Case No: CO/4532/2016

Neutral Citation Number: [2017] EWHC 7 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/01/2017

Before :

Mrs Justice Whipple

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Between:
R
-on the application of-

(1) Grace Bay II Holdings Sarl
(2) HIG Bayside Debt & LBO Fund II LP
(3) HIG European Capital Partners LLP
(4) HIG Europe Capital Partners LP
(5) HIG Europe-Silentnight Sarl
(6) Silentnight Group Limited
(7) Mr Mark Kelly
(8) Mr Lionel Laurant
(9) Mr Sami Mnaymneh **Claimants**

-and-

The Pensions Regulator **Defendant**

-and-

(1) ABF Limited (in Liquidation)
(2) SNGL Realisations (2011) Limited (in Liquidation)
(3) 20-20 Trustees Limited
(4) Mr William Ashburner
(5) Mr Geoffrey Bailey
(6) Mr Martin Jourdan
(7) Mr Geoffrey Shaffer **Interested**
(8) Board of the Pension Protection Fund **Parties**

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Michael Fordham QC, Iain Steele and Ajay Ratan (instructed by **Pinsent Masons LLP**) for the **Claimants**
Fenella Morris QC and Thomas Robinson, (instructed by **The Pensions Regulator**) for the **Defendant**
Monica Carss-Frisk QC, Jonathan Hilliard QC and Jamie Holmes (instructed by **Burges Salmon LLP**) for the **Third to Seventh Interested Parties**

Hearing dates: 14 December 2016

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Judgment

Mrs Justice Whipple:

INTRODUCTION

1. This claim for judicial review is brought by a number of Claimants against a warning notice dated 22 June 2016, issued by the Pensions Regulator (the "Regulator"). This was the second warning notice issued in the course of the Regulator's investigation and I shall refer to it as WN2. The first warning notice was issued on 11 December 2014 and I shall refer to it as WN1. Both warning notices named the Claimants in this action as the "targets", namely those persons and entities against whom the Regulator was considering taking regulatory action.

2. The Claimants challenge WN2 on the ground that it was unlawful, either because it was issued at a time when WN1 was still extant so that WN2 was beyond the Regulator's powers, or because the process leading up to issue of WN2 was so conspicuously unfair and lacking in even-handedness as to render WN2 unlawful.

3. The Claimants seek an order that WN2 be declared unlawful or quashed.

HEARING IN PRIVATE

4. An application to sit in private was made by the Regulator, by its Counsel (led by Miss Morris) in her skeleton argument. It was not resisted in the skeleton arguments filed by the Claimants (led by Mr Fordham) and by the third to seventh interested parties to this application (to whom I shall refer as the "Trustees") (led by Miss Carss-Frisk). At the outset of the hearing, I invited submissions from anyone present in Court who was not formally represented about whether I should hold the hearing in private. No one wished to address me. I ruled that the hearing should be in private, and said I would give my reasons later. These are my reasons.

5. The general principle is, of course, that hearings should be in open court. However, CPR 39.2(3) permits a hearing to be in private if that is necessary in the interests of justice. CPR 39.2(3)(c) deals with hearings involving "confidential information" defined to include information relating to personal financial matters, where publicity would damage that confidentiality. Rule 39.2(3)(g) is a catch-all which gives the Court power to hold the hearing in private where it is in the interests of justice to do so. The rules are supplemented by Practice Direction 39A.

6. In this case, the issues to be determined involved analysis and discussion of "Restricted Information" as that term is defined at section 82(4) of the Pensions Act 2004 (the "2004 Act"), being information obtained by the Regulator in the exercise of its functions which relates to the business or other affairs of any person, except information which is already in the public domain. Restricted Information is protected by the 2004 Act and must not be disclosed, s 82(1), (2) and (5). An exception to the bar on disclosure exists if the person to whom it relates consents, s 82(3).

7. The extent of interference with the principle of open justice occasioned by a private hearing was, in this case, relatively modest given that all parties agreed that my judgment should be public. I indicated at the beginning of the hearing, in public, that I intended to reserve judgment to enable the parties to make submissions on any

passages to be rephrased or removed before the judgment was released. The Claimants and Trustees would also at that stage be able to consider granting consent to disclosure, to the extent that my judgment disclosed Restricted Information relating to their affairs.

8. I am satisfied that some if not all of the Restricted Information in the case papers is "confidential information" within the meaning of CPR 39.2. I am further satisfied that the balance was correctly drawn by holding the hearing in private in order to protect that confidential information, and to serve the wider interests of justice in upholding the statutory protections for Restricted Information contained in the 2004 Act.

FACTS

9. The background to WN2 is, in summary, as follows. On 7 May 2011, the HIG Group ("HIG"), a US private equity group including offshore funds, individuals and limited liability partnerships, acquired the business of Silentnight, the bed manufacturing company (the "company") for £19.2 million. The first to sixth Claimants are members of the HIG Group. The seventh, eighth and ninth Claimants were personnel within the HIG Group at the material time. They were involved in the sale of the business to HIG.

10. The company operated an occupational pension scheme for past and present employees, called the Silentnight Group DB Scheme (the "Pension Scheme"). At the time of the sale of the business to HIG, the Pension Scheme was facing a large deficit. The consequence of the sale to HIG was to divorce the business from the Pension Scheme. The Pension Scheme now remains in deficit, and is unable to meet its liabilities in full. Subject to action by the Regulator, the Pension Scheme is likely to enter the Pension Protection Fund ("PPF").

11. By exercise of its powers under the 2004 Act, the Regulator commenced an investigation into the sale of the group's business and assets to HIG. The Regulator interviewed a number of witnesses and obtained expert evidence from a Mr Murdoch McKillop, a chartered accountant and licensed insolvency practitioner with specialist expertise in financial restructuring of distressed companies. Mr McKillop was instructed to advise on the market value of the group's business and assets at the date of sale in May 2011, whether that value (if higher than the actual sale price) could have been achieved on sale in 2011, the difference if any between the net recovery received by the Pension Scheme and what it would have received if the market value had been achieved, and whether the 2011 sale had achieved the maximum sum reasonably obtainable. His report was dated 5 December 2014. He concluded that there had been a sale at an undervalue, because the market value of the group's business and assets had been £31.5 to £38.5 million at the relevant time, and that in consequence the Pension Scheme had lost out on additional returns.

12. The Regulator served a warning notice on 11 December 2014, warning the Claimants of an intention to seek a contribution notice against them in the amount of £17.16 million. The predicate for that contribution notice was that the group's business and assets had been sold at an undervalue with a resulting loss to the Pension Scheme of £17.16m. This is "WN1". WN1 was largely based on the expert evidence of Mr McKillop.

13. WN1 was sent, amongst others, to the Claimants and to the Trustees. The Claimants and the Trustees are "directly affected" persons for the purposes of the statute.

14. On 16 October 2015, the Trustees filed their representations on WN1. They adduced (amongst other things) an expert report from Mr David Griffiths, an expert with experience of banking and lending, specifically in relation to property development and investment lending. His conclusion was that the group could have refinanced its debt up to January 2011 without having recourse to HIG at all. The likely terms of refinance would have been based on an asset-backed structure against invoices, stock, and plant and machinery, provided by an asset-based lender.

15. The Claimants filed their representations in answer to WN1 on 16 December 2015, accompanied by extensive evidence, including four expert reports, seven witness statements, and numerous individual documents. Although the outline of the Trustees' case had been intimated in correspondence shared with the Claimants prior to this, before serving their representations the Claimants were not provided with the Trustees' representations or any of the expert or factual evidence underlying it. The Claimants' representations did not deal in detail with the Trustees' case, although one witness statement did refer to unsuccessful attempts made to refinance the business before and during HIG's involvement.

16. The Regulator considered the Trustees' representations and the Claimants' representations on WN1. The Regulator requested further information from the Claimants.

17. The Claimants responded to Mr Griffiths' report by a letter dated 3 March 2016. They challenged Mr Griffiths' conclusion that the group could have been refinanced without the group's business being sold.

18. On 22 June 2016, the Regulator served WN2 on the Claimants and Trustees. WN2 was accompanied by new evidence and documents. Specifically, WN2 was supported by a report from Mr Robert Eddowes, an expert with specialist expertise in asset-backed lending ("ABL"). He defined ABL as a term *"used to denote a secured working capital facility using Receivables Finance as a core with additional formula driven lending against other types of assets including stock, plant and machinery, real estate, and other tangible assets".* His view was that the group would have been able to refinance on an ABL basis in the period 1 September 2010-29 November 2011, and that would have provided a cash flow surplus for the material period. In other words, it was his view that the group's business and assets need not have been sold at all, the group could have remained solvent throughout the relevant period if refinanced on an ABL basis. WN2 warned of a potential liability to contribution notices in an amount equal to the pension deficit at the material time. WN2 was premised, among other matters, on the expert evidence of Mr Eddowes.

19. The report of Mr Eddowes was not sent to the Claimants in advance of the issue and service of WN2.

20. The cover letter from the Regulator dated 22 June 2016 stated that WN2 was being given in addition to WN1 and did not affect the giving of notice of regulatory action under consideration in WN1. It continued:

> "Should the cases in both Warning Notices be referred to the Determinations Panel in due course, the Regulator's current intention is that the arguments set out in WN2 would represent its primary arguments, with the arguments set out in WN1 being run in the alternative."

LITIGATION HISTORY

21. The Claimants issued their Claim Form on 5 September 2016, challenging WN2. They have not to date responded substantively to WN2, preferring to pursue this application for judicial review.

22. The Regulator filed its Acknowledgement of Service and Summary Grounds on 28 September 2016. The Regulator indicated its intention to defend the application on substantive grounds, but also submitted that the Claimants had an alternative remedy, namely to proceed to the Determinations Panel and the Upper Tribunal. The Regulator resisted the grant of permission on the basis of alternative remedy, as well as on substantive grounds.

23. The Trustees filed their Acknowledgement of Service on 29 September 2016. They too resisted the claim, submitting that there was an alternative remedy open to the Claimants via the statutory regulatory process, and resisting the claim substantively.

24. On 19 October 2016, Lang J adjourned the application for permission to a "rolled up" hearing with the substantive claim to be determined at that hearing, if permission was granted. The rolled up hearing was subsequently fixed for 14 and 15 December 2016.

25. The Claimants subsequently issued an application for specific disclosure. On 25 November 2016, Lang J ordered that disclosure application to be heard with the rolled up hearing.

26. Thus, the matter came before me on 14 December 2016 as a "rolled up" permission hearing with an associated application for specific disclosure.

27. I was greatly assisted at that hearing by the written and oral submissions of all Counsel. I thank them for their efforts in getting this case before the Court, in good order, within a very short timescale.

ISSUES

28. The following matters were addressed by the parties in their skeletons:

    a) Whether the Claimants have an alternative remedy available to them (*Alternative Remedy*);

    b) Whether the Regulator has power to issue more than one warning notice, proposing the exercise of the same regulatory function against the same targets arising out of the same facts (*Vires*);

    c) Whether WN2 is unlawful as a result of unfairness in the Regulator's treatment of the Claimants (*Unlawful Exercise*)

d) Whether this Court should decline a remedy on grounds of the materiality test in s 31 Senior Courts Act 1981 (*Materiality*)

e) Whether the Regulator should be compelled to give specific disclosure (*Disclosure*).

29. The alternative remedy argument was pressed strongly by the Regulator and the Trustees. By contrast, the Claimants contended that this claim could and should be heard in the Administrative Court. That was the first issue on which I heard submissions given its potential to determine this application for permission.

STATUTORY SCHEME

30. The 2004 Act establishes the regulatory scheme. By s 5, the Regulator's objectives are described. These include the protection of benefits of members under occupational pension schemes, and reducing the risk of situations arising which may lead to compensation being payable from the PPF. By s 93, the Regulator is required to determine the procedure that it proposes to follow in relation to the regulatory functions. It is common ground in this case that the particular functions at issue are "reserved functions" as those are defined in the statute and referred to at section 93(2)(c). By section 93(3) the Determinations Panel of the Regulator (the "DP") *must* determine the procedure to be followed by it in relation to any exercise of any regulatory function. By section 94, the Regulator *must* publish a statement of any procedure determined under section 93. By section 95, the Regulator *must* comply with the "standard procedure" where it considers that the exercise of a regulatory function or functions may be appropriate. (There is provision for a special procedure also, but it was common ground that the standard procedure was applicable to the facts of this case.) I have emphasised the mandatory nature of these provisions.

31. Section 96 describes the standard procedure. Section 96(2) provides as follows:

> "(2) The "standard procedure" is a procedure which provides for –
>
> (a) the giving of notice to such persons as it appears to the Regulator would be directly affected by the regulatory action under consideration (a "warning notice"),
>
> (b) those persons to have an opportunity to make representations,
>
> (c) the consideration of any such representations and the determination whether to take the regulatory action under consideration,
>
> (d) the giving of notice of the determination to such persons as appear to the Regulator to be directly affected by it (a "determination notice"),
>
> (e) the determination notice to contain details of the right of referral to the Tribunal under subsection (3),

(f) the form and further content of warning notices and determination notices and the manner in which they are to be given, and

(g) the time limits to be applied at any stage of the procedure."

32. Section 96(3) provides for any determination by the DP to be referred to the Tribunal, as follows:

> "(3) Where the standard procedure applies, the determination which is the subject-matter of the determination notice may be referred to the Tribunal […] by-
>
> (a) any person to whom the determination notice is given as required under subsection (2)(d), and
>
> (b) any other person who appears to the Tribunal to be directly affected by the determination."

33. The reference to the Tribunal is to the Upper Tribunal (section 96(7)). It is common ground that the Tax and Chancery Chamber has jurisdiction over such references.

34. The powers of the Tribunal are contained in s 103, as follows:

> "…
>
> (5) On determining a reference, the Tribunal must remit the matter to the Regulator with such directions (if any) as the Tribunal considers appropriate for giving effect to its determination.
>
> (6) Those directions may include directions to the Regulator—
>
> (a) confirming the Regulator's determination and any order, notice or direction made, issued or given as a result of it;
>
> (b) to vary or revoke the Regulator's determination, and any order, notice or direction made, issued or given as a result of it;
>
> (c) to substitute a different determination, order, notice or direction;
>
> (d) to make such savings and transitional provision as the Tribunal considers appropriate."

35. The Regulator is compelled to act in accordance with the Tribunal's determination (s 103(7)).

36. Two points emerge from this brief review of the statutory scheme. The first relates to the nature of a warning notice. A warning notice is the first step in the regulatory sequence. It warns that a contribution notice is being considered. It is followed by an

opportunity for any directly affected persons to make representations. There is no obligation to make representations in answer to a warning notice. If representations are made, they must be considered in advance of any determination by the Regulator that regulatory action will be taken (for example, a contribution notice). In *ITV v Pensions Regulator* [2015] 4 All ER 919 at [57], Arden LJ held that a warning notice provides protection for targets, because they will know the case they have to meet and the fact that they are vulnerable to financial support directions from the warning notice, which is a reflection of the Regulator's duty to act fairly. In *Granada UK Rental and Retail Ltd and Others v Pensions Regulator, Box Clever Trustees Limited as IPs* [2016] UKUT 492 (TCC), Judge Colin Bishopp noted Arden LJ's comments at [33] but went on to say that a warning notice is not *"a kind of straightjacket"*. I agree. I accept Miss Morris' submission that a warning notice is part of the investigatory phase and it does not, at least not necessarily, represent the Case Team's final position. I also accept Mr Fordham's submission that even at this investigatory stage, the Regulator has an obligation to act fairly.

37. Secondly, the 2004 Act establishes a comprehensive regulatory code, including a right of reference from the DP to the Tribunal (and, subject to permission, on appeal from the Tribunal to the Court of Appeal). As part of that comprehensive code, the Regulator is required to determine its own procedure, and the Upper Tribunal of course will likewise govern its own procedure.

PUBLISHED GUIDANCE

38. The investigatory functions of the Regulator are carried out by the Case Team. The Case Team procedures as they relate to reserved regulatory functions are set out in a document entitled "Case Team Procedure" dated 16 May 2014. This is a document required by s 94 of the Act. Paragraph 8 provides for the Case Team to prepare and issue a warning notice where that may be appropriate, and sets out at paragraph 9 the contents of a warning notice, including:

    a) The circumstances of the case including the grounds and evidence on which the warning notice is based;

    b) Material received or obtained by the Regulator which might reasonably be considered to support or undermine the case for the exercise of the functions;

    c) Details of the specific functions that are under consideration; and

    d) A timeframe for receipt of representations.

39. Paragraphs 10 and 11 make provision for directly affected parties to make representations. Paragraph 12 provides for an oral hearing, if requested. Under the heading "Steps following representations", paragraph 15 states that the Case Team will keep disclosure under review, and paragraph 16 provides:

> "If a Directly Affected Party wishes to raise a procedural issue in the period before any referral by the Case Team to the Determinations Panel, it should be raised with the Case Team who will consider it and make a decision. The Case Team may share details of the issues among any of the other Directly Affected Parties, if it considers it appropriate to do so."

40. The procedures of the DP are set out in a document dated January 2013 entitled "Determinations Panel procedure". This too is a document required by s 94 of the Act. Under the heading "Standard procedure", paragraphs 8 to 11 provide for the referral of cases by the Case Team to the DP for determination. Paragraph 9 provides that once a case has been referred to the DP, all procedural issues will be determined by the DP. Paragraph 10 empowers the DP to issue directions. Paragraph 11 indicates that the DP will expect the documentation presented to the DP *"to set out fully the case that it is being asked to consider…".*

41. Under the heading "Decision-making", the following is stated:

> "26. The Determinations Panel will take no part in the investigation carried out by the Case Team. However, in order to ensure that its decision is made in a manner that is fair to all parties, including those persons whose interests the Determinations Panel is statute-bound to consider, and consistent with the regulator's public law duties, the Determinations Panel may:
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> i. consider additional material (to that required by paragraph 11 or 13 above) supplied by the Parties so long as it is submitted within a time period in which it can properly be considered by the Parties;
>
> ii. request the production of apparently existing material or information (ie material which, having considered the documentation provided, the Panel has reasonable grounds for concluding exists); and
>
> iii. decide, in managing the process, that it may consider any additional material or information received from persons who are not Directly Affected Parties."

42. In summary, these two documents describe the detail of the statutory scheme contained in primary legislation. The Case Team and the DP have wide powers to manage their own procedures and processes. They must be fair in doing so, conscious of their public law duties.

ALTERNATIVE REMEDY

43. This is the first issue which falls for determination.

Case Law

44. The principles which apply can be extracted from a series of cases which concern matters of financial regulation by the Financial Services Authority ("FSA") under the Financial Services and Markets Act 2000 (the "2000 Act"). That Act provided for the issue of warning notices as a statutory preliminary before the Regulatory Decisions Committee (the "RDC") of the FSA could issue a decision notice stating an intention to take regulatory action. The 2000 Act provided for any decision of the RDC to be referred to the Financial Services and Markets Tribunal, an independent body which would hear the matter *de novo*. The FSA was required to discharge its statutory responsibilities in accordance with the provisions of the 2000 Act, as further

explained in its Handbook of Rules and Guidance. A fuller review of the scheme is provided by the Court of Appeal in *R (Davies) v FSA* [2004] 1 WLR 185, a case to which I shall shortly come, at [3] to [9]. In short, the scheme established by the 2000 Act is similar in its essentials to that established by the 2004 Act for the regulation of the pensions industry. The cases which examined the jurisdiction question under the 2000 Act are therefore highly relevant to the issues raised in this case.

45. The first case in the sequence is *Davies*. In that case, the Claimants challenged the decision of the FSA to issue warning notices notifying an intention to make prohibition orders under ss 56 and 57 of the 2000 Act. The challenge was based on the Claimants' assertion that the notices were ultra vires and an abuse of process, because the FSA's predecessor, the Securities and Futures Authority ("SFA") had commenced and then discontinued disciplinary proceedings under the Financial Services Act 1986, the FSA was now out of time to take fresh disciplinary proceedings, and so it was argued that the use of the alternative power under ss 56 and 57 was improper. The FSA objected to permission being granted. It took the preliminary procedural point that these objections should be made to the RDC, from which a reference could be made to the Tribunal if appropriate. Permission was refused by Sir Richard Tucker on the papers, on the basis that an alternative remedy was available. The application for permission was renewed before Lightman J, at [2003] 1 WLR 1284. He heard full argument and concluded that it was appropriate to decide the substantive issue without determining the procedural objection (see [1] and [12]). In the event, he refused permission on substantive grounds.

46. The Court of Appeal dismissed the appeal, agreeing with Lightman J that the challenge was unarguable (see [21] to [25]). The FSA maintained before the Court of Appeal that the case should never have been adjudicated by the Administrative Court at all, given the availability of an alternative remedy. The Court agreed with the FSA (see [29] – [32]). The Court (per Mummery LJ) referred to the need to find "exceptional circumstances" for proceeding by way of judicial review and then concluded:

> "[32] … the points raised in the grounds on which judicial review is sought could and should, if pursued, be the subject of representations to the authority, or of submissions to the tribunal. … An application by way of judicial review is, in all the circumstances of this case, unjustified."

47. It is right to note that the Court went on to say that the statutory course could in that case have been taken without substantially increasing the expenses already incurred in preparations to defend the discontinued proceedings brought by the FSA. This is a point on which Mr Fordham places great emphasis, and to which I shall return.

48. The second case is *R (Griggs) v FSA* [2008] EWHC 2587 (Admin). This was a permission decision. A preliminary investigation report was prepared by the FSA and sent to the Claimant. A warning notice was then issued, before the Claimant had the opportunity to comment. The Claimant argued that there was such irredeemable unfairness that the warning notice had to be quashed. Burnett J refused permission. He referred to *Davies* and said this:

> "[14] It is entirely clear from [Mummery LJ's] judgment that only in very exceptional circumstances should this court entertain such applications. That is because the FSA is operating within a statutory environment that provides protection to those in the position of the claimant, and fundamentally the protection that is available through utilising the Tribunal. The relevant principles are set out in paragraphs 10, 20(4), 30 and 32 of the judgment. In my view, the principles articulated there apply with equal force to this application."

49. The third case is *R (Willford) v FSA* [2013] EWCA Civ 677. The case concerned a Decision Notice by the RDC against the Claimant under s 67 of the 2000 Act. The Claimant was dissatisfied with the reasons given by the RDC and applied for judicial review. The single judge granted the judicial review of the Decision Notice. The FSA appealed. The Court of Appeal considered whether judicial review was the appropriate procedure. Lord Justice Moore-Bick said this:

> "[20] It was common ground that the court has a discretion whether to give permission to proceed with a claim for judicial review and consider the substance of the claim. It was also common ground, however, that where there is an alternative remedy available to the claimant the court will not ordinarily allow him to proceed by way of judicial review, save in exceptional circumstances, usually because it is satisfied that the alternative remedy is for some reason clearly unsatisfactory."

Dealing with the argument that the particular breach alleged in that case could only be remedied by judicial review, he continued (at [20]):…

> "It was common ground that the tribunal does not have power to quash the Decision Notice and remit the matter to the RDC, but whether that means that a reference to the tribunal is not an adequate remedy is one of the principle issues that arises on the appeal. If the judge is right, however, it is difficult to see why any challenge to a Warning or Decision Notice on public law grounds should not routinely be made by way of judicial review."

50. Moore-Bick LJ reviewed a number of other cases. Referring to *R v Chief Constable of Merseyside Police ex parte Calveley* [1986] 1 QB 424, he said this

> "[23] … May LJ expressed the view that it is necessary to guard against granting judicial review in cases where there is an alternative appeal remedy merely because it may be more effective and convenient to do so. In my view those are important words of caution to bear in mind, because to allow a claim for judicial review to proceed in circumstances where there is a statutory procedure for contesting the decision in question risks undermining the will of Parliament."

51. He referred to the utility of an appeal by way of rehearing:

> "[24] An appeal in the form of a complete re-hearing has long been recognised as being capable of remedying serious defects in the original procedure. …"

52. He considered the context of the present application and compared it to those cases which involved matters of public health or safety. He said this:

> "[32] *Ferrero* and *South West Water* were both cases involving decisions taken by local authorities in the interests of public health and safety. They were both also cases in which the quashing of the notice would undermine the protective measures taken by the local authority and where Parliament had provided statutory appeal procedures designed to enable the substance of the dispute to be determined within a short time. It is not difficult to understand why in such cases the courts should lean strongly against allowing an applicant to proceed by way of judicial review, given that a successful application is likely to perpetuate what may be a harmful state of affairs. In such cases an appeal on the merits is likely to provide a quick and effective means of determining the real issue, namely, whether there is a threat to public safety. Given the role of the FSA in protecting the public against negligent or improper behaviour on the part of those who are responsible for the running of the financial services industry and its disciplinary powers (which include prohibition and suspension), similar considerations might be said to apply."

53. He concluded as follows:

> "[36] The starting point, as emphasised by cases such as *Preston*, *Calveley*, *Ferrero*, *Falmouth* and *Davies*, is that only in exceptional cases will the court entertain a claim for judicial review if there is an alternative remedy available to the applicant. The alternative remedy will almost invariably have been provided by statute and where Parliament has provided a remedy it is important to identify the intended scope of the relevant statutory provision. For example, in the context of legislation to protect public health the court is very likely to infer that Parliament intended the statutory procedure to apply, even in cases where it is alleged that the decision was arrived at in a way that would otherwise enable it to be challenged on public law grounds, because it enables the real question in dispute to be decided. That will be particularly so if the procedure allows a full reconsideration on the merits of a decision which has direct implications for public health and safety. A remedy by way of judicial review, although relatively quick to obtain, simply returns the parties to their original positions. It does not enable the court to determine the merits of the underlying dispute. In a few cases strong reasons of policy may dictate a different approach: see *R v Hereford Magistrates' Court, ex parte Rowlands*; but such cases are themselves exceptional and do not in my view detract from the general principle. Ultimately, of course, the court retains a discretion to entertain a claim for judicial review, but whether it will do so in any given case depends on the nature of the dispute and the particular circumstances in which it arises.
>
> [37] … It would be surprising, therefore, if Parliament had intended that disputes relating to the procedure adopted by the FSA should be reviewed by the courts, save in the most exceptional cases. *Davies* is authority for the proposition that the court should not entertain an application for judicial review, even in a case where it is said that the

> FSA has exceeded its powers with the result that its decision is a nullity … .
>
> [38]… In my view the judge did err in law in this case because he failed properly to identify the legislative intention behind the regulatory scheme embodied in the Act and so failed to appreciate that there was available to Mr Willford an alternative remedy that was a more appropriate means of challenging the Decision Notice. As a result his decision was, in my view, plainly wrong. For my part, therefore, I would allow the appeal on the grounds that the judge was wrong to entertain the claim for judicial review and should not have quashed the Decision Notice. I would only add that if a question of this kind is raised at the permission stage of the claim (as it should be and in this case was) the court ought to decide it before proceeding to hear the merits of the substantive claim. Not only does that respect the requirements of orderly procedure, but in many cases it may also avoid putting the parties to unnecessary expense in arguing points that are of no relevance to the eventual outcome. If a decision is deferred until after there has been argument on the substantive issues, there is likely to be an overwhelming temptation for the court to deal with those issues in order to avoid putting the parties to additional expense."

54. Pill LJ concurred, and added this:

> "[70] However, I add that I do not consider that the absence of a power in the Upper Tribunal to quash a decision of the FSA on procedural grounds, to which the judge attached importance at paragraph 100, is determinative of the issue in the present case. The issue is whether the FSA has so failed to meet the statutory requirements that intervention is required in the particular context. That context includes the underlying statutory purpose (*Ferrero*). One of the purposes of the FSA's disciplinary power is the protection of the public and substantive issues should not readily be deferred in order to determine procedural issues. That is the context in which the adequacy of the reasons must be considered."

55. In none of these three cases did the Court conclude that it was appropriate for the matter to proceed by way of judicial review. There are of course cases which go the other way. One such, relied on by Mr Fordham, was *R (S) v Knowsley NHS Primary Care Trust* [2006] Med LR 123. In that case the Administrative Court quashed decisions by two primary care trusts to hold oral hearings to determine whether general practitioners should be removed from the performers' list, at which hearings the doctor would not be permitted to have legal representation. These were anticipatory challenges, the oral hearings not yet having taken place. Toulson J said this

> "[68] It cannot, however, be in accordance with the spirit of the Convention or the common law that the court should be powerless to prevent a violation of a right to a fair procedure, merely because of the existence of a later way of remedying the consequences. A stitch in time may save nine."

56. I agree with Miss Morris, for the Defendant, that *Knowsley* stands as an example of an exceptional case where judicial review was appropriate, notwithstanding the existence of an alternative remedy. It is easy to see why: the oral hearings by the PCT would have been determinative of the doctors' livelihood; that meant that issues arose under Art 6 ECHR; the remedy was sought prospectively, meaning that the concern about slowing down the statutory process by interfering in it did not arise. The facts of *Knowsley* are very far distant from the present application.

57. Mr Fordham also relied on *R v Leeds City Council ex p Hendry* (1994) 6 Admin LR 439. In that case the Claimant judicially reviewed the council's refusal to grant him a private hire minicab licence, on grounds that the council had failed to follow its own published policy. The Claimant had a right of appeal to the magistrates against the refusal. Latham J noted the general rule that where Parliament has provided a statutory appeal procedure it is only exceptionally that judicial review should be granted, but concluded that the particular issue in the case was whether the officer refusing the licence was acting in accordance with the council's policy, and that was an issue which the magistrates could not determine, so that on the facts of this case it was appropriate for the challenge to proceed by way of judicial review. *Hendry* is a case where there was not an alternative forum for the particular challenge raised. That makes it different from the present situation.

58. *Knowsley* and *Hendry* are consistent with the principles established by the financial services cases. They do not assist the resolution of the alternative remedy issue in this case, given their very different facts.

Summary of Approach

59. From the three financial services authorities, the following propositions can be drawn (with thanks due to Miss Carss-Frisk, who advanced a similar list by way of submission):

    a) The issue of alternative remedy falls to be considered at the permission stage (*Willford,* [38]).

    b) Where there is an alternative remedy, the Court will only entertain a judicial review in exceptional circumstances, usually because the Court is satisfied that the alternative remedy is for some reason clearly unsatisfactory (*Davies* [30]; *Griggs* [14]; *Willford* [20], [36]).

    c) The Court will take into account whether granting permission in a case arising out of a regulatory procedure will lead to challenges in similar cases being pursued routinely by way of judicial review (*Willford* [20]).

    d) The mere fact that a statutory body cannot quash a decision or remit it to the prior decision maker, does not mean that the statutory remedy is not appropriate (*Willford* [20], [70]).

    e) It is necessary for the Court to guard against granting judicial review merely because it may be more effective and convenient to proceed by way of judicial review. That would risk undermining the will of Parliament (*Willford* [23]).

f) An appeal by way of rehearing is capable of remedying even serious defects in the original procedure (*Willford* [24]).

g) The Court should lean strongly against allowing an applicant to proceed by way of judicial review in those cases where Parliament has provided a statutory appeal procedure designed to enable the substance of the dispute to be determined within a short time. In these cases, where there is an issue of public interest or public safety at issue a successful application for judicial review is likely to perpetrate what may be a harmful state of affairs (*Willford* [32], [70]).

h) Where Parliament has provided a statutory remedy, it is important to identify the intended scope of the statutory provision. The Court will consider whether it is to be inferred that Parliament intended the statutory procedure to apply, even in cases where it is alleged that the decision was arrived at in a way which could otherwise be challenged on public law grounds, because it enables the real question to be decided. (*Willford* [36], and see *Davies* and *Griggs* on their facts).

Claimants' Submissions

60. The Claimants advanced two closely related arguments. First, they argue that the remedy available under the statutory scheme is insufficient, and for that reason judicial review is appropriate. Alternatively, they argue that this is an exceptional case of the sort which the Administrative Court should in its discretion retain.

Remedy Argument

61. As to the first argument, the Claimants seek a declaration or quashing order by way of remedy in the judicial review. They argue that these are not remedies available from the DP or from the Tribunal, they are exclusive to this Court. For that reason, it is said, the issues raised must be determined in this forum because the alternative remedy is deficient.

62. I cannot accept that argument. First and foremost, the point has been considered in the cases referred to above and the answer is encapsulated at paragraph 59 d). above. Remedy is not, or not alone, a reason for a case to progress in the Administrative Court if an alternative exists.

63. But in any event, this argument is more illusory than real. The Claimants have already submitted to the Case Team that WN2 should be revoked, in light of the Claimants' arguments that it is ultra vires or unlawful for other reasons. The Case Team has rejected those arguments and maintains WN2. But it was open to the Case Team, if it had thought the Claimants' arguments were good, to have withdrawn WN2. That would have the same practical effect as a quashing order from this Court.

64. If the Case Team in the future refers the case to the DP, and continues reliance on WN2 in doing so, then the Claimants will be at liberty to renew their arguments about WN2 to the DP. The DP may, if it is persuaded by those arguments, adjudicate accordingly. It could decide that WN2 was procedurally irregular and that as a result

the DP would not issue a contribution notice based on it. That would have a similar practical effect to a quashing order from this Court.

65. If the DP determines that a contribution notice should be issued against the Claimants reflecting WN2, then the Claimants will be at liberty to renew their arguments before the Tribunal. The Tribunal has wide powers, including the power to direct the Regulator to vary or revoke the determination (s 103(6)). If the Tribunal concluded WN2 was so procedurally irregular that it could not stand, and that the irregularity was not capable of cure, it could order revocation of the determination to issue the contribution notice based on WN2.

66. It is thus clear that at each stage of the process, the Claimants are at liberty to advance their arguments about the unlawfulness of WN2. And at each stage, if the arguments are found to be compelling, there is a remedy available which will protect the Claimants from that unlawfulness. That remedy will not be a declaration or quashing order in terms, but the effect will be similar.

67. The argument about remedy does not make it appropriate for this case to be determined by the Administrative Court.

Exceptionality Argument

68. The Claimants' alternative point is that this Court should, in its discretion, retain jurisdiction even though there is an alternative remedy available, because this is an exceptional case. The exceptionality is argued in a number of different ways.

69. **Ultra Vires:** First, the Claimants argue that WN2 was ultra vires, because the Regulator is not permitted under the statute to issue a second warning notice when a first warning notice remains extant; there is, so it is argued, a principle of "singularity" which mandates the Regulator to put the entirety of its case into a single warning notice. Allied to this argument is the proposition that the Regulator is not permitted simply to amend WN1 to include the contents of WN2 so as to arrive a "singular" warning notice; rather, it is necessary for the Regulator now to issue a new single warning notice in place of WN1 and WN2, which warning notice would reflect all the arguments. The fact that the Regulator is now likely to be out of time to issue a new warning notice addressing alleged failures in 2010 means, on the Claimants' argument, that the Claimants would probably not have to answer the substantive criticisms contained in WN2 at all. That would doubtless be a very good result for the Claimants.

70. The issue for me, at the moment, is one of jurisdiction. The Case Team has already considered and rejected the ultra vires argument. The Claimants can renew that argument to the DP in due course, and to the Tribunal after that if the DP rejects it and goes on to make a determination against the Claimants based on WN2. The Court of Appeal in *Davies* criticised the single judge for deciding an ultra vires argument raised in that case, because the argument should have been left to the FSA and the Tribunal. I take the same view here. Further, this is the sort of procedural objection which can properly be dealt with by the statutory authorities, see paragraph 59 f) above.

71. There is nothing exceptional about the ultra vires argument. It should be determined within the statutory scheme.

72. **Unlawful Exercise of Power:** The second way that this case is said to be exceptional is on the basis of the alleged unlawful exercise of power by the Regulator in issuing WN2. The exercise of power is said to be unlawful because it follows grossly unfair treatment of the Claimants. There are a number of threads to this argument. The first is that the Regulator has engaged in expert-shopping, by initially placing reliance on Mr McKillop, whose report formed the basis of WN1, shifting reliance to Mr Griffiths, and then shifting reliance to Mr Eddowes, who arrived at a different analysis reflected in WN2. The Claimants argue that the cases advanced in each of WN1 and WN2 are inconsistent, and it is not open to the Regulator to run both cases in parallel – they are "*like ships passing in the night"* - at least not without clarifying the status and view of Mr McKillop in relation to WN2. The Regulator's answer, in evidence filed with the Court (see the witness statement of Simoney Jane Elphick dated 28 September 2016 at [31] – [33]) is that Mr McKillop was asked about the trustees' representations but that *"[i]t was apparent that refinancing by means of ABL lending was not his* [ie Mr McKillop's] *specialist expertise*". The Regulator stands by Mr McKillop's analysis and WN1, alongside the analysis of Mr Eddowes, encapsulated in WN2, as alternatives. The Claimants invite me to reject Miss Elphick's evidence as wrong in fact (because, they argue, Mr McKillop is just as well qualified to speak about ABL lending as Mr Eddowes), unreliable (because the Regulator has not produced any report from Mr McKillop commenting on Mr Eddowes) and untenable (because WN1 and WN2 are inconsistent and cannot be maintained as alternatives).

73. The second thread is that the Regulator has not behaved with even-handedness, because it has treated the Trustees preferentially by accepting the evidence of Mr Griffiths, and then allowing the Trustees to instruct Mr Eddowes on the ABL lending analysis which came to be reflected in WN2; by failing to invite comment on Mr Eddowes' report before WN2 was issued; by failing to investigate the ABL lending analysis advanced by Mr Griffiths and Mr Eddowes adequately in advance of issue of WN2, in circumstances where there was extensive evidence to counter their view that the group could have been refinanced in 2010/2011; and in failing to make disclosure of material requested and relevant to the ABL lending analysis.

74. The issue for me, again, is one of jurisdiction. The arguments under this head of "unlawful exercise of power" are procedural matters which have been considered and rejected by the Case Team. The arguments can be renewed to the DP if the Claimants so wish. These matters are qualitatively different from the ultra vires argument because they relate to the detail of the case and, specifically, to the evidence relied on by the Regulator. These are matters which in my judgment, quite apart from the jurisdiction argument, are much better determined by those close to the case, namely the Case Team, the DP and the Tribunal itself on a referral. They can most conveniently be addressed within the statutory scheme. As an example: this Court could not determine whether Mr McKillop and Mr Eddowes share the same expertise, as the Claimants contend, without receiving expert evidence on that very point, and (I dare say) hearing from the experts themselves. Not only would that be an unusual approach on a judicial review, but it would also be unnecessary. The relevant expertise already exists or is readily available to the decision makers within the

statutory scheme (at the Case Team level or within the DP). That is an expert body. It is much better placed to resolve case management issues of this sort, arising in the course of regulatory investigations. That is, in any event, what Parliament intended by establishing the statutory scheme. For the Administrative Court to become involved risks a delay in the resolution of the real question of public concern, which is whether the Claimants should be issued with a contribution notice in relation to the Pension Scheme deficit.

75. Further, these matters are not far distant from the sort of complaints raised by the claimants in both *Griggs* and *Willford*, yet in both cases, the Court concluded that the arguments should be addressed within the statutory scheme. Paragraph 59 b), g) and h) are in point. Those factors are determinative against the Claimants.

76. **Prejudice in Costs:** At the hearing, Mr Fordham concentrated on a third argument, namely the prejudice to the Claimants if this Court were to decline to hear the judicial review. If the Claimants are left to pursue their arguments within the statutory scheme, via the Case Team, DP and Tribunal, the Claimants will have to answer WN2, and they say, expend considerable sums doing so (they say it will cost them £2-4 million, on top of the £7 million already spent in dealings with the Regulator relating to the sale of the group's business). Mr Fordham relies on *Davies* in support of his argument that the Administrative Court should step in. He points specifically to the comments of Mummery LJ to the effect that the arguments in that case could be raised with the regulator without significant delay or further expenditure, see [32]. Mr Fordham says that in this case there will be both delay and significant further cost to the Claimants if the Administrative Court does not step in, and that is what makes this case exceptional.

77. There are a number of points to be made in answer. The first is that the Claimants' argument is of course predicated on its challenge to WN2 succeeding. The Case Team has already rejected it. I express no view, but note the obstacles in the way of the Claimants' arguments outlined in the skeleton arguments and other legal documents filed by the Regulator and the Trustees in this judicial review. Secondly, Parliament must have intended, as a necessary part of the statutory scheme, that a target subject to investigation might incur costs in the investigatory phase. There is nothing unusual or untoward about that. Thirdly, for this Court to interfere at this stage would risk frustrating the intention of the legislators in establishing the scheme. As I have already noted, the Court should lean strongly against allowing an applicant to proceed by way of judicial review in those cases where Parliament has provided a statutory appeal procedure to enable quick resolution, where there is an issue of public interest or public safety at issue, as there is here (see paragraph 59 g) above. Fourthly, in the end, the Claimants' argument relating to cost is one of convenience. I have already noted that the Court should guard against judicial review simply because it is more convenient (see paragraph 59 e) above). But further, and fifthly, for me to step in now, in this case, would create an unwelcome precedent by inviting similar applications to this Court whenever procedural issues arose in the context of statutory proceedings, regulatory or otherwise, which could conveniently be settled one way or another on judicial review. That would not be right – see paragraph 59 c) above.

78. The short answer is that the prospect of the Claimants answering WN2 (if they choose to) and incurring costs in so doing is not an exceptional circumstance. It is precisely what the statute envisages. *Davies* supports this analysis. The fact that the Claimant

in *Davies* could progress within the statutory scheme without delay or significant expenditure was a feature of the facts of that case. It is not right to suggest, as Mr Fordham does, that absent that feature, judicial review is appropriate.

Conclusion on Alternative Remedy

79. The Claimants have an alternative remedy available to them. There is nothing exceptional about their challenge which warrants judicial review. The Administrative Court is not the appropriate forum to resolve the Claimants' challenges to WN2.

CONCLUSION AND CONSEQUENTIAL MATTERS

80. I refuse permission for judicial review because the Claimants have an alternative remedy.

81. In those circumstances, it is not appropriate for me to express any view on the merits of the Claimants' challenge that WN2 is ultra vires, or represents an unlawful exercise of power. I have considered those arguments in part in the context of the alternative remedy argument. But those matters must be determined substantively elsewhere.

82. I do not need to address the issue of materiality. This would only have arisen in this Court if I had retained jurisdiction and had then concluded that the Claimants succeeded, at least in principle, in establishing that WN2 was unlawful. That would have led to a discussion about whether the unlawfulness could be cured, and if it could, whether the error in the first place was material. For reasons given, the merits will be determined elsewhere.

83. I do not need to address the issue of disclosure, which is closely connected with the Claimants' arguments that WN2 represented an unlawful exercise of power, which arguments are to be resolved elsewhere. Disclosure requests can be made by the Claimants to the Regulator. As noted above, the Case Team is required to disclose material which supports or undermines its case, and may disclose other materials if it considers that it is necessary to do so to ensure fairness (see [9(ii)] of the Case Team Procedure document). It is required to keep disclosure under review (see [15] of that document). If the Case Team makes a referral to the DP, the DP will decide all procedural issues and can issue directions (see [9] and [10] of the of the Determinations Panel Procedure document). The Tribunal has powers to order disclosure, if the case is referred to it in due course. Disclosure is, in any event, much more appropriately considered by experts in the matters raised by WN1 and WN2, in the context of that statutory scheme.

84. The application is dismissed.