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"*Box Clever*

How has judicial guidance in the *Box Clever* case changed existing thinking on reasonableness and financial support directions? Why does it matter and why is it so significant for practice?"

Nicolas Stallworthy QC

Caveats and disclaimers

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- ‘Chatham House Rules’ apply
- Any views expressed are mine alone …
- Nothing I say should be treated as reflecting the views of the Pensions Regulator (“**tPR**”)

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The key provisions of the PA 2004

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- s.43(5)(b): tPR may issue an FSD to a person "*only if* [tPR] *is of the opinion that it is reasonable*" to do so.
- s.47(7): when forming that opinion, tPR "*must have regard to such matters as* [tPR] *considers relevant including, where relevant, the following matters —*

(a) the relationship which the person has or has had with the employer (including … whether the person has or has had control of the employer within the meaning of [s.435(10) IA 86]),

(b) … the value of any benefits received directly or indirectly by that person from the employer,

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

(d) the financial circumstances of the person, and

(e) such other matters as may be prescribed."

The key facts of the case

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- Joint venture between Thorn (Nomura) and Granada, combining their respective TV rental businesses.
- The TV rental market was in terminal decline
- The businesses were sold down into the Joint Venture for £980M in June 2000

  - Granada £600M: cash £530M, balance in loan notes

  - Thorn £380M: cash £330M, balance in loan notes
- The cash consideration was financed by Box Clever borrowing £860M from WestLB, secured on the entire joint venture.
- Scheme established in October 2001
- Administrative receiverships from September 2003

The key guidance on reasonableness

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- *Granada UK Rental & Retail Ltd, Granada Media Ltd, Granada Group Ltd, Granada Ltd and ITV plc v The Pensions Regulator and Box Clever Trustees Ltd*
- Upper Tribunal, 18.05.18 (Rose J, as she then was; Judge Herrington; and Ian Abrams): [2018] UKUT 0164 (TCC)
- Court of Appeal, 20.06.19 (Patten, Newey and Males LJJ): [2019] EWCA Civ 1032, [2020] I.C.R. 747, [2019] Pens. L.R. 20
- Permission to appeal refused by Supreme Court on 13.02.20

Emphasis on responsibility

- s.5: "*The main objectives of tPR in exercising its functions are*

  (a) to protect the benefits under occupational pension schemes of, or in respect of, members of such schemes …

  (c) to reduce the risk of situations arising which may lead to compensation being payable from the PPF …"
- s.100: tPR must have regard to the matters set out in s.100(2):

  "(a) the interests of the generality of the members of the scheme to which the exercise of the function relates, and

  (b) the interests of such persons as appear to the Regulator to be directly affected by the exercise".
- The purpose of tPR's FSD powers is to further its statutory objectives: UT [429]-[430] & CA [139]

Emphasis on responsibility: UT [430]

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"*… in making our assessment, we should give the legislation a purposive interpretation, having regard to the policy objective of the legislation, which … is to create a rescue framework for pension schemes which are in deficit through the medium of imposing new liabilities on those who have had the necessary degree of association and connection with the relevant scheme at the relevant time. We should therefore consider whether the legislation was intended to embrace the circumstances pertaining to this case as being circumstances in which it is reasonable to issue an FSD…*". {seemingly approved by CA [216]}

Emphasis on responsibility: UT [433]

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"***there is an important distinction between blame and responsibility***. *Even if all the decisions made by the Targets were taken for good commercial reasons at the time and, without the benefit of hindsight, were perfectly reasonable decisions to take, … the key question is whether the structure left the Joint Venture vulnerable to adverse movements in the market so that Granada should bear some responsibility for the risks which eventuated for the Employers and the Scheme.* ***The fact that this is a matter of responsibility rather than blame*** *is also relevant to the extent to which hindsight is a legitimate factor in our consideration.*"

Emphasis on responsibility: CA [211]

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- Not a fault-based jurisdiction: [67], [166] & [207]

- [211]: "*The distinction drawn by the tribunal between fault on the one hand and responsibility on the other is in our view a valid one. Thus it is possible to say, as the tribunal did say in this case, that even though a target was not at fault legally or ethically, it nevertheless bears a high degree of responsibility for an insufficiency of funding.*"

Emphasis on responsibility: CA [213]

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"*The need for a balance to be struck is apparent when the consequences of a decision that the imposition of an FSD is (or is not) reasonable are considered. Another way of asking whether it is reasonable for an FSD to be imposed on the facts of any given case is to ask whether, having regard to: the relationship between the target and the employer; the target's connection with the scheme; and the value of any benefits received by the target from the employer, and giving appropriate weight to any retrospectivity and absence of moral hazard, fairness requires that an insufficiency of funding should be borne by the levy payers of the PPF and the scheme members on the one hand, or the target on the other. ...*".

Hindsight: the Targets' argument

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- The Targets contended that:
  - the mere exchange of an asset for its then present value could not constitute a 'benefit';
  - so the consideration received in 2000 could not be characterised as a 'benefit' unless the price was proven to be an overvalue as at June 2000; and
  - it was illegitimate to evaluate the price with hindsight.

Hindsight: discussion

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- If the Targets were correct, one would have to ignore the fact that £74M in loan notes were written off, treating the Targets as receiving £600M cf. £530M.
- The assessment of what is 'reasonable' has to be undertaken at the present date.
- Whether a target has received any benefits from the employer is not concerned with fault (e.g. whether there was a sale at an overvalue), but rather with whether – with hindsight – a target has received benefits from the employer which make it more reasonable to impose the requirements of an FSD on that target.

Hindsight: CA guidance [136]-[137]

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"[136] tPR is entitled to consider the relationship between the target and the employer … and the target's involvement with the scheme …, not only as these exist at the time when the imposition of an FSD is being considered ('which the person has') but also as they existed in the past ('or has had').

[137] tPR is entitled to take a similar approach to 'the value of any benefits received'… . Thus it may be that, viewing the matter as at the time when the imposition of an FSD is being considered, it can be seen that the benefit received in the past has turned out to be much more valuable than may have been considered at the time or, conversely, that it has in the event proved to be of less value or even of no value at all. …"

Hindsight: CA guidance [207]

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"*Whether it is reasonable to impose an FSD must be decided at the date of the determination and is not dependent on any fault on the part of the targets. … Those specified matters require the tribunal to consider the position, not only at the time of the determination, but also as they stood in the past, to the extent that this is relevant. …*".

Hindsight: CA guidance [183]

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"*The targets submitted that to exchange an asset for cash at a fair value was an equal exchange in which neither side can be said to have obtained a benefit. Plainly, however, viewing the matter at the date of the determination, the fact that Granada had obtained very substantial cash proceeds for a business which was already in terminal decline was a very valuable benefit. By the time of the determination, the business had failed and was of no value at all …*"

Benefit: not needing to be quantified

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UT [425]-[427] (approved CA [162]): 'benefit' not necessary for it to be reasonable to impose an FSD –

"*... the absence of any circumstances falling within the scope of those specific matters does not preclude the issue of an FSD if, taking into account all other circumstances, it is reasonable to do so. ...*

... the fact that a target has not received any substantial benefit directly or indirectly from an employer is not a bar to the issue of an FSD if, taking into account the nature of the relationship between the potential target and the employer or the scheme, it is otherwise considered reasonable for an FSD to be issued..."

Benefit: CA [138]

- The Targets' argument that, absent proof of overvalue, there was no 'benefit', noted that s.43(7)(c) refers to "*the value of the benefits received …*"
- The question thus arose as to whether any 'benefits' relied upon had to be precisely quantified. The CA held:

"*The fact that s.43(7)(b) speaks of 'the value' of any benefits received does not mean that the value of such benefit must be susceptible of precise quantification. Where that is possible, it will be a factor which may be relatively easy to take into account and to give appropriate weight, but there are other benefits whose value may nevertheless be real, even if difficult or impossible to quantify in money terms*"

Benefit: CA [215]

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"*In our judgment, the benefits which the tribunal identified as having been received by the targets clearly were benefits within the ordinary meaning of that term. They had a value, even if that value was not necessarily readily quantifiable, and the tribunal was entitled to take that into account. Moreover, the benefits arose from the way in which the transaction had been structured and, as the tribunal recognised, this factor therefore supported the tribunal's reasoning concerning the relationship between the targets and the employers rather than providing independent support for its conclusion.*"

Relevance and the process for assessing reasonableness

- Under this regulatory jurisdiction the factual enquiry is potentially wide-ranging.
- s.43(7): "*tPR must have regard to such matters as tPR considers relevant including, where relevant, the following matters …*"
- This regulatory enquiry is more open-textured and factually inclusive than e.g. the majority of private law causes of action, which tend to have fewer, and more predictable, ingredients that have to be established.

Relevance cf. interpretation

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- The inclusive wording of sub-section (7) may sometimes make its precise interpretation and application less critical.
  - if tPR (or the Tribunal) considers a matter relevant, debate as to whether that matter falls narrowly within the wording of the list at (a)-(d) may be arid;
  - because even if that matter is not narrowly within the wording of one of those paragraphs, it can still legitimately be taken into account, if considered relevant.

? s.43(7) to be given "*a wide meaning*" UT [430]

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

? s.43(7) to be given "*a wide meaning*" CA [215]-[216]

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"…***Whether the term 'benefit' should be given a wide meaning is not a question which arises on the facts of this case***. *In our judgment, the benefits which the tribunal identified as having been received by the targets clearly were benefits within the ordinary meaning of that term. … Nor do we accept that the tribunal misdirected itself as a result of stating too broadly the 'policy object' of the FSD legislation. The only significance of this submission was that it is said to have led to the tribunal giving too broad a meaning to terms such as 'relationship', 'involvement' and 'benefit' used in s.43(7). However, an examination of the tribunal's specific reasoning as to the matters listed in the subsection demonstrates an entirely conventional usage of such terms. The submission adds nothing of significance to the targets' submission on retrospectivity and has no independent validity.*"

Relevance: CA [51] & [135]

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[51] "*s.43(7) contains a list of certain matters which tPR must consider (where relevant) as part of this exercise,* ***while recognising that there will be other relevant matters which it must also take into account.***"

[135] "... ***The matters to which tPR must have regard are not limited to the list of matters specified in s.43(7).*** *The word 'including' makes clear that the list is not exhaustive. However,* ***where those matters are relevant, which is an objective question of law, tPR must have regard to them.*** *The weight to be given to each of them is for tPR to decide. They are not necessarily to be given equal weight. ...*"

Relevance: CA [140]

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"*The legislation allows,* ***and we would say <u>requires</u>****, tPR to have regard to the fact that, when it is the case, the matters relied upon as relevant … all occurred before the coming into force (or even the announcement) of the legislation. That can either be regarded as part and parcel of consideration of the listed matters or as an additional matter which must be taken into account, bearing in mind that the list in s.43(7) is not exhaustive. Plainly, however, where this is the case, as it is here, it will be a relevant consideration,* ***and it would be an error of law not to take it into account and to give it appropriate weight****.*

…"

Relevance: CA [208]-[209]

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"[208]... *in assessing reasonableness, the tribunal was not only entitled* ***but required*** *to take into account the retrospective elements in this case, together with the fact that the targets' practical connection with the employers and the scheme had ceased as long ago as 2003 when the administrative receivers were appointed, and to give them appropriate weight.*

[209] *We would accept that the tribunal* ***was obliged as a matter of law*** *to treat the matters relied upon by the targets under the heading of retrospectivity as matters having substantial or significant weight against the imposition of an FSD. That is emphatically not, however, to treat words such as "substantial" or "significant" as terms of art. ...*"

Relevance: questions

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In the light of this guidance, you might ask:

- what s.43(7) means by saying that tPR "*must*" have regard to the matters listed at paragraphs (a)-(d) "*where relevant*" ?
- when the matters listed at paragraphs (a)-(d) might not be 'relevant' ? and
- what is the basis on which the CA was saying that other matters not listed at paragraphs (a)-(d) would be matters which tPR must take into account ?

Relevance: provisional answers

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- The words "*where relevant*" do not mean 'where applicable'
- But rather 'where the matter points towards it being reasonable or not to impose an FSD'.
- e.g. UT [439]: "... *we do not consider the financial circumstances of the Targets to be relevant in this case. It was common ground that the Targets have the funds to comply with any direction that is imposed. However, we do not consider that the fact that they do have substantial funds points in favour of issuing an FSD. In a case where potential targets are sufficiently resourced, financial circumstances should be regarded as a neutral factor ...*".

Relevance: provisional answers (continued)

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And:

- when the CA held that retrospectivity was a matter which tPR was obliged to take into account,
- despite not being a matter listed in paragraphs (a)-(d),
- that was on the basis that no reasonable decision-maker would have failed to take it into account (on a *Wednesbury*, public law, analysis).

Relevance: public law analysis

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On this analysis, s.43(7) fits into orthodox public law categorisations of:

- obligatory considerations (which the statute expressly or impliedly says must be taken into account, at least to the extent of determining whether they point one way or another in the required assessment); and
- permissible considerations (which the decision-maker can choose for itself whether or not to take into account, subject to having to act reasonably in a *Wednesbury* sense).

Relevance: public law analysis (continued)

- Within the range of otherwise only 'permissible' considerations, the *Wednesbury* test of rationality may yet entail that there are additional matters (not listed in (a)-(d)) which no reasonable decision-maker would fail to take into account (or, conversely, would choose to take into account); e.g. because they are so obviously material (or immaterial) to the decision.
- But outside the list of obligatory considerations specified by the statute, "*it is for the decision-maker and not the court, subject again to Wednesbury review, to decide upon the manner and intensity of inquiry to be undertaken into any relevant factor accepted or demonstrated as such.*" (see *Khatun* *)

Relevance: public law cases

- ***In re Findlay*** [1985] AC 318 at 333-334
- ***R (Khatun) v Newham LBC*** [2004] EWCA Civ 55, [2005] QB 37 at [34]-[35]*
- ***R (Hurst) v London Northern District Coroner*** [2007] UKHL 13, [2002] 2 AC 189 at [57]
- ***Derbyshire Dales DC v S of S for Communities and Local Government*** [2009] EWHC 1729 (Admin [2010] 1 P&CR 19, at [25]-[28]
- ***Cumberledge v S of S for Communities and Local Government*** [2018] EWCA Civ 1305, [2018] PTSR 2063 at [20]-[25]

The significance of this guidance …

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- likely to embolden tPR as to when it may properly act, broadening the circumstances in which it may be perceived as 'reasonable' to issue an FSD.
- will undermine arguments that a target 'did nothing wrong' (and that there was no 'moral hazard'), turning the focus to responsibility and questions whether it is fairer for underfunding to be borne by beneficiaries and/or the PPF:

  – a relational, remedial, regulatory regime.
- may inform the interpretation and operation of other provisions of the Act, where very similar wording is used: e.g. ss.47(4) and 38(3)(d) & (7)