL were to be sold by MFSL, then MPGL "would be expecting 40% of the current sale proceeds".

138. On 29 July 2011, the auditor of the Scheme asked Mr Anant Shah to authorise Mr Howell to send him a copy of the latest accounts of MFSL. On the same day Mr Anant Shah asked Mr Howell "Have you actually advised anyone that we have prepared full accounts?".

139. Mr Howell responded that he expected that the auditor would ask for further information. He said: "John [the auditor] is a bit of a detail man he will I think follow up the

request to see them as a lot [of] his discussions with Wayne [Trustee] seem to be over concerns regarding strength of covenant, which John is obliged to consider".

140. On 1 August 2011 Mr Howell advised Mr Anant Shah to respond as he did last year, sending only the abbreviated accounts. He said that he found it "surprising that the Trustee did not press for the full accounts in November 2010 given that previously they had seen full accounts."

141. Following that email, Mr Anant Shah replied to the Scheme auditor as follows:

> "I have requested [Mr Howell] to send you the accounts of [MFSL] as at 31 December 2010."

142. As Mr Anant Shah clearly knew to be the case, that statement was misleading in that it was intended only to send the abbreviated accounts and hope that the auditor or the Trustee did not ask for any more information. We therefore accept Mr Walmsley's submission that Mr Anant Shah intentionally withheld full information from the Trustee by authorising the release of abbreviated accounts only, in full knowledge that the Trustee was concerned about the covenant to the Scheme.

143. In October 2011, Mr Anant Shah (together with his wife and children) and Mr Vipin Shah executed documents to exclude Mr Anant Shah and Mr Anant Shah's wife and children from members of the class of beneficiaries of the Animegh Foundation, MPGL's shareholder.

144. In December 2011, solicitors were instructed by Mr Anant Shah on behalf of MFSL to advise on the implications of proposals to remove MPL from the ownership of MFSL, and its transfer to an offshore company.

145. On 12 December 2011, Mr Glenn Hurstfield, who had been Mr Anant Shah's personal solicitor for many years, sent an email to another solicitor (Mr Adam Bradley) who was advising on corporate matters for MFSL in advance of a meeting which was to be held shortly. The email records that "arguably" the entire amount of the anticipated 2014 sale proceeds of the shares in the Indian JV was due to Mr Rohin Shah and says that originally an idea had been that MPL would be transferred or sold to Mr Rohin Shah "but given the current state of play with MFSL's potential future pension obligations in 2014, Rohin understandably wants his money but without him being saddled with the … pension debts".

146. After summarising a scheme that Mr Rohin Shah's accountants had come up with involving a sale of MPL to an offshore company, Mr Hurstfield commented that he was not comfortable with it because it was "an artificial arrangement simply to remove the [Indian JV] investment ahead of the payment date, thereby disposing of a valuable asset which could (IF further pension contributions are ordered in 2014) have been used to fund any ongoing shortfall".

147. Mr Hurstfield expressed concerns that Mr Anant Shah in his capacity as a director of MFSL may be acting ultra vires if he agreed to the disposal of the shares in MPL "when he has constructive knowledge of what the sale is designed to achieve." He said he would prefer "he exhibits the agreement/Memo of Understanding between MPG and Rohin as evidence that the [MPL] share of JLL is of no value as this has already been contractually

pledged by MPG", which is understood to be a reference to the 17 June 2004 note referred to at [95] above.

148. On 15 December 2011 Mr Anant Shah and Mr Rohin Shah met with various advisers including Mr Hurstfield and Mr Bradley. We had in evidence a copy of the minutes of that meeting which refer to a "Memorandum of Understanding" – understood to be a reference to the 17 June 2004 note as annotated which is described as an "important document that underpins the whole argument of why we are doing what we are doing … in case there was any comeback from the pension fund trustees and/or the pension fund regulator". It was said that the "MOU" should be put on to a "proper legal footing and so that it records the 'understanding' from the original date ("MOU Legal")" and that its tax implications for Mr Rohin Shah would need to be checked. A pensions adviser, who was present, Mr Nick Frank, is recorded as having advised that once the "MOU Legal" was in place, "the trustees should be approached and the proposed transaction to take out the current market value of MPL (c.£4m, say) explained to them and, in this manner, it is then in the clear that the transaction was entered into with their full knowledge".

149. It is therefore clear from these minutes that the strategy to be followed was to take the position that the proposed "MOU Legal" was intended to record in more formal terms a pre-existing legal agreement – the 2004 Agreement. However, it is also clear that Mr Anant Shah was advised that when implemented the arrangements should be explained to the Trustee.

150. As Mr Walmsley observed, some additional context to the idea that the "MOU" would be put on a "proper legal footing" was given by Mr Hurstfield to MFSL's liquidators in an interview on 23 August 2016, in which he said:

> "… because of the cultural aspects of the family this was to them a binding agreement but if it came to a third party looking at it, would it be a … So, it was agreed that it should be restated by the parties in a form which was in a more legal document. So it was never meant to be a sort of fresh agreement. It was a restatement of the earlier 2004 informal agreement between Anant and Rohin"

151. In the same interview Mr Hurstfield said

> "… the 2012 Agreement – this actually varied what the legal position was, the recognition being because Rohin had actually landed this and managed this deal singlehandedly he should be rewarded more than passing everything up through – to MFSL."

152. On 19 December 2011, a "copy of the informal memorandum between Anant and Rohin which took place [sic] between June and July 2004" was provided to Mr Bradley by Mr Hurstfield. Mr Hurstfield said, "I suspect this is all that is required to put together the bones of the Memorandum of Understanding".

153. It is therefore clear that the lawyers were under the impression that the annotation to the 17 June 2004 note was made on the date it bore, that is 19 July 2004 but, as Mr Anant Shah now accepts, the annotation was added in 2011, shortly before the memorandum was provided to Mr Hurstfield.

154. Following this, a draft of what became the 2012 Agreement was produced by 10 January 2012. On 13 February 2012, a copy of the draft agreement was sent to Mr Nick

Frank who in an email to Mr Bradley and Mr Hurstfield commented that "I remain concerned by this, much as I was at the meeting we had back in December". Mr Frank went on to explain that he had a "major concern" about the Trustee finding out that "the monies which came to MFSL last year all passed up to [MPGL] and were then distributed to family members, with none of it going to the pension fund". Mr Frank added that if the trustee found out "… not only did that happen but that nothing else is going to come from the sale of the JLL shares then they will possibly argue that the last asset of the company has been disposed of with no regard as to the funding of the pension scheme."

155. Mr Anant Shah confirmed in his oral evidence that Mr Frank's concerns were communicated to him and that the intention was that once the 2012 Agreement had been signed it would be presented to the Trustee.

156. On 18 May 2012, the 2012 Agreement was entered into. The parties were MPGL, MPL, MFSL and PPL.

157. Recital 3 to the 2012 Agreement stated that it "records and clarifies the terms of the Memorandum of Understanding". That is a reference to the 17 June 2004 note which was annexed, including the annotation purportedly dated 19 July 2004. Mr Anant Shah confirmed in his oral evidence that because the annotation was not made until 2011, a misleading impression was created because on the face of the document the annotation purported to have been made on 19 July 2004.

158. Recital 4 to the 2012 Agreement records that all sums owed to MFSL under the arrangements had previously been paid so that MFSL had no claim in respect of any further sums (described as "Sale Proceeds" and "Other Relevant Sums") arising from its shares in MPL or from the business of MPL.

159. The key operative provision of the 2012 Agreement is Clause 2.4 which provides:

> "It is further agreed by the parties that MFSL shall have no further entitlement to or claim in respect of any Sale Proceeds or to any Other Relevant Sums from the Completion Date. PPL, as the party which is ultimately entitled to such Sale Proceeds (through the declaration and payment of further dividends by MFSL) or Other Relevant Sums, be solely entitled to receive and be paid all and any further Sale Proceeds or Other Relevant Sums as from the Completion Date absolutely without any deduction, set-off, counterclaim or any other withholding whatsoever in accordance with the terms of this Agreement."

160. It is clear from this clause that it was provided that henceforth PPL would be the sole beneficiary of any sums derived from MFSL's holding of shares in MPL.

Events after the execution of the 2012 Agreement

161. On 20 May 2012, two days after the 2012 Agreement was entered into, Mr Anant Shah contacted the Trustee to arrange a meeting. Three days later, on 23 May 2012, the assets of the Animegh Foundation, MPGL's shareholder and thus the offshore entity which received the "20% share" of the proceeds generated from the Indian JV, were transferred to the New Medici Trust, another Shah family trust.

162. Mr Anant Shah's meeting with the Trustee took place on 25 July 2012, at which the Trustee was told of the 2012 Agreement.

163. Less than a week later, on 31 July 2012, Mr Anant Shah, his wife and his children signed a declaration of release which excluded themselves from future benefit under the New Medici Trust. Mr Anant Shah had previously received one payment from the New Medici Trust of approximately £1,350,000 on 15 July 2010 which was used to repay a bridging loan he had taken out for the purchase of his home.

164. Mr Anant Shah did not accept that the timing of the execution of the declaration of release was such that it enabled Mr Hurstfield to make the statement referred to at [165] below in his letter of 2 November 2012. He gave a "no comment" response when asked why Mr Hurstfield had not stated that until 31 July 2012 Mr Anant Shah and his immediate family did have an interest in the trust. We return to that issue when considering the Reasonableness Test.

165. On 2 November 2012 Mr Hurstfield provided the Trustee with a pack of papers including a copy of the 2012 Agreement, with a copy of the annotated 17 June 2004 note attached. The covering letter described the history of the Indian JV and said that "in a memorandum dated 19 July 2004" it was agreed between Mr Rohin Shah "and the directors of MFSL" that the net proceeds of the Indian JV would be paid 20% to MFSL and that the remaining 80% belonged to Mr Rohin Shah. Mr Hurstfield also stated that neither Mr Anant Shah nor his immediate family had any direct or indirect financial interest in the offshore trust which owned the shares in MPGL, which was the position following the declaration of release referred to above.

166. The letter then referred to the pension position, stating that now MFSL's interest in the Indian JV had been exhausted, the existing level of contribution to the Scheme was no longer sustainable. Mr Hurstfield also reiterated that MFSL would have no further interest in the Indian JV when it was finally liquidated in 2014.

167. The letter went on to offer to pay £48,000 to the Scheme with a view to MFSL being placed into liquidation. The Scheme's deficit was known at that time to be £4.8 million on the buyout basis. The offer was not accepted.

168. A meeting took place on 23 January 2013 which was attended by Mr Anant Shah and representatives of the Trustee. Mr Anant Shah was informed that the Scheme's deficit was understood to have increased to £7 million on the buyout basis.

169. On 22 March 2013 Mr Hurstfield wrote to the Trustee offering to pay £250,000 to the Scheme. This offer was not accepted.

170. There was then a change in approach. On 19 June 2013 Mr Hurstfield wrote to the Trustee notifying it that the decision had been made to withdraw the present offer of settlement and to continue the monthly payments as required under the present arrangement.

171. From June 2013, MPL began making monthly loans to MFSL in the sum of £15,000 per month. This enabled MFSL to meet its monthly contributions to the Scheme.

172. On 20 August 2013, a conference with Counsel was attended by Mr Anant Shah, Mr Rohin Shah and Mr Hurstfield, following which a note of conference was settled on 14 October 2013. Counsel had been asked to advise on whether the 2012 Agreement and the earlier annotated 17 June 2004 note were:

> "… sufficiently strong to meet any arguments the Pensions Regulator or the PPF might raise that the final payment from the JLLM deal, which is purely for the benefit of RS, should be withheld and paid towards the MGPS deficit? If so, what steps, if any, can the parties take to mitigate this liability?
>
> As MPL is estimated to owe 10% of the MPGS deficit, is there an argument that MPL should withhold the sum MPL owes towards the deficit from the final payment from the JLLM deal and pay this towards the MGPS deficit? If so, what steps, if any, can the parties take to mitigate this liability?"

173. The note of the conference records that Counsel advised that "it would be difficult to argue any sale proceeds could be withheld from the Scheme, a third party creditor." Counsel advised that various steps needed to be taken to clarify and strengthen the position, including executing a deed of rectification or supplemental agreement to the 2012 Agreement which clarified any ambiguity and confusion. Counsel advised that in the meantime no substantive steps should be taken, such as a sale of MPL or a transfer of the shares in the Indian JV.

174. Mr Rohin Shah became concerned about needing to continue to drip feed the Scheme with monthly contributions in order to avoid MFSL being placed into liquidation before the 2014 sale proceeds had been received. On 30 October 2013 Mr Rohin Shah asked Mr Hurstfield in an email whether MPGL could assist MPL with making the necessary loans to MFSL, because he was concerned about MPL's cash flow situation. Mr Anant Shah refused that request.

175. On 7 November 2013, Mr Hurstfield sent an email to Mr Rohin Shah. In this email, Mr Hurstfield communicated that Mr Anant Shah was upset with the changes to the timing of the final sale of the shares in the Indian JV. He said that "it was only at the last moment that you decided to delay your own payment until 2014. If that had not happened, then final payment would have been made in 2012 and the current problems may well have been avoidable." In his oral evidence, Mr Anant Shah agreed that it would have been better to have had the Indian JV all sorted so that he could have presented a finalised position to the Trustee as part of the next process, due in 2014.

176. Mr Hurstfield's email also referred to a "strategy" discussed between Mr Rohin Shah and Mr Anant Shah at a previous meeting "regarding the dispersal of the last [Indian JV] payment by way of 'bonus' etc …" and said that AS could not be party to that in the light of Counsel's advice, but if that were Mr Rohin Shah's "preferred route" Mr Anant Shah suggested that he retire as a director of MFSL in favour of Mr Rohin Shah, thereby leaving Mr Rohin Shah free to proceed as he saw fit.

177. In response, Mr Rohin Shah said that the suggestion proposed to him was not acceptable, that Counsel's view had not been decisive, and that any negotiation with the Trustee had no clear outcome.

178. On or around 3 January 2014, MPL (acting by Mr Rohin Shah) exercised its put option in respect of the remainder of MPL's shares in the Indian JV. On or around 14 or 15 January 2014, JLL paid the sum of 483,027,913 rupees (equivalent to £3,688,108) to MPL. Mr Rohin Shah directed that this be paid to his offshore nominee, PPL, the same day. Mr Anant Shah says that he was unaware that this payment had been made until some three months later. We return to that issue later in this decision.

179. Following this event, MPL stopped lending money to MFSL and MFSL's monthly pension contributions stopped in March 2014.

180. On 6 May 2014 Mr Hurstfield wrote to the Trustee to give notice that neither MFSL nor MPL would be making any more contributions to the Scheme.

181. On 22 August 2014, the Meghraj name was removed from MPL, which was re-named Upgrade Properties Ltd. MFSL's name had already been changed, on 23 October 2013, to Turley Services Ltd. On 30 September 2014, the Trustee resolved to wind up the Scheme. On 9 October 2014, MFSL and MPL were placed into creditors' voluntary liquidation. The Scheme received no significant distribution from either liquidation. It was owed £5,317,000 from MFSL and £534,000 from MPL.

Discussion- The Party Test

182. There are two issues that we need to determine under the Party Test:

(1) Do the 2012 Act and the 2014 Act together constitute a "series" for the purposes of s 38(12) PA 2004?

(2) If so, was Mr Anant Shah a party to the Series?

183. As Mr Walmsley submitted, the first of these issues sub-divides into two sub-issues:

(1) An issue of statutory interpretation: does any chronologically ordered list of acts qualify as a "series" for the purposes of s.38(12) PA04?

(2) If not, are the two acts relied on in this case nevertheless sufficiently connected to qualify as a series?

184. We do not need to determine the statutory interpretation issue on the facts of this case. As Mr Walmsley submitted, it is plain as it can be that the two acts relied on by the Regulator in this case, that is the 2012 Act and the 2014 Act, are sufficiently related to qualify as a "series" for the purposes of s 38(12) PA 2004, even if the term is construed in a way that requires there to be some underlying connection between the acts in order for them to qualify as a series.

185. Mr Anant Shah denied in his Reply that the two acts concerned could be regarded as a series, but no reasoning for that position was set out in that document. Nor did Mr Anant Shah make any submissions on the point at the hearing.

186. Our findings of fact show that the purpose of the 2012 Agreement was to record the agreement between the relevant parties as to how the proceeds of the last tranche of the sale of the shares in the Indian JV were to be dealt with. As set out at [159] above, the agreement recorded that MFSL would have no further entitlement to any of those sale proceeds and that PPL, the offshore vehicle of Mr Rohin Shah, alone was entitled to receive and be paid those proceeds. Accordingly, the 2012 Agreement, as Mr Walmsley submitted, was intended to clear the path for the extraction of the remaining value in the Indian JV and its payment to PPL.

187. The 2014 Payment was made in reliance on the terms of the 2012 Agreement. As discussed later, there is a dispute as to whether the manner in which the payment was made,

namely a direct payment from MPL to PPL, was what was contemplated by the agreement, as maintained by Mr Rohin Shah, or whether, as maintained by Mr Anant Shah the payment should have been made through the declaration of dividends by MPL to MFSL and then upwards through the relevant Meghraj Group structure, as had previously occurred. However, in our view, whichever of those positions is correct, the ultimate result was the same, PPL received the full benefit of the proceeds of the sale of the last tranche of shares, as provided by the terms of the 2012 Agreement.

188. Accordingly, whilst the 2012 Agreement cleared the path for the extraction of the value of the Indian JV, the 2014 Payment constituted the extraction of value and in our view that is clearly sufficient to amount to a series of acts for the purpose of the test in s 38(12) PA 2004.

189. Mr Anant Shah accepted that he was a party to the first act in the series, the 2012 Agreement. That is patently the case because he signed it on behalf of MFSL. He signed the 2012 Agreement in the knowledge that MFSL's pensions adviser, Mr Frank, had raised serious concerns about the last major asset of the company being disposed of with no regard as to the funding of the pension scheme, as described at [154] above. Mr Anant Shah also knew that no specialist pensions advice was taken about the implications of entering into the 2012 Agreement and, in particular, whether it was a "notifiable event" which pursuant to Regulation 2(2)(a) of The Pensions Regulator (Notifiable Events) Regulations 2005/900 should have been notified to the Regulator. That is a matter that we return to later when considering the Reasonableness Test.

190. Mr Anant Shah contends that he was not a party to the 2014 Act because, he says:

(1) He had understood that the 2014 sale would have taken place in March or April 2014.

(2) He was unaware of Mr Rohin Shah having made the 2014 Payment until late April 2014.

(3) He at no stage expected Mr Rohin Shah to act unilaterally by (i) failing to inform him that the sale of the final tranche of the Indian JV shares had completed; (ii) making the payment out from MPL direct to PPL; and/or (iii) failing to inform him that PPL had received the proceeds of sale.

(4) Given that Clause 2.4 of the 2012 Agreement clearly stated that the payment should be made in the previously agreed, and implemented, manner, up the corporate chain, he relied on that mechanism. He says that when he found out 3 months later that the sum had been paid to PPL, he had no way of being able to reverse the payment. Even if he had tried to contact Mr Rohin Shah (with whom he was not at that stage on speaking terms) he would have been ignored.

191. We reject Mr Anant Shah's submissions on this point. It was clear that the purpose of the 2012 Agreement, which Mr Anant Shah executed on behalf of MFSL, was to ring fence the Indian JV as away from MFSL. That is abundantly clear from recital 4 to the agreement. Regardless of the question of the interpretation of the agreement, which we return to shortly, it was clearly contemplated by the 2012 Agreement that any further sums received in respect of the Indian JV were to be passed through to PPL, the vehicle of Mr Rohin Shah, without any consideration as to whether any such sum should be retained within MFSL to meet other liabilities, in particular liabilities owed to the Scheme. Therefore, by executing the 2012 Agreement on behalf of MFSL Mr Anant Shah did so in the knowledge that when the 2014

Payment came to be made, regardless of its timing, it would pass through to PPL for the sole benefit of that entity. Mr Anant Shah had therefore committed MFSL to that course of action and there is no suggestion if he had been aware that the proceeds of sale had been received and that payment must be made in accordance with what he believed to be the correct interpretation of the terms of the 2012 Agreement, that Mr Anant Shah would have taken any steps to prevent it.

192. By this time, the die had been cast as to how MFSL was to approach its obligations towards the Scheme. We accept Mr Walmsley's submission that the conduct of Mr Anant Shah from the execution of the 2012 Agreement up to and including May 2014 present a clear picture of Mr Anant Shah being entirely content for the 2014 sale proceeds to pass to Mr Rohin Shah whilst at the same time attempting to create the impression that he was not involved in the matters concerned.

193. No pensions advice was taken as to the implications of entering into the 2012 Agreement as far as the Scheme is concerned. Pensions advice was, however, taken from Counsel in August 2013 and, as recorded at [173] above, Counsel advised it would be difficult to argue that any sale proceeds from the Indian JV could be withheld from the Scheme. Mr Anant Shah did not act upon that advice.

194. On the contrary, the position was taken that following the execution of the 2012 Agreement, the existing level of contribution to the Scheme was no longer sustainable. That is the position that was presented to the Trustee on 2 November 2012 when Mr Hurstfield provided the Trustee with a copy of the 2012 Agreement, as described at [165] above.

195. The approach of Mr Anant Shah was to make offers to pay relatively small amounts into the Scheme in order to settle the matter. As we have found, those offers were not accepted and the existing contributions were maintained for a while at the previously agreed rate. However, that position was not modified following the receipt of Counsel's advice in August 2013.

196. The findings of fact that we have made clearly demonstrate Mr Anant Shah's desire to distance himself from what ultimately became the 2014 Payment.

197. Mr Anant Shah procured the change of MFSL's name in October 2013 to Turley Services Ltd because, as he admitted in his cross examination, he did not want a company with the name "Meghraj" to go into liquidation in connection with "the pension issue".

198. It is clear from the findings of fact made at [175] above that Mr Anant Shah would have preferred the 2014 Payment to have been made much earlier, so that he could present the Trustee with a "fait accompli", that is that there was no further benefit to be derived from the Indian JV as far as MFSL was concerned, which would obviously have an impact on what contributions could realistically be sought for the Scheme following the next valuation, due in 2014 but which needed to be discussed during 2013.

199. Mr Anant Shah's concern with the "strategy" of dispersing the 2014 sale proceeds by way of bonus from MPL, as described in Mr Hurstfield's email of 7 November 2013, as described at [176] above, was, as submitted by Mr Walmsley, based on Mr Anant Shah wishing to distance himself from that payment. Instead, Mr Anant Shah made constructive suggestions as to how Mr Rohin Shah could achieve his aim of getting the money out of MPL which would not involve Mr Anant Shah being seen to have been responsible for

authorising the payment. Mr Anant Shah was quite candid about this in his oral evidence as this exchange demonstrates:

> "Q. … it's obvious from this proposal, Mr Shah, that your central concern is that you don't want to be seen as responsible for this last stage, which is controversial, yes?
>
> A. That's right, yes.
>
> Q. That's your concern –
>
> A. That's right.
>
> Q. --- you don't want to be seen as responsible?
>
> A. No."

200. The fact that Mr Anant Shah and Mr Rohin Shah appeared to have been discussing the possibility of the 2014 Payment being made by way of a bonus from MPL to Mr Rohin Shah is clearly inconsistent with a belief on Mr Anant Shah's part that the payment would have to be made, as previously, through the declaration of dividends up through the corporate chain. Indeed, Mr Anant Shah accepted in his oral evidence that he did not make that point to Mr Rohin Shah in their discussions nor did he consider that it appeared that Mr Rohin Shah was planning to make the payment in a manner which was inconsistent with the 2012 Agreement. Nor did Mr Anant Shah give any consideration to the question as to whether the Regulator should be informed as to the proposals. Mr Anant Shah accepted that whilst Mr Rohin Shah made the suggestion that the 2014 Payment be made by way of bonus and not through the corporate structure, he was not going to stand in the way of that proposal in that he would be happy to resign as a director in order to clear the path for Mr Rohin Shah to be able to make the payment in that way.

201. Nor do we consider that, when construed as a whole, the 2012 Agreement contemplated that the proceeds from the last tranche of the shares in the Indian JV would be paid to PPL by way of dividends which flowed through the corporate structure.

202. For convenience, we set out again Clause 2.4 of the 2012 Agreement which provides:

> "It is further agreed by the parties that MFSL shall have no further entitlement to or claim in respect of any Sale Proceeds or to any Other Relevant Sums from the Completion Date. PPL, as the party which is ultimately entitled to such Sale Proceeds (through the declaration and payment of further dividends by MFSL) or Other Relevant Sums, be solely entitled to receive and be paid all and any further Sale Proceeds or Other Relevant Sums as from the Completion Date absolutely without any deduction, set-off, counterclaim or any other withholding whatsoever in accordance with the terms of this Agreement."

203. Mr Anant Shah contends that the words in brackets in the third line of the clause make it clear that the payments to be made to PPL under this agreement were to be effected by way of declaration of dividends through the corporate structure.

204. However, although the clause is poorly drafted, in our view the words in brackets are simply there to indicate that in accordance with the existing arrangements the sums previously paid had been made through the declaration and payment of further dividends. The first sentence of the clause confirms that MFSL shall have no further entitlement to any

sums arising out of the Indian JV. The clause then confirms that PPL alone will be entitled to receive and be paid any further Sale Proceeds or Other Relevant Sums. Clearly, that provision is inconsistent with the suggestion that the sums would initially be paid to MFSL by way of dividend.

205. This interpretation is also consistent with what is said in Clause 2.3 and Recital 4 of the 2012 Agreement. Clause 2.3 states that MFSL had received its 20% share noting that it been paid by way of dividend around 2011 "in full and final satisfaction of all sums which were owed, or would become payable to MFSL…". Recital 4 states that the agreement "records and clarifies" that "the Sale Proceeds and any other Relevant Sums to which MPL is now entitled (payment of the sums owed to MFSL… having been made to MFSL prior to completion) are effectively "ring fenced" as assets of MPL and not of MFSL."

206. Therefore, it is clear that the effect of the 2012 Agreement was that whilst previously MFSL would have expected to have received dividends from MPL as and when the proceeds of sale of shares in the Indian JV were received, the right to receive any further sums on the sale of the last tranche of the shares in the Indian JV had effectively been disposed of in favour of PPL. In our view, following the execution of the 2012 Agreement MFSL no longer had any right to any of the proceeds of the Indian JV and that the previous arrangement whereby the sums concerned would be paid to MFSL through the declaration of a dividend by MPL no longer applied.

207. Consequently, we do not accept Mr Anant Shah's evidence that the fact that the 2014 Payment was made directly from MPL to PPL came to him as a "total surprise". That assertion is inconsistent with the contemporaneous documentation. For example:

(1) The email exchanges between Mr Hurstfield and Mr Rohin Shah in November 2013 in which Mr Anant Shah makes proposals to clear the path for Mr Rohin Shah to be able to have the 2014 sale proceeds paid directly out of MPL.

(2) An email from Mr Hurstfield dated 5 May 2014 informing a Mr Nick Palmer that the 2014 Payment by "Rohin must clearly have taken place in reliance of [sic] the 2004 Agreement as restated… in 2012." That email gives no hint of grievance on the part of Mr Anant Shah about the 2014 Payment.

(3) Another email from Mr Hurstfield dated 5 May 2014 in which he referred to the Indian JV issue as having been "resolved" again without referring to any grievance or surprise on the part of Mr Anant Shah that the 2014 Payment had been made.

208. There is no documentary evidence that after he learnt of the making of the 2014 Payment Mr Anant Shah raised any grievance with Mr Rohin Shah about the payment or took any steps to have it repaid, which clearly he would have been expected to have done had he considered that the payment had been effected in breach of the 2012 Agreement. In his oral evidence, Mr Anant Shah accepted that was the position. Ultimately, he accepted that the 2014 Payment was all in line with what the 2012 Agreement was intended to achieve, subject to his objection to the fact that the monies "didn't flow the way it was meant to flow". This a point that Mr Anant Shah accepted he did not make in May 2014 when he learnt of the payment.

209. Consequently, we conclude that Mr Anant Shah was a party to the making of the 2014 Payment. It was made in accordance with the terms of the 2012 Agreement which Mr Anant Shah had entered into on behalf of MFSL. He had therefore agreed that the 2014 Payment

would in due course be made directly to PPL in accordance with the terms of that agreement. That is because, according to the terms of that agreement, by the time of the payment the sale proceeds of the shares in the Indian JV were contractually due to PPL. At the very least, Mr Anant Shah's involvement in the events that took place after the execution of the 2012 Agreement amounted to knowing assistance in the making of the 2014 Payment, so that the provisions of s 38(5) PA 2004 which state that "the parties to an act… include those persons who knowingly assist in the act" apply on the facts of this case so as to include Mr Anant Shah as a party to the act in question.

210. We therefore conclude that Mr Anant Shah was a party to the Series and consequently the Party Test is satisfied. Accordingly, we do not need to consider the Regulator's submission that Mr Anant Shah could have been a party to the Series without being a party to the 2014 Act.

Discussion - The Act Test

211. The Regulator contends that the Series satisfies the "material detriment test" prescribed by s 38A PA 2004.

212. The material detriment test is met where the Upper Tribunal "is of the opinion that the act(s) or series of acts… has detrimentally affected in a material way the likelihood of accrued scheme benefits being received (whether the benefits are to be received as benefits under the scheme or otherwise)" (s 38A(1) PA 2004).

213. Section 38A(4) PA 2004 provides that "In deciding for the purposes of section 38 whether the material detriment test is met… the Regulator must have regard to such matters as it considers relevant, including (where relevant)" – and it then lists various factors (a) to (g). Of that list, the Regulator relies in this case in particular on the extent to which the Series affected the extent to which MFSL (and MPL) were able to meet obligations to the Scheme (s 38A(4)(f) PA 2004).

214. The Regulator contends that if the Tribunal finds that Mr Anant Shah has failed to establish that his arrangements with Mr Rohin Shah in 2004 amounted to a binding agreement, the Series plainly satisfies the material detriment test. The Regulator contends that in the absence of a binding agreement made in 2004, at the time of the execution of the 2012 Agreement the final proceeds from the Indian JV would have been prospectively available for the purposes of improving the funding position of the Scheme.

215. Consequently, the Regulator contends that it is obvious that the Series has very materially and detrimentally affected the extent to which MFSL (and/or MPL) was (and/or were) and is (and/or are) likely to be able to discharge its (or their) obligations to the Scheme.

216. Mr Anant Shah contends that because the 2004 Agreement was legally binding, the entry into the 2012 Agreement had no substantive effect on the financial resources of MFSL or those of the Scheme and therefore the Series would not satisfy the material detriment test on the basis contended for by the Regulator.

217. Our findings of fact set out at [100] to [109] above lead to the conclusion that Mr Anant Shah and Mr Rohin Shah did not regard the 2004 arrangements as giving rise to a legally binding contractual agreement, albeit that the arrangements were binding on them as

a matter of trust and honour. In that sense, both parties regarded themselves as being bound as a matter of trust and honour to ensure that the relevant corporate entities implemented what had been agreed under these arrangements so that the benefit of the proceeds of the Indian JV would be distributed to them personally in the proportions agreed between them, by the flow of dividends through the corporate structure.

218. That of course is not the position taken at the time of the 2012 Agreement. That agreement was drafted on the assumption that the 2004 arrangements were legally binding although, as we have seen, the various advisers had doubts at the time as to whether the arrangements were effective to ensure that the Trustee could not argue that the proceeds of the Indian JV should be available to the Scheme.

219. It does not, however, appear that the advisers were asked to undertake any detailed analysis at the time of the execution of the 2012 Agreement on the question as to whether the 2004 arrangements were legally binding. It appears that the parties proceeded on the basis that they were legally binding without further enquiry.

220. Furthermore, although the intention of the parties is one factor in deciding whether a particular arrangement was intended to be legally binding, as the case law demonstrates, the test to be applied is an objective one.

221. The general approach to the question whether parties have entered into a binding contract was set out by Lord Clarke in *RTS Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14, [2010] 1 WLR 753 at [45]:

> "Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

222. This passage was considered recently by the Court of Appeal in *Pretoria Energy Company (Chittering) Limited v Blankney Estates Limited* [2023] EWCA Civ 482 at [15]-[18]. We summarise those paragraphs at [223] to [225] below.

223. The quoted passage from *RTS* identified two key issues: contractual intention and certainty. Although these are distinct questions, one issue may inform the other: the more vague and uncertain an agreement is, the less likely it is that the parties intended it to be legally binding: *MacInnes v Gross* [2017] EWHC 46 (QB) at [77]. However, as the passage from *RTS* above indicates, it is in most cases for the parties to choose which terms they regard as essential for the formation of legally binding relations. They can agree to be bound contractually, even if there are further terms to be agreed between them: *Barbudev v Eurocom Cable Management Bulgaria EOOD* [2012] EWCA Civ 548 at [32].

224. In a commercial context, the onus of demonstrating that there was a lack of intention to create legal relations lies on the party asserting it, and it is a heavy one: *Barbudev*, above, at [30]. Parties may expressly negative contractual intention, which they often do by using the phrase "subject to contract". But the use of such words is not essential: *Cheverny Consulting*

v Whitehead Mann Ltd [2006] EWCA Civ 1303, [2007] 1 All ER (Comm) 124 at [42]. Nor is the label "heads of terms" conclusive: a document referred to as "heads of terms" may be intended to be a non-binding record of the broad principles of an agreement to be made in formal written documents subsequently negotiated, or may be intended, in whole or part, to be a binding contract governing the parties' relations until a more detailed agreement is drawn up, as in *Green Deal Marketing Southern Ltd v Economy Energy Trading Ltd* [2019] EWHC 507(Ch), [2019] 2 All ER (Comm) 191 and *Mahmood v The Big Bus Company* [2021] EWHC 3395(QB).

225. Where the parties intend to be contractually bound, the courts are reluctant to find an agreement is too vague to be enforced: *Wells v Devani* [2019] UKSC 4, [2020] AC 129 at [18]. The court may be able to imply terms to fill apparent gaps, particularly in commercial dealings between parties familiar with the trade in question or where the parties have acted in the belief that they have a binding contract: *Mamidoil-Jetoil Greek Petroleum Company SA v Okta Crude Oil Refinery AD* [2001] EWCA Civ 406 at [69]. It is to be borne in mind that business people may record important agreements in a summary way: *Hillas & Co Ltd v Arcos Ltd* [1932] All ER Rep 494 at 503.

226. Although the test is an objective one, as Leggatt J (as he then was) said in *Blue v Ashley* [2017] EWHC 1928 (Comm) at [64] where, as here, the court is concerned with an oral agreement, the test remains objective but evidence of the subjective understanding of the parties is admissible in so far as it tends to show whether, objectively, an agreement was reached and, if so, what its terms were and whether it was intended to be legally binding. Evidence of subsequent conduct is admissible on the same basis.

227. In our view, the relevant facts in this case lead objectively to a conclusion that there was no intention to create legal relations between any of the possible parties to the 2004 arrangements. Our reasons for that conclusion are as follows.

228. Obviously the 2004 Agreement could only be legally binding as between MPL, as the owner of the Indian JV shares and MFSL, as the owner of the whole of the share capital of MPL and therefore the entity entitled to the benefit of the Indian JV when the proceeds of sale were distributed by way of dividend, if both of those entities were the parties to the 2004 Agreement. If neither of those entities were party to that agreement, then at best if the agreement was to be legally binding it could only be as an agreement between Mr Rohin Shah and Mr Anant Shah. If the latter were the case, then the 2004 Agreement would have no effect on the legal rights and obligations of MPL and MFSL with the result that the benefit of the Indian JV would remain as an asset which would remain legally and beneficially owned by MPL. In those circumstances the agreement between Mr Rohin Shah and Mr Anant Shah could only be construed as an agreement between them to use such powers as they had to procure that MPL and MFSL respectively arranged for the benefit of the Indian JV to be distributed in accordance with the terms of the 2004 Agreement, but such an agreement could not bind MPL and MFSL.

229. As our findings at [108] and [109] above indicate, there is no evidence of any corporate action on the part of either MPL or MFSL that could properly be interpreted as an adoption by either of those corporate entities of the 2004 Agreement and an undertaking to comply with the terms of that agreement. As we found, no board resolutions were passed and none of the other (non-Shah family) directors of each of the entities was asked to approve the arrangements. It does not appear that they were even consulted. As we have found, that is

strong evidence that the arrangement was nothing more than an agreement between Mr Rohin Shah and Mr Anant Shah which did not involve the corporate entities.

230. As we have also found, that was the way that the arrangements operated in practice: see our findings at [102] to [106] above based on the evidence of Mr Anant Shah himself. The agreement operated in such a manner that each of the parties were to exercise their influence over the relevant corporate entities to ensure that those entities dealt with their asset, the benefit of the Indian JV, in a manner which was consistent with the 2004 Agreement. This conclusion is further reinforced by how the asset and the dividends derived from it was accounted for in the accounts of the relevant entities.

231. Consequently, when it came to the 2012 Agreement, the parties, which at that stage included both MPL and MFSL, entered into an agreement which clearly put on a legally binding footing an agreement between those two entities as to how the benefit of the Indian JV was to be dealt with as between those two parties. That agreement purported to be a restatement of the 2004 Agreement but it cannot be considered to be a restatement of an agreement entered into between the corporate entities in 2004.

232. The analysis set out above is sufficient in itself to negate any suggestion that there was a legally binding agreement between MPL and MFSL or to which either of them was a party which was created in 2004. Those entities simply were not parties to that agreement, and accordingly it is not necessary to consider whether there was any intention to create a legally binding agreement between those parties. Accordingly, the legal position is that the benefit of the Indian JV was fully available to MPL to dispose of it as it thought fit which it did so pursuant to the terms of the 2012 Agreement by dealing with the asset in accordance with the terms of that Agreement.

233. We shall, however, deal briefly with the other points raised by the Regulator to support its contention that the 2004 Agreement was not legally binding.

234. First, our findings of fact demonstrate that the 2004 Agreement was incomplete and did not include key terms, such as how the proceeds of the Indian JV were to be shared. The original note talked about a 76%/24% division and said nothing about the entities that were to receive the benefit when it was distributed. Mr Anant Shah now accepts that the annotation purported to be dated 19 July 2004 was not added until 2011. That annotation confirms the 80/20 split that was agreed and stated that it applied from 1 January 2003. It also made provision for Mr Rohin Shah's share to be paid to any entity that he designated. It was undoubtedly the case that the 2011 annotation reflected how the arrangements had in fact been operated in practice since 2004, but is also consistent with our analysis of the nature of the 2004 arrangement agreed between the two individuals and which they would procure was implemented by the corporate entities. The matters referred to in the annotation, however, cannot be considered to be part of the 2004 Agreement. Mr Anant Shah accepted in his evidence that the ability for Mr Rohin Shah to have his share paid to another entity was never discussed in 2004.

235. We accept Mr Walmsley's submission that Mr Anant Shah's purpose in adding the 2011 annotation was to bolster efforts to overlay the 2004 arrangements with a contractual analysis in the light of the decision that was made at that time to put the arrangements on a sounder legal footing. Clearly, by annexing to the 2012 Agreement both the original 2004 note and the 2011 annotation with the date of 19 July 2004 on the latter, the impression that the 2012 Agreement was doing no more than restating an agreement reached in 2004 would

be strengthened. However, on the basis of our findings, it was clear that this was a false impression.

236. Secondly, our factual findings clearly demonstrate that Mr Anant Shah now accepts that the arrangement between himself and Mr Rohin Shah concluded in 2004 was an agreement binding in honour and it did not need to be legally binding: see our findings at [104] above. This is also consistent with what Mr Hurstfield said to the liquidator of MFSL in 2016 as recorded at [150] above. As we have said, Mr Hurstfield has acted as Mr Anant Shah's solicitor for many years and must know very well how he and his family operated in relation to arrangements of this kind. As we recorded at [152] above, Mr Hurstfield described the annotated 17 June 2004 note as a "informal memorandum" and one that was entered into between Mr Rohin Shah and Mr Anant Shah.

237. Thirdly, there was an absence of certainty on key terms in the 2004 Agreement. As Mr Walmsley submitted:

(1) Mr Rohin Shah and Mr Anant Shah appeared to be at odds as to whether the 2004 Agreement was to split the profits from MPL's interest in the Indian JV and profits from MPL's domestic business (which is Mr Anant Shah's case) or only the former (which was Mr Rohin Shah's case).

(2) Mr Anant Shah and Mr Rohin Shah have never articulated a proper case as to what was to be split. It was not clear what exactly "profits" is supposed to mean in this context. It has never been suggested by either Mr Anant Shah or Mr Rohin Shah that there was any agreement between them as to what, if any, costs were deductible in calculating the supposed profit share. The fact that, in practice, there had to be ad hoc negotiations between Mr Anant Shah and Mr Rohin Shah as to how the proceeds of the Indian JV were to be divided illustrates that no binding agreement was entered into in 2004 and that instead they simply reached a loose understanding between themselves.

(3) No term has ever been articulated by either Mr Anant Shah or Mr Rohin Shah as to when sums payable under the arrangements fell due and payable. Nor has any consistent practice as to timing been identified.

(4) Both Mr Rohin Shah and Mr Anant Shah have found it difficult to articulate and maintain a consistent case regarding the person(s) or entity or entities from which Mr Rohin Shah was due his 80% share - for example, whether from MPL directly (and if so whether via payroll or not), or from MFSL, or from another group company, or at his election, or any combination of these options.

(5) The position in relation to the remaining 20% is also obscure. It was Mr Anant Shah's case that the 20% was "due" to MFSL (suggesting a contractual entitlement) but it is also said that the 20% was to be paid to MFSL by dividends (suggesting no contractual entitlement).

238. Fourthly, as Mr Walmsley submitted, in order for the 2004 Agreement to have amounted to a contract, Mr Rohin Shah would have to have given consideration. Mr Anant Shah and Mr Rohin Shah each advance the case that Mr Rohin Shah's consideration was his work for MPL. However, only a fraction of the sums he received in relation to the Indian JV were paid via payroll, which is what one would expect if the sums he received were remuneration. In a subsequent disclosure report to HMRC he stated, in terms, that none of the sums he received in respect of the Indian JV were paid in connection with the performance of his duties as an employee of MPL.

239. Fifthly, the existence of a binding agreement in 2004 is negated by the contemporaneous materials and conduct. Specifically:

(1) The preparation and approval, year after year, of financial statements on behalf of MPL and MFSL which are inconsistent with the proposition that Mr Rohin Shah personally had any contractual or trust-based rights giving him a financial interest in funds generated by the Indian JV.

(2) The practice of Mr Anant Shah and Mr Rohin Shah (and those acting on their behalf) agreeing on an ad hoc basis how funds from the Indian JV were to be divided up. As Mr Walmley submitted, had a binding agreement with sufficient certainty on the essentials been reached in 2004, it would not have been necessary to have discussions every year in order to agree what was to be shared. The manner in which the agreement was allegedly varied in 2010 or 2011 as referred to at [135] above is an example of this practice.

(3) The fact that the 2004 Agreement was described (variously) as a " memorandum of understanding" in the minutes of the meeting of 15 December 2011 and in the 2012 Agreement itself, and the 2004 arrangements were described as a "private arrangement" in Mr Hurstfield's letter of 19 December 2011 and "a 'loose' business arrangement" by Mr Anant Shah himself, as referred to above.

(4) The fact that the annotation to the 2004 note was only added in 2011.

(5) The absence of evidence on the part of any members of the boards of MPL, MFSL and MPGL (other than those with a direct or indirect interest in these proceedings, i.e. Mr Rohin Shah, Mr Anant Shah and Mr Vipin Shah) of the alleged 2004 agreement.

240. Sixthly, the lack of support for a binding contractual arrangement is demonstrated by the fact that Mr Anant Shah in his Reply pursued an alternative analysis, namely to the effect that there was a trust over the proceeds of the Indian JV in favour of Mr Rohin Shah.

241. Mr Anant Shah pleaded that "Oral declarations of trust in respect of personalty… are entirely permissible and can be inferred by the Court in appropriate circumstances, no particular form of words is necessary and the settlor need not even understand that the words or conduct have created a trust if they have this effect on their proper legal construction." However, there is no identification of any words or conduct that might be relied on as supporting the conclusion that there was a trust of any relevant asset. Mr Anant Shah made no submissions on that point at the hearing and in the absence of any evidence to support the analysis the trust case is hopeless.

242. However, as Mr Walmsley submitted, the alternative construction of the effect of the purportedly contractual arrangement demonstrates the lack of certainty which stands in the way of any attempt to provide an analysis that the 2004 arrangements were legally binding.

243. Consequently, although the case law demonstrates that in a commercial context the burden of demonstrating that there was a lack of intention to create legal relations is a heavy one, in this case an objective appraisal of the words and conduct of those involved and the vagueness of the terms of the alleged agreement, as detailed above, leads clearly to a conclusion that none of the relevant parties intended the 2004 Agreement or any subsequent variation of it prior to the execution of the 2012 Agreement to be legally binding. Our objective appraisal is reinforced by the fact that the subjective understanding of Mr Anant

Shah, as came out in his oral evidence, was that the 2004 Agreement was not intended to be legally binding.

244. As a consequence of this finding, we agree with the Regulator that the Series plainly satisfies the material detriment test. In those circumstances, we do not have to consider an alternative case put forward by the Regulator on the basis that, contrary to its submissions, we were to find that the 2004 Agreement was legally binding. We are in full agreement with the following submissions made by Mr Walmsley:

> (1) Immediately prior to 18 May 2012 (i.e. the date of the 2012 Agreement), the substantial asset of MFSL was its 100% shareholding in MPL, and MPL's substantial asset was its shareholding in the Indian JV which was due to be finally sold in 2014 for a sum anticipated at that time to be in the region of £5.24m (net). At this time there was no legally binding agreement or arrangement which entitled Mr Rohin Shah (or his nominee) personally to any of the proceeds of sale from the Indian JV.
>
> (2) At this time in 2012, as Mr Anant Shah knew, the Scheme had a multi-million pound deficit. As Mr Anant Shah also knew, a further review of the Scheme's funding position was due in March 2014.
>
> (3) Assessed in the absence of any binding arrangement requiring the final proceeds from the Indian JV to be dealt with in a different way, any objective assessment of the likelihood of accrued scheme benefits being received would treat the final proceeds from the Indian JV as prospectively available for the purposes of improving the funding position of the Scheme (or at the very least substantially so).
>
> (4) The effect of the 2012 Agreement was to give Mr Rohin Shah's nominee, PPL, a contractual right (at least, if such a sum was demanded) to receive an amount equal to the 2014 sale proceeds directly from MPL. The 2014 Payment then, in accordance with the 2012 Agreement, put the 2014 sale proceeds offshore and out of reach of MFSL, MPL and the Scheme. The Series thus destroyed and/or extracted the value to and/or from MFSL of its key asset, being its shareholding in MPL. The result was that none of the 2014 sale proceeds was made available for the benefit of the Scheme. MFSL and MPL both entered into liquidation later in 2014 and the Scheme achieved negligible recovery in their liquidations.
>
> (5) Of the various factors under s 38A(4) PA 2004, it is factor (f) that is of particular significance: in the light of the foregoing, it is obvious that the Series has very materially and detrimentally affected the extent to which MFSL (and/or MPL) was (and/or were) and is (and/or are) likely to be able to discharge its (or their) obligations to the Scheme.

245. We can deal with Mr Anant Shah's causation argument very briefly. Mr Anant Shah pleaded that even if there was no binding contractual agreement entered into in 2004, he believed that there was such an agreement and, accordingly, would have permitted the proceeds of the 2014 sale to be paid to PPL in any event. As such, he argues that as a matter of causation, the series of acts / acts complained of did not cause material detriment.

246. In the light of Mr Anant Shah's acceptance in cross-examination that the 2004 Agreement was not intended to be legally binding this argument must fail. It is clearly the case that as a matter of causation, the entering into the 2012 Agreement and the making of the 2014 Payment resulted in material detriment to the Scheme.

247. We therefore conclude that the Act Test is satisfied.

248. For completeness, we refer to the fact that the Regulator put forward an alternative case that the case for a CN was met because the main purpose or one of the main purposes of the Series was to prevent the recovery of the s 75 debt. As s 38(5)(a) PA 2004 makes clear, a CN may be issued either if this "main purpose test" is met or if the material detriment test is met. As there is no doubt in our view that the material detriment test is satisfied in this case, there is no need for us to consider this alternative case and we say no more about it.

The Reasonableness Test

Findings of Fact

249. Many of the findings of fact that we have made at [79] to [181] above are relevant to our consideration of the Reasonableness Test. We refer to those findings in the discussion of this issue where appropriate.

250. However, in view of the fact that (i) Mr Anant Shah's submissions were almost entirely directed to his contention that his financial circumstances were such that he could not afford to pay any significant amount in respect of any CN that may be issued and (ii) a target's financial circumstances is one of the factors that we are required to have regard to when assessing reasonableness by virtue of s 38 (7) (f) PA 2004, it is necessary for us to make further findings as to Mr Anant Shah's financial circumstances.

251. There can be no doubt that Mr Anant Shah was for a long time during his career a wealthy man. That wealth appears to have been derived from first the large inheritance he obtained from his father in 1964, as described at [81] above, and secondly through the success of the Meghraj Group over many years.

252. We accept that Mr Anant Shah's interest in the wealth derived from the success of the Meghraj Group was an indirect one. The shares in MPGL, the holding company for the UK businesses, were held by three settlements, the Animegh Settlement, the Animegh Foundation and the New Medici Trust. Mr Vipin Shah was the settlor of those settlements, and it appeared that decisions as to who would benefit from distributions from those settlements was made by Mr Vipin Shah as the senior member of the wider Shah family.

253. Mr Vipin Shah's evidence was that each of these trusts has been wound up. The Animegh Settlement was wound up in 2007. The Animegh Foundation was wound up in 2012. The New Medici Trust was wound up in 2016. Each of these trusts had a wide class of beneficiaries from the Shah family and charity. Mr Vipin Shah's evidence was that Mr Anant Shah never received a distribution from the Animegh Settlement or from the Animegh Foundation. Mr Vipin Shah confirmed that Mr Anant Shah received one payment from the New Medici Trust of £1,350,000 on 15 July 2010.

254. Mr Anant Shah accepted that he provided the Regulator with incorrect information regarding his assets in his response dated 11 March 2018 to a notice issued by the Regulator under s 72 PA 2004. In that response Mr Anant Shah said that he had never received any benefit either directly or indirectly from the New Medici Trust. That was untrue; Mr Anant Shah confirmed that he and his wife had received the sum of £1.35 million referred to above in order to repay a bridging loan used to buy a property.

255. Mr Anant Shah declined to answer the question as to how he came to provide the Regulator with that false information by exercising the privilege against self-incrimination

and we make no findings as to whether the failure to provide the information was either intentional, reckless, negligent or he was simply forgetful. Whatever the position, however, the fact that he failed to provide information about such a large sum of money clearly casts doubt on whether Mr Anant Shah's evidence that he had not received other distributions from other family trusts or other sources is both credible and reliable. We cannot place any weight on Mr Vipin Shah's evidence that no other distributions were made for Mr Anant Shah's benefit from the various trusts in the light of his absence from the hearing for cross-examination.

256. Mr Anant Shah's relationship with the Animegh Foundation and the Animegh Settlement is directly relevant to this point. Mr Anant Shah's evidence was that the Animegh Foundation was not properly to be regarded as his family trust. We reject that evidence because:

(1) Mr Anant Shah accepted that the recipient of the 20% share of the distributions from the Indian JV which he agreed with Mr Rohin Shah would be his share was the Animegh Foundation.

(2) The Animegh Foundation was named after Mr Anant Shah's children. Mr Anant Shah's evidence was that this was Mr Vipin Shah's decision but could offer no explanation for why the trust would be named after Mr Anant Shah's children if it was not his family trust. His statement at one point that it was a "coincidence" is not credible.

(3) A typed letter that Mr Anant Shah wrote on 17 June 2004 to Mr Rohin Shah but did not in the event send refers to Mr Anant Shah spending a lot of time deliberating about what he hoped to do over the next few years. It also deals with the financial consequences on Mr Anant Shah's children of any decisions that he takes and on his discussions with Mr Rohin Shah about the future structure of MPL, with the former influencing the latter. Mr Anant Shah's evidence on this point that he was only thinking about his salary from MFSL is not credible in the light of the following exchange:

> "Q. So the share that -- the part of the benefit of these businesses, I say businesses because it's the UK part and the foreign part, yes?
>
> A. Yes.
>
> Q. Part of that that's not the Rohin part in terms of the benefit, you would be participating in?
>
> A. Yes.
>
> Q. And your children would therefore stand to participate in?
>
> A. Yes.
>
> Q. Did you think anyone else would?
>
> A. No, no."

(4) In his personal notes from June 2011, Mr Anant Shah used "I" to refer to the Animegh Foundation ("I will be left with MFSL and MPGL"). Again, he offered no explanation for this.

(5) Mr Anant Shah's evidence was that the purpose of the release declaration Mr Anant Shah made in October 2011 in relation to the Animegh Foundation was so that "there was no reason for anyone to think that we were connected with this". Thus, as Mr Walmsley submitted, Mr Anant Shah wished to create distance from the Animegh Foundation, judged from the perspective of third parties.

(6) Mr Hurstfield, who was fully conversant with Mr Anant Shah's affairs, described, in an email dated 5 May 2014, the ultimate recipient of the 20% as "Anant's family trust"

257. We therefore conclude that the purpose of the Animegh Foundation was to be a settlement for the benefit of Mr Anant Shah and his family. Although it may well have been the case that Mr Vipin Shah, as the settlor of the trust, had the power to direct who would benefit from distributions made from that foundation, we infer that he would look favourably on requests from Mr Anant Shah to make payments to him or his family. We have had no evidence of what distributions were actually made over the years from the Animegh Foundation or indeed any of the family trusts. That is undoubtedly because one of the key features of Liechtenstein foundations are that they are not transparent vehicles. However, in view of our findings above, we infer that Mr Anant Shah is likely to have benefited from distributions made from the Animegh Foundation up to the point at which he and his family were removed as potential beneficiaries.

258. From that conclusion, we also infer that the same position is likely in relation to other trusts for the wider Shah family that were mentioned in these proceedings and where we have no evidence as to what distributions were actually made.

259. In particular, The Meghan Foundation was also named after Mr Anant Shah's children (Meghna and Anish). Mr Anant Shah and Mr Vipin Shah were beneficiaries of this family trust which owned, via intermediate companies, three properties sold for nearly £6 million. We have no documentary evidence which clearly identifies who benefitted from those proceeds, but it is possible that Mr Anant Shah did so.

260. Mr Anant Shah and his wife received a loan of £1.3 million from the Infinity Trust in 2009. As previously mentioned, Mr Anant Shah and his wife also received a gift of £1.35 million from the New Medici Trust in 2010. This was arranged by Mr Vipin Shah.

261. Mr Anant Shah has also received significant benefits from the Scheme. He received a tax-free lump sum from the Scheme of £141,349 in June 2013. This is additional to his annual income from the Scheme of around £24,000.

262. In September 1990, Mr Anant Shah was included on a "rich list" published by India Today (number 27 of 50) with estimated assets of £25 million. Mr Anant Shah denies that his inclusion on that list or the amount of wealth attributed to him was accurate. We do not place any significant weight on that evidence, bearing in mind the length of time that has elapsed and the absence of any other documentation to support the assertions made. However, as we have said, it is likely that at that time Mr Anant Shah was a wealthy man, even if not to the extent suggested by that publication in 1990.

263. According to the declaration of solvency signed by Mr Anant Shah on 22 February 2000, the Meghraj Bank Ltd was wound up with an estimated surplus of more than £10 million. Mr Anant Shah gave evidence that about £4 million was used to repay a personal creditor, but he agreed that there was a substantial amount left over. It can therefore not be

discounted that Mr Anant Shah benefited through the ownership chain, or the various family trusts, from any of the surplus.

264. It was at this point, when Mr Anant Shah began to wind down his business activities and devote his attention primarily to charitable activities, that he says in line with the principle of Aparigraha he began to dispose of his personal wealth in support of those activities.

265. We have no evidence of the extent of Mr Anant Shah's wealth at that point, or a detailed account of how his wealth was disposed of in the period following, particularly during the period when the arrangements for the sharing of the proceeds of the Indian JV were agreed. Such evidence as we have as to the current state of Mr Anant Shah's finances is largely based on assertion that he has disposed of all of his wealth save for a cash balance of approximately £32,000 and supplements his income from his pensions and by the sale of artwork and his wife's jewellery. Again, we have no detailed evidence what assets were previously held, what has been sold and what remains. The latest bank statements we have relate only to one account in Jersey for the period 19 December 2019 to 19 October 2021. Those statements do, as Mr Anant Shah, submitted show limited income and relatively modest expenditure, as he indicated was the case. However, we cannot regard these statements and the other evidence on which Mr Anant Shah relies as cogent evidence of the complete picture as far as Mr Anant Shah's finances are concerned.

266. There is evidence that Mr Anant Shah's immediate and wider family have been prepared to gift and lend Mr Anant Shah and his wife significant sums. For example:

(1) The Infinity Trust (the trustee of which was Minerva Trust Company, the company run by Mr Vipin Shah) made an unsecured loan of £1.3m to Mr Anant Shah and his wife in 2009.

(2) As mentioned above, Mr Vipin Shah arranged for the New Medici Trust to gift £1.35m to Mr Anant Shah and his wife in July 2010. This was shortly after Mr Anant Shah contacted Mr Howell to arrange for £1.4m to "flow through" MFSL to MPGL as dividends. Mr Anant Shah said that the fact that these dividends were a similar size to the £1.35m gift was a "just a coincidence":

(3) Mr Vipin Shah granted Mr Anant Shah a loan facility of £300,000 to fund his legal costs in these proceedings, secured over his then residence.

(4) Mr Anant Shah's son (Anish Shah) granted Mr Anant Shah a loan facility of £35,000 to fund his legal costs in these proceedings.

(5) Mr Anant Shah's daughter (Meghna Patel) granted Mr Anant Shah a loan facility of £70,000 to fund his legal costs in these proceedings.

(6) Mr Vipin Shah's son (Binoy Meghraj) granted Mr Anant Shah a loan facility of £70,000 to fund his legal costs in these proceedings.

(7) Mr Vipin Shah's son (Binoy Meghraj) recently lent £200,000 to Mr Anant Shah's wife to fund the purchase, and redecoration, of a £800,000 three-bedroom semi-detached property.

267. Mr Anant Shah's evidence was that none of his family would now be willing to advance him further funds as following the sale of his property he no longer had any security to offer in respect of any loan. We cannot determine with any certainty whether or not that would be the case were a CN to be issued to Mr Anant Shah. However, as Mr

Walmsley submitted, it is relevant to take into account the likelihood of the wider family making funds available to him in the light of the evidence of Mr Anant Shah that he, his family and Mr Vipin Shah espouse the values of their father, which include showing kindness and doing good. The way that the family trusts were organised also suggests that assets generated from the wider Meghraj Group, which included the valuable Minerva Trust company managed by Mr Vipin Shah who, Mr Anant Shah says, makes the relevant decisions as to the distribution of assets from the various family trusts, would be regarded as being available to the wider family, which would include Mr Anant Shah.

268. Mr Anant Shah accepted as accurate the following statement of Jain values that were put to him:

> "Although it is rare, when Jain businesses have gone bankrupt, the owners have used personal and family resources to pay back creditors and lenders rather than run away with any loot or ignore their debts and responsibilities as moral citizens of the town or city ."[1]

269. Mr Anant Shah accepted that Mr Vipin Shah had made a lot of money – in excess of £10m – from a sale of the Minerva Group to JTC Plc in 2018.

270. Mr Anant Shah accepted that it is possible that funds generated by the Indian JV remain in family trusts. He accepted that if that were the position the argument would be strong that at least part of the money should be used to help the Scheme. He also agreed that his family know (i) his sole defence to these proceedings is that he is (he says) not in a position to pay a significant sum; (ii) the Regulator makes the point that he is in a position to ask his family to assist him; and (iii) if they offer to put him in funds to pay a contribution notice, his sole defence would be completely undermined.

271. We therefore infer, despite him denying that to be the case, that Mr Anant Shah understands that there is therefore a good explanation (founded on his interests in these proceedings) for why his family are now apparently taking the position that they will not provide any further funds to Mr Anant Shah otherwise than by way of secured lending.

272. Mr Anant Shah accepted in evidence that the principle of Aparigraha would not permit or require him or his family to ignore responsibilities or debts to creditors, including the Scheme. He accepted that any family member who has benefited from the Meghraj Group for which Mr Anant Shah was responsible would, if they live by the principles that the family holds itself out as following, be anxious to allow money to be used to ensure the Scheme was dealt with properly. That was clearly demonstrated by the following exchange:

> "Q. So when assessing your responsibilities for the purposes of evaluating your needs in order to live by the doctrine of Aparigraha, you have regard to those of your obligations that arise as a result of this Jain family business principle that we discussed yesterday?
>
> A. Yes.
>
> Q. So you have regard to responsibilities you have in respect of those businesses, Jain businesses you've been involved with, where companies themselves have liabilities they can't meet; yes?
>
> A. Yes.

[1] Quote from "Jainism and Ethical Finance" (2017), Atul K. Shah and Aidan Rankin,

Q. So in your context, when thinking about what needs you need to -- what responsibilities you have in order then to define what needs you have, in order to ensure you don't give away too much of your wealth, you need to have regard to your responsibility vis-à-vis the Meghraj pension scheme; correct?

A. Yes.

Q. And if you, as part of living by the doctrine of Aparigraha, have given up some of your wealth or deprived yourself of wealth in a way which has benefited wider Shah family members, for instance by releasing yourself from trusts or whatever; if you have - we don't have to decide whether you have -- engaged with the doctrine in a way which has benefited other family members -- yes? -- then they would not be living by -- according respect to Aparigraha if they refused to enable some of that benefit that they've had to come back and assist the scheme. Isn't that right?

A. I understand what you're saying.

Q. Do you agree with it?

A. Yes.

Q. Yes. So any family member who has benefited from the Meghraj Group that you're responsible for, the MFSL structure, if they themselves lived by the Jain principles that you've explained the family hold itself out as living by, they would be anxious to allow money to be used to ensure the pension scheme was properly paid back, agreed, properly paid?

A. Yes.

Q. Yes.

A. Mm.

Q. They wouldn't require security for a loan, they would just ensure the money was made available, wouldn't they, Mr Shah?

A. Yes. I understand what you're saying, but I'm not them.

Q. You understand what I'm saying and you agree with what I'm saying, don't you, Mr Shah?

A. Yes, if it were me, yes, I understand.

Q. So if family members of yours, wider family members are in that position and choose not to assist --

A. Yes.

Q. -- they're not living by the Jain principles that you espouse?

A. I understand.

Q. You agree?

A. Yes, I agree.

Q. And therefore they're not living by the principles that the family holds itself out as living by?

A. I understand.

Q. Do you agree?

A. I agree.

Q. But you wouldn't expect, would you, any family members who benefited from the operation of the Meghraj Group, about 20 per cent, whoever it is who has benefited from the 20 per cent --

A. Yes.

Q. -- anyone who has benefited in that way and lives by the Jain principles we've discussed, you would expect them to make available what they can to help with the pension scheme problem; correct?

A. Yes.

Q. And that would include assisting you to pay any debt that may arise under a contribution notice --

A. Yes.

Q. -- should this Tribunal think that's the reasonable thing to do?

A. I understand.

Q. Do you agree?

A. I agree, yes."

273. It should, however, be noted that in 2018 Mr Anant Shah reached a settlement with the liquidator of MFSL so that without any admission of liability on his part he agreed to pay the liquidator £85,000 in full and final settlement of various matters in dispute including any claim for contributions to the Scheme or any other claim in the liquidation.

Discussion

Introduction

274. To recap, provided the other conditions in s 38 PA 2004 are satisfied, s 38(3)(d) permits the Regulator to issue a CN to a person if it is of the opinion that it is reasonable to impose liability on the person to pay the sum specified in the notice, having regard to the extent to which, in all the circumstances of the case, it was reasonable for the person to act or fail to act, in the way that the person did.

275. Section 38(3)(d) also requires the Regulator, when deciding whether it is reasonable to impose liability under a CN, to have regard "to such other matters as the Regulator considers relevant". In that respect, s 38(7) requires the Regulator to have regard, where relevant, to a number of specific matters, which are set out in full at [24] above and for convenience we can summarise as follows:

(1) The degree of involvement of the target of the CN in the act or failure to act on which the Regulator relies.

(2) The relationship which the target has or has had with the employer.

(3) Any connection or involvement which the target has or has had with the scheme.

(4) If the act or failure to act was a notifiable event for the purposes of s 69 PA 2004 (duty to notify the Regulator of certain events), any failure by the person to comply with any obligation imposed on the target to give the Regulator notice of the event.

(5) The purposes of the act or failure to act (including whether a purpose of the act or failure was to prevent or limit loss of employment).

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

(7) The likelihood of relevant creditors being paid and the extent to which they are likely to be paid.

(8) The financial circumstances of the target.

276. In this case, Mr Anant Shah ultimately accepted that his only argument on reasonableness was his financial circumstances. He accepted that it would be reasonable to impose on him liability under a CN had he the resources to meet it. Nevertheless, we shall for completeness, deal with all of the relevant factors concerning reasonableness at [277] to [310] below.

277. Although it is clear from the provisions of s 38 PA 2004 that the specific matters referred to above are non-exhaustive of the matters that the Regulator must take into account when assessing reasonableness, save for the issue that Mr Anant Shah raised with regard to his health and the fact that he did not benefit directly from the 2014 Payment, which we deal with below, we are not aware of any other factors which either party have placed reliance on in this case.

278. In our view, it is not the case that each of the specific matters should necessarily be given equal weight. It seems to us that on the facts of this case, in addition to the factor in s 38(3)(d)(i), the first three factors specified above, in particular, should be given strong weight in the light of the clear purpose of s 38. The section supports the statutory objective of the Regulator to protect the benefits of members under occupational pension schemes and to reduce the risk of situations arising which may lead to compensation being payable from the PPF. Section 38 seeks to provide this support by imposing liability on those with a close connection with the scheme and its employer and who have been party to acts or failures to act which have caused material detriment to the scheme. Where those circumstances exist, the case for a CN will become stronger where the person concerned has also benefited as a result of the acts or failures which have caused material detriment to the scheme.

279. As we have indicated at [31] above, we must determine the matter afresh. It is not simply a question of us considering whether the Regulator's determination was one that was open to the Regulator to make. We now stand in the shoes of the Regulator and our function

is to determine what is the appropriate action for the Regulator to take. We must therefore assess the question of reasonableness by application of the provisions of s 38, taking into account the Regulator's statutory objectives. However, in contrast to the position of the Regulator, whose decision-making body, the DP, is an administrative decision maker, we make our decision acting judicially. It is well-established that in cases of this kind, where the court or tribunal is asked to decide whether a particular course of action is reasonable, it is necessary to undertake a multifactorial assessment and arrive at a value judgment. This means that we should treat all the relevant circumstances as facts which have to be balanced together to reach an assessment or evaluation in this particular case, using our expertise as a specialist tribunal.

280. Against that background, we now turn to consider first whether it was reasonable for Mr Anant Shah to have acted in the way that he did in relation to the matters on which the Regulator relies before considering the specific factors relating to reasonableness which are relevant in this case.

The reasonableness of Mr Anant Shah's behaviour

281. At the time the decision was taken to enter into the 2012 Agreement Mr Anant Shah was fully aware that the purpose of that agreement was to minimise the risk of any comeback from the Trustee or the Regulator were those entities to question why the proceeds of the Indian JV were not available to MFSL and thereby potentially available to reduce the deficit in the Scheme: see our findings at [148] above. That was at a time when MFSL was in a poor financial position and its only remaining significant asset was its shares in MPL and through that holding, the benefit of the Indian JV.

282. In spite of this, the strategy adopted, to which Mr Anant Shah was party as the sole director of MFSL, was not to inform the Trustee of what was proposed until the 2012 Agreement had been entered into, thus presenting the Trustee with a *fait accompli.* That was against a background where in previous years active steps were taken to minimise the information available to the Trustee regarding the value of the Indian JV by providing the Trustee only with abbreviated accounts rather than the full accounts of the relevant companies. It was also the case, as we have found at [153] above, that at the time the 2012 Agreement was being prepared, Mr Anant Shah was aware of the serious concerns that the pension adviser, Mr Frank, had raised as to the Trustee finding out that none of the proceeds of the Indian JV were being made available for the benefit of the Scheme: see [154] and [155] above.

283. Because of the financial position of MFSL at the time, the primary duty of the directors of the company, which at that time consisted of Mr Anant Shah alone, was to act in the best interests of the creditors of the company. As Mr Walmsley submitted, if the company is insolvent, or bordering on insolvency (or at least if the directors know or ought to know that fact), the interests of creditors of the company are engaged: *BAT Industries v Sequana* [2022] 3 WLR 709 (SC). This underlying principle also applies where one is concerned with acts that would put creditors' interests at that level of risk, i.e. "directors are not free to take action which puts at real (as opposed to remote) risk the creditors' prospects of being paid, without first having considered their interests rather than those of the company and its shareholder": see *Re HLC Environmental Projects* [2014] BCC 337 at [89].

284. As Mr Walmsley submitted, as at May 2012 and up to January 2014 it is plain that Mr Anant Shah's duties to creditors as director of MFSL were engaged as a result of what was understood to be the financial position of MFSL at that time.

285. As Mr Walmsley also submitted, it is similarly plain that Mr Anant Shah cannot reasonably have believed that the acts of causing MFSL to enter into the 2012 Agreement or the making of the 2014 Payment were compliant with those duties: the 'ring-fencing' of the 2014 Payment, the granting of a contractual right to PPL in respect of that sum (and indeed in respect of "Sale Proceeds" more generally as defined in the 2012 Agreement), and the making of the 2014 Payment to an offshore entity were quite obviously not acts undertaken for the benefit of the creditors of MFSL.

286. Furthermore, before the 2014 Payment was made, as we have found, at a conference with counsel attended by Mr Anant Shah on 20 August 2013 counsel had advised that unless it could be demonstrated that Mr Rohin Shah held some form of an equitable interest in the shares (which counsel advised was unlikely) "it would be difficult to argue that any sale proceeds could be withheld from the Scheme, a third party creditor". As we have found, Mr Anant Shah took no steps to follow that advice.

287. Consequently, Mr Anant Shah clearly paid no regard to the interests of the Scheme, as a creditor of MFSL, at the time that he signed the 2012 Agreement on behalf of MFSL or at any time thereafter until the 2014 Payment was made.

288. We therefore find that having regard to the wording of s 38(3)(d)(i) PA 2004 it was wholly unreasonable for Mr Anant Shah to act as he did. In those circumstances, we accept Mr Walmsley's submission that his conduct was so unreasonable that only if the other factors we have to take into account pointed very clearly in the opposite direction could a sensible case be built that it would not be reasonable to issue a CN.

The degree of involvement of Mr Anant Shah in the 2012 Agreement and the 2014 Payment

289. This factor points very strongly in favour of the issue of a CN to Mr Anant Shah. Clearly, because of his role as the sole decision maker on behalf of MFSL the 2012 Agreement could not have been entered into without his approval. As far as the 2014 Payment is concerned, as we found at [191] above, the 2012 Agreement was executed by Mr Anant Shah in the knowledge that when the 2014 Payment came to be made, regardless of its timing, it would pass through to PPL for the sole benefit of that entity and Mr Anant Shah had committed MFSL to that course of action. On the basis of our findings of fact at [194] to [208] above we concluded at [209] that he was a party to the making of the 2014 Payment. At the very least, he knowingly assisted in the making of that payment.

The relationship which Mr Anant Shah has or has had with the employer

290. This factor points very strongly in favour of the issue of a CN to Mr Anant Shah. Throughout the period which is relevant to the acts on which the Regulator relies, Mr Anant Shah was a director of MFSL, the principal employer in relation to the Scheme and he was the sole director from 9 August 2010.

The connection and involvement which Mr Anant Shah has had with the Scheme

291. Again, this factor points very strongly in favour of the issue of a CN to Mr Anant Shah. He was the sole decision maker in his capacity as the sole director of MFSL in deciding the strategy of dealing with the Trustee and, in particular, the negotiation of the amount of the contributions that MFSL would make to the Scheme. As we have found at [133] above, on 26 March 2011, Mr Anant Shah agreed a schedule of contributions with the Trustee which required MFSL pay contributions of hundred and £180,000 per annum over the next 10 years but monies were held back in MFSL which were only sufficient to meet those obligations for a period of 3 years. That was a time when discussions were taking place with a view to MFSL receiving its 20% share of the proceeds of the Indian JV as soon as possible. It was Mr Anant Shah who decided that following the 2014 Payment, MFSL's monthly pension contributions would cease.

Failure to comply with s 69 PA 2004

292. Again, this factor points very strongly in favour of the issue of a CN to Mr Anant Shah. As we found at [189] above, Mr Anant Shah took no specialist pensions advice regarding the implications of entering into the 2012 Agreement. In particular, no advice was taken as to whether it was a "notifiable event" which should have been notified to the Regulator.

293. Section 69 of the PA 2004 requires (among other things) the employer to notify the Regulator of any "notifiable event", including "any decision by the employer to take action which will, or is intended to, result in a debt which is or may become due to the scheme not being paid in full" (Regulation 2(2)(a) of The Pensions Regulator (Notifiable Events) Regulations 2005/900). It is plainly the case that the 2012 Agreement and the 2014 Payment resulted in MFSL's debt and (if assuming it is a statutory employer) MPL's debt to the Scheme not being paid in full. At the time the 2012 Agreement was entered into, had advice been taken it is clear on the basis of the concerns that were being raised by Mr Frank and the state of MFSL's finances at that time that MFSL would have been advised that the result of the entering into of the 2012 Agreement and its implementation would be that the debt owed by MFSL to the Scheme would not be paid in full. Therefore, the advice would undoubtedly have been that the event should be notified.

294. Accordingly, both the entering into of the 2012 Agreement and the making of the 2014 Payment should have been notified to the Regulator. Had the 2012 Agreement been notified, then undoubtedly the Regulator would have had the opportunity of stepping in at that point with a view to taking steps to ensure that the interests of the Scheme were protected.

The purposes of the act or failure to act (including whether a purpose of the act or failure was to prevent or limit loss of employment)

295. The words in brackets indicate that this is a factor that can tend against the issue of a CN where the purpose of the act or failure concerned was to protect employment. That is clearly not the case here. The purpose of the acts in question was to ring fence assets of MFSL so they were to be used solely for the benefit of PPL. As a result, those assets would not be available to meet MFSL's liabilities, including its obligations to the Scheme. This factor therefore points strongly in this case in favour of the issue of a CN to Mr Anant Shah.

The value of any benefits which Mr Anant Shah receives, or is entitled to receive, from MFSL and the Scheme.

296. It is possible that Mr Anant Shah has received personally benefits from the 20% share in the proceeds of the Indian JV. He was not forthcoming in his evidence as to what had happened to those sums through the corporate chain. In those circumstances, at the very least this is a neutral factor.

297. The same is true of the fact that Mr Anant Shah, as a member of the Scheme received a substantial lump sum and a continuing monthly pension. We do, however note, that he received his lump sum of £141,349 in June 2013 shortly before Mr Hurstfield wrote to the Trustee to say that payment of contributions would only be maintained at the levels agreed in 2011 notwithstanding the increasing deficit in the Scheme.

The likelihood of relevant creditors being paid and the extent to which they are likely to be paid

298. This factor points very strongly in favour of the issue of a CN to Mr Anant Shah. Creditors in the liquidation of both MPL and MFSL, including the Scheme, received no significant distribution. The same position applies in respect of MPL insofar as it is a statutory employer. The liquidation of both companies has now been completed.

Mr Anant Shah's financial circumstances

299. The first point to be made in relation to this factor is that, as we have said, there is nothing in the legislation which suggests that any of the particular factors mentioned in s 38 (7) PA 2004 are to be given stronger weight than any of the others. In a case where an assessment of the factor in s 38(3)(d)(i) and the first three factors in s 38(7) demonstrates that the case for the issue of a CN is particularly strong, the financial circumstances of the target, even where the evidence clearly demonstrates that the issue of a CN in the amount proposed would cause serious financial hardship to the target, should not be given such weight that it would outweigh the other factors.

300. It is important to bear in mind that the issue of a CN is not akin to the imposition of a financial penalty by a regulator for the breach of regulatory provisions. In those circumstances, as is the case with the imposition of criminal penalties, the financial circumstances of the individual concerned are a very important factor. Even then, financial circumstances will not always be given strong weight in the most egregious cases where it is important not to dilute the deterrent effect of any penalty. As we have said, the purpose of s 38 PA 2004 is to ensure that a person with a close connection with a scheme and its employer and who has been party to acts or failures to act which have caused material detriment to the scheme makes a contribution to scheme in circumstances where it is reasonable to do so.

301. The second point to be made is that in our view a target who wishes to rely on straitened financial circumstances as a factor tending against the issue of a CN must put forward cogent evidence which clearly demonstrates his financial position.

302. The evidence to satisfy either the Regulator or the Tribunal on this issue must by necessity come primarily from the target himself and in that regard, the Tribunal would expect a full and frank disclosure not only of the current position regarding the person's finances but also the circumstances that have led to his current position of straitened circumstances. That is particularly important in the case of an individual who clearly has been wealthy in the past. In those circumstances, where the individual concerned has taken

positive steps to dispose of his wealth or the ability to access wealth, the reasons why that has happened need to be satisfactorily explained, particularly where the disposal took place at a time when the subject concerned may have been aware, or might reasonably have been expected to be aware, of the potential for regulatory action to be taken by the Regulator against him.

303. The Regulator has given some helpful guidance on these matters in a report which it issued under s 89 PA 2004 following the determination it made in relation to The Carrington Wire Defined Benefit Pension Scheme in May 2015 which we gratefully adopt:

> "When considering the reasonableness of a contribution notice, the reference to a target's 'financial circumstances' under section 38(7)(f) is not limited to the target's current financial worth but also includes consideration of how the target has ended up in the financial position in which he currently finds himself. This includes taking into account the target's receipt of monies and how they have been used.
>
> The Panel accepted that it was correct to draw a distinction between the issuing of a contribution notice and its enforcement. Questions about the ability to recover and the costs and proportionality of so doing are far less relevant to the decision to issue a contribution notice than to decisions over whether and how it should be enforced."

304. In the light of those points, it is clear to us that we should not place significant weight on Mr Anant Shah's financial circumstances in this case. In that regard, we rely on the following points which arise from our findings of fact at [251] to [272] above:

(1) Mr Anant Shah's failure to be open regarding who benefited from the 20% share in the Indian JV proceeds which was ultimately received by the Animegh Foundation of which he was a beneficiary.

(2) The limited information that Mr Anant Shah provided regarding his current financial circumstances.

(3) The absence of information as to how he disposed of his wealth, particularly during the period leading up to the execution of the 2012 Agreement and thereafter prior to the making of the 2014 Payment.

(4) His failure to provide the Regulator with accurate information regarding his receipt of benefits from the New Medici Trust.

(5) The timing of the execution of the declaration releasing him from his status as a beneficiary of the Animegh Foundation. That was effected at a time when Mr Anant Shah knew that concerns were being raised by the Trustee about the strength of the covenant given to the Scheme.

(6) The timing of the execution of a declaration of release which excluded Mr Anant Shah and his immediate family from future benefit under the New Medici Trust which was less than one week after the Trustee was told of the 2012 Agreement and his failure to provide a satisfactory explanation as to the timing of the release.

(7) The likelihood that Mr Anant Shah and his immediate family received distributions from the various family trusts that have been identified and which have not been disclosed.

(8) The lack of an explanation as to how the surplus arising from the winding up of Meghraj Bank was dealt with.

(9) The fact that Mr Anant Shah's immediate and wider family have been prepared to gift and lend him and his wife significant sums which suggests that they may well do so in the future. It is understandable that they would not wish at the present time to give any indication that they would do so when they know that Mr Anant Shah's sole defence in these proceedings is that he has no funds to meet any liability imposed on him under a CN.

(10) The fact that the principles of Aparigraha which he and his family follow would tend to suggest that further financial support would be provided to Mr Anant Shah, particularly where to do so would be for the benefit of a pension scheme owed significant sums from a business which was run in a manner consistent with Jain principles.

305. As we have said, our review of all the other relevant factors point very strongly to the reasonableness of issuing a CN to Mr Anant Shah. In those circumstances, and bearing in mind the Regulator's guidance regarding the distinction to be made between the issuing of a CN and its enforcement, we do not consider that the financial circumstances factor outweighs the other relevant factors. Consequently, the case for the issue of a CN is compelling. That would be the case even if we had much stronger evidence of a lack of financial resources on Mr Anant Shah's part, bearing in mind the wholly unreasonable behaviour on his part that we have found.

306. Before concluding our discussion on reasonableness, we should deal with a few other points made by Mr Anant Shah:

(1) The fact that he did not directly benefit from the 2014 Payment.

(2) The fact that he paid a sum of money to settle misfeasance claims intimated against him by MFSL's liquidators.

(3) The fact that he is in his 70s and has various ailments commensurate with his age.

307. As far as the first of these points is concerned, whilst Mr Anant Shah may not have directly benefited from the 2014 Payment, Mr Rohin Shah, a connected party, did so benefit and, as we have found, Mr Anant Shah had a key role in facilitating the payment.

308. As far as the second point is concerned, the Scheme did not benefit from that settlement and accordingly Mr Anant Shah should receive no credit for it in the context of these proceedings.

309. As far as the third point is concerned we do not consider that age, or age related ailments are a relevant factor to be taken into account when considering the issue of a CN in the absence of any indication to that effect in the legislation. In any event, we have had no up to date medical evidence of Mr Anant Shah's current state of health.

310. Accordingly, none of these points affect our conclusion that in the circumstances it is reasonable to issue a CN against Mr Anant Shah.

Quantum

311. In its Statement of Case, as amended following its settlement with Mr Rohin Shah, the Regulator seeks as its primary case a CN against Mr Anant Shah for a principal sum of £1,844,054, this being 50% of the 2014 Payment, plus an uplift for the passage of time.

312. On the Regulator's primary case prior to the settlement with Mr Rohin Shah, pursuant to which liability was to be imposed on a joint and several basis, the Regulator's position was that the sum of the 2014 Payment (i.e. £3,688,108) is reasonable, given that:

(1) On the assumption that MPL and MFSL were statutory employers, MPL's estimated section 75 debt as at 8 October 2014 was £534,000 and MFSL's estimated section 75 debt was £5,317,000 as at the same date.

(2) The Scheme represented 88.5% of the unsecured creditors of MFSL and 95.2% of the unsecured creditors of MPL, meaning that it is reasonable to conclude that the detriment to the Scheme equates to a large proportion of the sum of £3,688,108.

(3) On the facts of this case, focusing on an estimate of detriment based on the pro rata creditor position would fail to give due weight to the aggravating factors in this case and the fact that Mr Rohin Shah himself took the benefit of the entirety of the sum in question.

313. In circumstances where liability is to be imposed on a sole liability basis, and in all the circumstances of this particular case, the Regulator's position is that the sum that is reasonable as at 2014 by reference to Mr Anant Shah alone is 50% of the sum that would have been reasonable were liability to be imposed on a joint and several basis, and thus (on the Regulator's primary case) £1,844,054 (being 50% of the 2014 Payment). The Regulator contends that this sum is reasonable even though Mr Rohin Shah received the entirety of the 2014 Payment, because Mr Rohin Shah was a party connected to Mr Anant Shah and Mr Anant Shah facilitated the payment.

314. The Regulator suggests that on the facts of this case the quantum analysis may be approached through a three-step process:

(1) considering what sum would be reasonable assessing the matter as at 2014;

(2) considering what, if any, adjustment to that sum may be appropriate to take account of the passage of time since 2014; and

(3) confirming that the figure is within the shortfall sum and applying any other useful cross-check as to reasonableness.

We agree with that approach.

315. The question arises as to whether the amount that may be directed to be the subject of a CN is subject to any constraint other than (i) the amount which the Tribunal considers is reasonable in the light of its multifactorial assessment undertaken in the light of all the circumstances and (ii) the limitation set out in s 39 PA 2004. The latter provision states that the sum specified in a CN may be either the whole or a specified part of the shortfall sum in relation to the Scheme, which in this case would be the amount of the estimated s 75 debt. In this case, the sum sought by the Regulator is within that limit.

316. The reason this question arises is because Mr Walmsley, fairly, drew our attention to the *obiter* remarks of Warren J in *Bonas* on this subject. *Bonas* was a case decided by reference to the legislation as it stood before the "material detriment " test was introduced. Before then, in order for the Act Test to be satisfied it was necessary that the Regulator was of the opinion that the main purpose or one of the main purposes of the act or failure was:

(1) to prevent the recovery of the whole or any part of the s 75 debt, or

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

317. At [96] to [99] Warren J made the following observations in relation to this provision:

> "96. ….section 38(5) refers to the recovery of the whole or any part of the debt. If an act or failure to act prevents payment of only part of the debt, then the case falls within the subsection. The person preventing that payment is then exposed to the risk of a contribution notice being issued against him. But the liability which can be imposed is restricted, under section 38(3)(d) to the sum which the Regulator considers that it is reasonable to impose. Since payment of part only of the debt has been prevented by the act or failure to act under consideration, it is not easy to see how the Regulator could properly be of the opinion that it is reasonable to impose a liability for the whole debt. To take an extreme case, the act or failure to act might have prevented recovery of only £1,000. It would be very surprising if the Regulator was able to impose a liability under section 38 for £1,000,000 being the total section 75 debt….
>
> …
>
> 98. Suppose that a company is insolvent and that its only creditors are the trustees of the pension scheme under which it is the sole employer. Suppose that the assets of the company are £2X and that the section 75 debt is £4X. Suppose that the parent of the company is a party to an act or failure to act within section 38(5)(a) which reduces the assets available in a winding up to £X. In the absence of that act or failure to act, the most which the trustees could obtain from the company would be £2X or 50% of its debt. The result of the act or failure to act is to reduce the available recovery to £X or 25% of its debt. The act or failure to act has prevented, and could only prevent, recovery of £X. It cannot be said that the act or failure to act has prevented recovery of £3X. Prevention of the recovery of £X is enough, however, to bring the case within section 38(5)(a) so that a contribution notice may be issued to the parent. But I find it very difficult indeed to see how it could be said be reasonable to specify £3X as the amount in contribution.
>
> 99. ….What needs to be identified, in my view, when it comes to assessing the reasonableness of the amount to be specified in the contribution notice, is the extent to which the act or failure to act has resulted or will result in a reduction in the amount available (whether from the employer or from any other person liable for the debt such as guarantor, or by way of reduction in the value of a security for the debt). ..

318. He repeated the point at [193] as follows:

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

319. The reasoning of Warren J in *Bonas*, as set out above, suggest that there may be a further constraint, based on the need to show loss, by considering whether and the extent to

which the act or failure to act in question has prejudiced the recoverability of all or any part of the s 75 debt.

320. In our view, this reasoning cannot be applied when interpreting the current wording of s 38 and 38A, at least when applying the material detriment test. We do not consider that there is anything either in the current wording of s 38 and s 38A or the purpose behind those provisions which suggest that there is a need to base the quantum of a CN on any kind of compensatory analysis based on what the loss to the Scheme has been as a result of the act or failure to act in question.

321. As far as the purpose of the legislation is concerned, in our view this is clearly in support of the Regulator's statutory objectives, as set out at s 5(1) PA 2004, which include protecting the benefits under occupational pension schemes of, or in respect of, members of such schemes. The focus should therefore be on the extent to which the act or failure to act in question has caused detriment to the prospects of members of the Scheme receiving the benefits to which they are entitled. That is consistent with the wording of s 38A(1) which requires the act or failure in question to have detrimentally affected in a material way the likelihood of accrued scheme benefits being received.

322. Therefore, when interpreting the current provisions, there is no basis to imply a further constraint on the concept of reasonableness beyond the permissive non-mandatory and non-exhaustive factors set out in the legislation. If the purpose behind the legislation was to limit the amount to be included in a CN to the loss caused to the Scheme by the act or failure to act in question, it would not be drafted as it is, with a cap set by reference to the shortfall sum and a direction to the Tribunal to carry out a multifactorial assessment in order to determine whether the amount sought by the Regulator was reasonable.

323. We therefore do not consider that the reasoning of Warren J at [193] of *Bonas* is applicable when interpreting the current version of s 38, at least in relation to the material detriment test. In our view, the Tribunal simply has to establish whether the act or failure to act has caused "material detriment" in the sense that the failure has detrimentally affected in a material way the likelihood of accrued scheme benefits being received. It makes that assessment by reference to the relevant factors in s 38A(4) PA 2004. It is clear from the provision that the effect of the act or failure on the value of the assets or liabilities of the Scheme may be but one relevant factor in that regard in appropriate circumstances. The example given by Warren J at [96] of *Bonas* is an apposite example of where such a factor would be appropriate.

324. If having considered those factors, the Tribunal considers that there has been material detriment and, our findings of fact in this case have led us to the conclusion without hesitation that such is the case in relation to the subject matter of this reference, then the Tribunal should then proceed to consider the question of reasonableness constrained only by the cap provided by s 39 PA 2004, that is the amount of the s 75 debt. In our view, there is nothing in the legislation that indicates that as part of the assessment of reasonableness that there is a further cap, including a cap referable to the extent to which the act or failure to act in question has prejudiced recoverability of the s 75 debt.

325. In the light of that discussion, we now proceed to consider the three stage approach proposed by the Regulator in the context of the circumstances of this case.

326. As far as the first stage is concerned, we agree with the Regulator that it is reasonable to identify a sum by reference to the full 2014 Payment, rather than some smaller sum, having regard to all of the aggravating factors in this case, including the fact that it was a connected party who received the benefit of the 2014 Payment and that Mr Anant Shah facilitated the same. Although for reasons just explained it is not necessary to conclude that the sum itself represents a loss to the Scheme, in our view, the amount of the 2014 Payment represents such a loss, that is it represents a sum which would have been available to meet benefits due to members had it been paid to the Scheme.

327. In particular, in our view had Mr Anant Shah taken pensions advice following Mr Frank's concerns expressed before the execution of the 2012 Agreement, or if, he had notified the Regulator of the proposal to enter into that Agreement as he should have done it is likely that he would have been advised that any further sums generated from the Indian JV should have been made available to the Scheme because of the weak position that the Scheme was in at that point. Mr Anant Shah also received counsel's advice to that effect in 2013 and ignored that advice. This was against a background where Mr Anant Shah had failed to provide full information to the Trustee as to the value of the Indian JV as a result of which much lower recovery plan payments were made than might otherwise have been the case.

328. As regards the position of other creditors should the whole of the 2014 Payment been made available to the Scheme, the directors would obviously have needed to have considered the position of those creditors at the time and they would need to have been treated fairly, consistent with their duties as directors at the time. We have mentioned the Jain principles by which Mr Anant Shah said he was guided in his business dealings, and the application of those principles would appear to lead to the conclusion that sums should be found from personal resources to ensure that all creditors were paid.

329. As regards the second stage, we accept that it is appropriate to apply an uplift to take account of the passage of time since 2014. This is in circumstances where significant harm has been done to the Scheme as a result of Mr Anant Shah's acts over a considerable period of time. As Mr Walmsley submitted, that harm has had a continuing impact on the Scheme for a number of years and the funds wrongly diverted from the Scheme were put into the hands of a party connected to Mr Anant Shah who has therefore enjoyed the benefit of those funds for many years.

330. We accept the basis on which the Regulator has calculated the uplift to be applied in the light of the latest investment return data, as derived from the Scheme Actuary's latest report. This indicates that an uplift of 1.7% should be made to the figure identified as at 2014. This figure is derived from assuming (i) an investment start date of 7 August 2014 (being the date when substantial new investments were in fact made following a change in investment strategy), (ii) an investment end date of 31 March 2023 (the end-date of the period covered in the Scheme actuary's report), and (iii) that the sum would have been invested in the same way as substantial new investments were in fact made in 2014 following the change in investment strategy.

331. As a result, the amount of the liability under the CN would be increased by £31,349, from £1,844,054 to £1,875,403.

332. As regards the third stage, the shortfall sum, as referred to in s 39 PA 2004 is £7.3 million if the CN is issued by reference to the 2012 Act. If the CN is issued solely by

reference to the 2014 Act, the shortfall sum is £5.3 million. The funding position of the Scheme, as at 1 March 2023, shows a deficit of £4,475,000, as stated in the Scheme Actuary's latest report.

333. Accordingly, the issue of a CN to Mr Anant Shah in the sum of £1,875,403 (being 50% of the amount of the 2014 Payment plus an adjustment to take into account the passage of time since 2014) would in all the circumstances be reasonable and would be within the shortfall sum.

Conclusion and Directions

334. The reference is dismissed. Our decision is unanimous.

335. In accordance with the relevant provisions of s 103 PA 2004:

(1) We determine that the appropriate action for the Regulator to take in relation to the matter referred to us on this reference is to issue a CN to Mr Anant Shah in the sum of £1,875,403.

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

(3) We remit the reference to the Regulator with a direction that effect be given to our determination and there be liberty for the Regulator to apply to the Tribunal for further directions in this regard.

JUDGE TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE
RELEASE DATE: 28 July 2023