

<p>The Pensions Regulator</p>	<p><b>Standard Procedure</b> <b>DETERMINATION NOTICE</b> <b>under Section 96(2)(d) of the</b> <b>Pensions Act 2004 (“the Act”)</b></p> <p><b>The Carrington Wire Defined Benefit</b> <b>Pension Scheme</b> <b>(“the Scheme”)</b></p>	<p>The Pensions Regulator case ref:</p> <p><b>TM8663</b></p>
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1. The Determinations Panel (“the Panel”), on behalf of the Pensions Regulator (“the Regulator”), met on 11 March 2015 to decide whether to exercise a reserved regulatory function in relation to the issues raised in the Warning Notice dated 30 November 2012 (“the Warning Notice”) in respect of Mr Richard Williams, referred to below as the “Target”.

**Matters to be determined**

2. The Panel was asked to determine whether to issue a contribution notice (“CN”) under section 38 of the Act<sup>1</sup> to the Target.

**Directly Affected Parties**

3. The Panel considers the following parties to be directly affected by this determination:
  - 3.1. Mr Richard Williams, the Target;
  - 3.2. Carrington Wire Limited (“CWL”), the employer in relation to the Scheme;
  - 3.3. The Trustee of the Scheme (“the Trustee”)<sup>2</sup>; and
  - 3.4. The Board of the Pension Protection Fund (“PPF”).

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<sup>1</sup> References to statutory provisions hereafter are to provisions of the Pensions Act 2004 unless otherwise stated.

<sup>2</sup> References to “the Trustee” or “the Trustees” hereafter are to the trustee or trustees of the Scheme in office from time to time.

## **Contents**

4. The remainder of this Determination Notice is divided into the following main sections:

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### **Introduction**

5. By the Warning Notice, the Regulator gave notice that it considered it appropriate to issue a CN, under section 38, to the Target and two other targets, namely OAO Severstal and OAO Severstal-Metiz (“Severstal-Metiz”). The action against the two Severstal targets was settled in January 2015. This determination, therefore, only relates to Mr Williams.
6. Pursuant to section 10(1)(a), the Panel exercises on behalf of the Regulator the power to determine whether to exercise reserved regulatory functions. Reserved regulatory functions include the power to issue a CN under section 38 (see paragraph 30 of Schedule 2).
7. As part of its process of determining whether to issue a CN to the Target, and at the request of the parties, the Panel convened an oral hearing on 11 March 2015. At that hearing, the Panel considered oral submissions made by the Regulator, the Target and the Trustee. Although the parties submitted witness statements, no oral evidence was heard. Despite a request by the Regulator and the Trustee that Mr Williams make himself available for cross examination at the hearing, Mr Williams did not do so. In arriving at its determination, the Panel has also considered all of the written evidence and representations submitted by the Regulator, the Target and the Trustee.

### **Parties and Representation**

8. The Regulator was represented at the oral hearing by Miss Raquel Agnello Q.C. and Mr Thomas Robinson. The Target was represented by

Miss Elizabeth Ovey, instructed by Simon Burn Solicitors. The Trustee was represented by Mr Andrew Spink Q.C. and Mr James Rickards, instructed by Squire Patton Boggs.

## **Background Facts**

### ***CWL and the Scheme***

9. CWL was at all material times a UK based business engaged in the sale and supply of wire and wire products. It was and remains the sole sponsoring employer of the Scheme.
10. The Scheme was established on 30 January 2006 when the Acertec Group, then owners of CWL, decided to close two pension schemes and replace them with three new schemes, one of which was the Scheme. Clearance was obtained for this restructuring from the Regulator. As part of this process, the Scheme received the benefit of a guarantee from Acertec Holdings Limited ("AHL"), which guaranteed payment of CWL's liabilities to the Scheme for as long as AHL remained "associated" with CWL within the meaning of section 435 of the Insolvency Act 1986.
11. The Scheme has always been closed to new members, and closed to future accrual, apart from a limited period when it was first established when it was open to a single member.
12. At its first valuation, as at 6 April 2006, the Scheme had a deficit on the ongoing basis of £2.04 million and on the buyout basis of £12.8 million. Since that time, the Scheme's deficit has increased significantly and more recent estimates indicate a deficit in the order of £26 million calculated on the buyout basis.

### ***Severstal's<sup>3</sup> purchase of CWL***

13. On 10 April 2006, CWL was sold by the Acertec Group to the Severstal Group, a large Russian-owned mining and steel supply group.
14. The purchasing company of CWL was a Cypriot holding company called Canolion Limited ("Canolion"), which was wholly owned by

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<sup>3</sup> In this document, a distinction is drawn between OAO Severstal and Severstal-Metiz only when necessary. Otherwise, references to "Severstal" should be understood as referring to either OAO Severstal and/or Severstal-Metiz or alternatively to the Severstal Group generally.

Severstal-Metiz, itself a 100% subsidiary of the Severstal Group's ultimate parent company, OAO Severstal.

15. The sale of CWL out of the Acertec Group caused the guarantee given by AHL to terminate. However, it was a condition of the sale that OAO Severstal provide a similar replacement guarantee under which it guaranteed CWL's liabilities to the Scheme, including any debt under section 75 of the Pensions Act 1995 ("section 75").
16. Accordingly, on 10 April 2006, OAO Severstal entered into a guarantee in favour of the Trustees of the Scheme ("the Guarantee"). The Guarantee provided that:
  - 16.1. OAO Severstal irrevocably and unconditionally guaranteed the full and prompt payment when due of any and all amounts to be paid by CWL to the Scheme, including under section 75;
  - 16.2. OAO Severstal's obligations would cease if both it and Canolion ceased to be associated with CWL within the meaning of section 435 of the Insolvency Act 1986.
17. A sale price of £18.2 million for CWL was agreed after extensive due diligence by Severstal and its advisers. It is clear from the contemporaneous documents that Severstal was aware, at the time of purchase, that CWL had its own financial difficulties and also of the generally poor funding position of the Scheme. According to Severstal's advisors, BDO LLP, the price paid reflected CWL's "*loss-making status and the pension deficit*". CWL's value to Severstal appears to have been as a means of strengthening Severstal's position in the metalware market and also to allow the exchange of technology and know-how between CWL and Severstal's Russian plants.
18. Following the sale, Severstal's main representative in the UK in relation to CWL was xx xxxxxxxxxxx xxxxxxxx, who was the xxxxxx xxxxxxxx for xxxxxxxxxxxxxxx xxxxxxxx xxxxxxxxxxxxxx at Severstal-Metiz. xx xxxxxxxx also became an employer-nominated Trustee of the Scheme (although he was not a director or employee of CWL).

### **Severstal's exit from CWL**

19. Severstal failed to make a success of its purchase of CWL and by late 2008 it was looking for an exit route.

20. In March 2009, Severstal engaged Deloitte to provide advice in relation to its exit strategy. Deloitte's engagement letter records that Severstal was at that time considering a share sale of CWL's parent, Canolion.
21. However, by the time that Deloitte produced its detailed report on 24 July 2009, it noted that Severstal considered that a share sale was unlikely to be achieved on the basis that CWL was loss-making, had net liabilities of £10 million and an FRS17 pension deficit of £2.8 million. Deloitte therefore assessed four other options, namely:
  - 21.1. a solvent sale of the trade and business;
  - 21.2. a solvent wind down of CWL;
  - 21.3. the wind down of CWL in administration; and
  - 21.4. the continued funding of CWL.
22. In its report, Deloitte stated that the most important consideration would be the effect of each option on the Scheme. Deloitte highlighted that under the Guarantee OAO Severstal was liable for any section 75 debt (which Deloitte estimated at c. £20 million to £25 million) as well as unpaid employer contributions. Deloitte also noted that employer contributions under the Scheme were likely to increase following the updated Scheme valuation, as at 6 April 2009, to approximately £1.2 million per year (including fees and assuming a ten year recovery plan).
23. Deloitte further explained that the Guarantee was “*very valuable*” to the Trustees of the Scheme and that they would look for it to be transferred on the sale of CWL, thus making a share transaction unattractive to potential purchasers.
24. Deloitte also stated that the Regulator should be notified if any of the following decisions was made: to sell CWL's business and assets; to cease to trade CWL in the UK; or to commence a solvent wind down. Finally, Deloitte advised Severstal that, in Deloitte's opinion, the Regulator was unlikely to use its “anti-avoidance” powers unless “*Severstal default[ed] on the Guarantee*” or “*Severstal [withdrew] funds from Carrington and TPR and the Trustees have concerns about the enforceability of the Guarantee*”.
25. On 2 December 2009, xx xxxxxxxx (on behalf of Severstal) informed the Trustees that Severstal was considering various options for CWL's

business, and that realisation of “any” of the options would require the approval of the Trustees and, probably, also the Regulator. Severstal later told the Regulator that it wished to honour the Guarantee and had no intention of abandoning the Scheme.

26. By December 2009, two offers had been made to Severstal for the purchase of the shares in CWL, both for a price of £1 and neither offering a replacement guarantee for the Scheme. One of the offers was put forward by a company known as Matrix IFS which was led by Mr Williams.
27. The Trustees met representatives of both potential purchasers (Mr Williams being a representative of Matrix IFS) on 15 December 2009. After listening to both presentations, the Trustees considered that neither offered sufficient security to replace the Guarantee (which the Trustees appreciated would terminate on the sale of CWL out of the Severstal group). The Trustees were described by Deloitte (in its attendance note of the meeting) as being “alarmed” by the manner of the presentation of the bid put forward by Mr Williams. The Trustees formally responded to Severstal in relation to these two presentations, by email of 18 December 2009, saying that neither offer was satisfactory.
28. Accordingly, Severstal did not accept either offer and on 15 January 2010 gave notice to CWL that it had decided to implement a solvent wind down rather than to sell CWL. It is important to note that implementing a solvent wind down would not have had the effect of terminating the Guarantee.
29. On 12 January 2010, the Trustees asked Severstal whether OAO Severstal would be willing to become a participating employer in the Scheme. This request was evidently prompted by a concern on the Trustees’ part that, were the Guarantee to terminate, then the employer covenant under the Scheme (consisting of only CWL’s covenant) would be weak. This point was of immediate practical relevance because at that time negotiations were taking place over a new schedule of contributions for the Scheme.
30. By letter from xx xxxxxxxx of 3 February 2010, Severstal refused to consent to OAO Severstal participating in the Scheme, stating that:

*“We understand the Trustees’ concern that there is a potential gap in the wording of the current Guarantee in that it does not cover what happens should CW cease to be connected to Severstal. However as*

*CW will soon become a dormant company, it would be impracticable to now sell CW and, furthermore, Severstal has no intention of following this course of action. We do not envisage any circumstance when the connection [between CWL and Severstal] would be broken."*

31. In February 2010, CWL's manufacturing facilities were closed and its plant and machinery were transported to Severstal in Russia. On 23 February 2010, Severstal submitted to the Regulator a Notifiable Event form, giving notice of the decision to commence a solvent wind down of CWL.
32. On 24 February 2010, the Trustees made a request to Severstal that the Guarantee be amended so that it was consistent with the type of guarantee used by the PPF (i.e. one that would not terminate on Severstal ceasing to be associated with CWL). The Trustees also indicated that, unless the wording of the Guarantee was improved, they might need to revisit the valuation assumptions used for the Scheme's schedule of contributions then under discussion which had been based on the existence of a strong employer covenant.
33. On 4 March 2010, xx xxxxxxxx replied to the Trustees (on behalf of Severstal) asking to see draft wording for the proposed amended guarantee that the Trustees sought. He also asked for information about the impact on the valuation assumptions (on the alternative scenarios with and without the amended guarantee being in place) as well as the amount of expected employer contributions under a three year recovery plan if Severstal did not accept an amended guarantee.
34. By email of 31 March 2010, the Trustees replied to xx xxxxxxxx, forwarding a draft of an amended guarantee, and stating that with no acceptable guarantee in place the deficit on a gilts only basis would be some £14 million, and employer contributions would amount to several million pounds per year. Under this scenario, the Trustees also indicated that they would enlist the help of the Regulator. However, the Trustees went on to explain that if an acceptable guarantee were put in place then the Scheme deficit would reduce and it could also be funded over a longer period of time.
35. xx xxxxxxxx replied to the Trustees on 8 and 22 April 2010 indicating that he would need to involve OAO Severstal and that a substantive reply was hoped for by the second half of May 2010.

### ***Sale of CWL to Gillico Limited (“Gillico”)***

36. Despite the rejection of his offer to purchase CWL (which he had presented to the Trustees on 15 December 2009), Mr Williams remained in contact with xx xxxxxxxx. The two met with each other in January 2010 and then again in February 2010. In his written evidence to the Panel, Mr Williams explains that, during this period, he offered to provide his assistance to Severstal in the wind down process of CWL, including by the removal of machinery.
37. On 24 February 2010 (the same day that the Trustees requested Severstal to amend the Guarantee to the style used by the PPF), xx xxxxxxxx emailed Mr Williams with a copy of the Guarantee under a covering email which stated “*as discussed*”. This was only one day after the Regulator had been notified by Severstal that a solvent wind down of CWL was underway. In his written evidence to the Panel, Mr Williams says that he does not recall why xx xxxxxxxx forwarded the Guarantee to him or the content of their discussion at this time, save that Mr Williams does claim to recall that xx xxxxxxxx confirmed to him that Severstal would stand behind the Guarantee as “*they were too big a company to simply walk away*”.
38. The full extent of the discussions between Mr Williams and xx xxxxxxxx during March and April 2010 are far from clear (and Mr Williams states in his evidence that he is not sure of the exact sequence of events). However, what is clear is that these discussions culminated in a draft sale and purchase agreement which was provided on 11 May 2010 by xx xxxxxxxx to Mr Williams and which proposed the sale of the shares in CWL by Canolion to an unnamed special purpose vehicle (SPV) for a purchase price of £1. That draft also included provision for a guarantee to be given by the purchasing party in favour of the Scheme.
39. On 13 May 2010, after reviewing the draft sale and purchase agreement, Mr Williams emailed xx xxxxxxxx stating:
- “Does the agreement for the parental guarantee provided by Severstal to the trustees contain any requirement for Severstal to inform the regulator or the trustees of any sale of the company? If not then there is no requirement for me to offer any form of guarantee to the trustees.”*
40. Following further discussions by telephone, Mr Williams emailed xx xxxxxxxx on 21 May 2010. The text of Mr Williams’ email is important to the matters before the Panel and emphasis was placed on it by all of the

parties during the hearing. Its material parts (which are lengthy) were as follows:

*"I have considered your proposal with my solicitors (HBJ Gateley-Wareing, xxxxxxxx xxxxxxxx is dealing) who Freshfields will know. Their reaction is that a share purchase by me would be very high risk when taken with the pension guarantee.*

*I can understand why Freshfields want this guarantee in place but it is not one I would agree to, by doing so I would be leaving myself open to a full investigation and possible charges from the pension regulator to the tune of £21 million.*

*However:*

*As I understand it there are no provisions in the parent company guarantee for Severstal to inform or negotiate with the trustees in relation to any sale. Neither are there any conditions under which Severstal has to ensure a future buyer undertakes to transfer such guarantees. Therefore the sale of the business to myself can be undertaken without the need for any form of guarantee on my part.*

*I am happy to sign a guarantee which states that Carrington will contribute to the pension fund but only on the basis of profitability.*

*Since:*

*The Regulator would need to show that it was reasonable for it to issue any contribution notice and so, if I was able to show that:*

- *none of the transactions (within the wider arrangement) that I was directly involved in resulted in the removal of value from CW (eg if I pay full value, or a value representing good faith, **direct to CW** for the property); and*
- *but for this deal CW would have no chance of meeting its pension obligations and that by taking on the shares and trying to run a business **through that company** (ie not just using the trading name to create value in a separate legal entity) you would at least give it a chance of being able to do so.*

*I think we can structure a deal that suits both parties, but as usual we will need the solicitors to be less risk averse and more business minded.*

*If we go back to first principles we are trying to avoid Severstal paying the £21m, if you sell the business to me on the above basis then yes we are running a risk that the regulator will pursue us both for contributions, however he has to show that it is reasonable for him to issue a contribution notice, if Carrington are not making enough money to make such contributions then it is not reasonable for him to pursue it.*

*The worse case scenario is that after a protracted period of time Severstal have to enter into a **negotiated settlement**. This I would suggest could be as low as £5million. Given this Severstal would save a minimum of £16million, and would have earned profit from the sale of goods to Carrington throughout this period (possibly 2-3 years).*

*The above represents **Shared Risk**.*

*We are looking to save Severstal a massive amount of money...*

*At the end of the day there can be only one of 2 outcomes, **either Severstal saves £16million OR it costs Severstal £21million.**"*

[emphasis included in original]

41. On 2 June 2010, xx xxxxxxxx sent Mr Williams a revised sale and purchase agreement which removed reference to the purchaser (now named as Gillico, a dormant company wholly owned by Mr Williams with no material assets) providing a guarantee and replaced it with a clause that required Gillico to procure that CWL grant the Scheme a fixed charge over CWL's premises at Elland, West Yorkshire and any other fixed assets.
42. On 16 June 2010, the sale and purchase agreement between Canolion and Gillico ("the 2010 SPA") was entered into, with Mr Williams executing the document on behalf of Gillico in his capacity as its sole director. Under this final version:
  - 42.1. The entire share capital of CWL was sold to Gillico for £1.
  - 42.2. A working capital adjustment payment was to be made, subject to a maximum sum of £400,000.
  - 42.3. The provision for a fixed charge in favour of the Scheme had been replaced by an obligation on Gillico to procure that a sum, limited

to the market value of CWL's premises at the time of closing of the 2010 SPA, be paid to the Scheme following any sale of the premises.

43. Neither Severstal nor Mr Williams informed CWL's management or the Trustees of the sale in advance of it being signed. Instead, the Trustees were first notified by an email on 16 June 2010 from xx xxxxxxxx which stated that the 2010 SPA had already been entered into and that the transaction had closed. In his email, xx xxxxxxxx also informed the Trustees that the Guarantee "*is not valid any more*".
44. It is common ground between the parties that the sale of CWL to Gillico was effective to terminate the Guarantee.

#### ***Events after the 2010 SPA***

45. As stated above, the 2010 SPA provided for a working capital adjustment up to a maximum of £400,000. Following the sale, the full amount of this sum (£400,000) was paid by Severstal to Gillico's solicitors (HBJ Gateley-Wareing). After the deduction of legal fees by HBJ Gateley-Wareing, a balance of £382,136.05 was transferred to Mr Williams personally on 22 June 2010.
46. According to Mr Williams, of this sum:
  - 46.1. £300,000 was used in October 2010, together with other monies, to purchase a property in the name of xxxxxxxx (xxxx xxxx Mr Williams says xx xx xxxxxxxxxx); and
  - 46.2. the remainder was used by Mr Williams to discharge his personal liabilities.
47. In his written evidence submitted to the Panel, Mr Williams claims that the £400,000 was not a true working capital adjustment but instead was remuneration which he had agreed with xx xxxxxxxx (by way of a separate undocumented agreement) for services that he would provide to CWL following the sale. Mr Williams says that he then left it to the transacting parties' solicitors as to how this payment should be dealt with under the 2010 SPA and that it was then treated as forming part of CWL's target working capital.

48. Following the sale of CWL to Gillico, Mr Williams made attempts to operate CWL as a supplier and distributor of Severstal products. However, this did not prove successful.
49. Soon after the sale, Mr Williams discovered that CWL's financial position was worse than he had thought on account of a number of bad debts within CWL's debtor ledger.
50. Of further practical significance, following the sale, Severstal wanted CWL's customers to sign new sales contracts directly with Severstal rather than with CWL. This approach would have had the effect of reducing CWL to an introducer's role in return for a small percentage of Severstal's revenue earned from selling products to customers that had been found with CWL's assistance. Ultimately, no agreement was reached between CWL and Severstal as to ongoing business between the two. In early 2011, Severstal decided not to renew a form of certification for wire that was essential for the sale of its products in the UK. This decision was effectively the end for CWL's business.
51. In January 2011, CWL sold its premises and received £3.137 million. It then paid this money to the Scheme in two tranches: £2 million on 28 February 2011 and £1.137 million on 4 October 2011. Before Mr Williams agreed to the proceeds of sale being paid to the Scheme, he had initially attempted to obtain a complete discharge of all liabilities on the part of both CWL and himself in return. Mr Williams subsequently relented after the Trustees had obtained a copy of the 2010 SPA, which, as set out above, expressly provided for the proceeds of sale to be paid to the Scheme. In the period following the 2010 SPA, CWL also made regular contributions to the Scheme which totalled about £132,000.
52. Ultimately, CWL went into insolvent liquidation on 5 December 2012 and at the same time the Scheme entered a PPF assessment period. The recent estimate of the Scheme's deficit is approximately £26m calculated on the buyout basis.

### ***The settlement with Severstal***

53. As originally issued, the Warning Notice named OAO Severstal and Severstal-Metiz as targets alongside Mr Williams. The quantum of the CN sought in the Warning Notice was:
  - 53.1. £17.721 million against OAO Severstal and Severstal-Metiz on a joint and several liability basis (with £382,136 of that sum also on a joint and several basis with Mr Williams);

- 53.2. £382,136 against Mr Williams, with an order that he be jointly and severally liable for this sum with OAO Severstal and Severstal-Metiz under the CNs issued to them.
54. The Severstal targets made written representations in response to the Warning Notice in which they argued why a CN should not be issued against either of them. Mr Williams also made written representations.
55. The oral hearing of this case was first listed to start on 13 January 2015 and the parties (including the Severstal parties) filed skeleton arguments in readiness for appearing at that hearing. On the eve of the hearing, the Panel was informed that the Severstal parties and the Regulator were very likely to reach settlement of the proceedings and the Panel granted a request for an adjournment to enable that settlement to be finalised. Settlement between the Regulator and the Severstal parties was duly confirmed and the Regulator has since published that a payment of £8.5m was made by the Severstal parties to the Scheme.
56. In its letter of 6 March 2015, the Regulator stated that “[f]or the avoidance of doubt”, it asked the Panel to determine to issue a CN to Mr Williams in the sum of £382,136 and that the Panel is not asked to make any other person jointly and severally liable for that sum, there being no other target before the Panel. Accordingly, the relisted oral hearing on 11 March 2015 proceeded only against Mr Williams without the Severstal targets.

### **Statutory Tests under section 38**

57. Section 38 imposes five tests or conditions for the issue of a CN to a target. They are:
- 57.1. That the scheme in question is an occupational pension scheme other than a money purchase scheme or a prescribed scheme or a scheme of a prescribed description (section 38(1)), the “Scheme test”.

- 57.2. That the target was at any time during the relevant period<sup>4</sup> either the employer or a person connected with, or an associate of, the employer (section 38(3)(b)(ii)), the “Connection test”.
- 57.3. That the Regulator is of the opinion that the target was a party to an act or a deliberate failure to act which falls within section 38(5) (section 38(3)(a)), the “Target test”.
- 57.4. That the act or failure to act falls within section 38(5), the “Act test”. As explained below, this requires either the “material detriment test” or the “main purpose test” to be satisfied as well as that the act or failure to act occurred within certain time limits.
- 57.5. That the Regulator is of the opinion that it is reasonable to impose liability on the target to pay the sum specified in the CN (section 38(3)(d)), the “Reasonableness test”.
58. It is common ground between the parties that the Scheme test and the Connection test are met in the present case and the Panel is also satisfied that these tests are met. Accordingly, the three remaining statutory tests which were in dispute are addressed below.

### ***The Target test***

59. In order for a CN to be issued, section 38(3)(a) requires that:

*“the Regulator is of the opinion that the [target] was a party to an act or a deliberate failure to act which falls within subsection (5)”.*

### **The acts or failures relied upon**

60. Before determining whether Mr Williams was a ‘party to’ an act or deliberate failure to act, it is necessary first to identify the act or failure to act that the Regulator relies upon. In this regard, section 38(12) and (13) provide that a “series of acts or failures to act” may be relied upon by the Regulator so long as the target is a party to that series (and the requirements of subsection (5) are satisfied in relation to the series).

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<sup>4</sup> The “relevant period” begins with the time when the act or failure to act falling within section 38(5) first occurs and ends with the giving of a warning notice (section 38(6)).

61. In this case, the Regulator relies upon a series which is encapsulated in paragraph 24 of the Warning Notice, which describes the series as follows:

*“24.1. Mr Williams knowingly assisted in the repeated deliberate failures to notify the Trustees (save xx xxxxxxxx) or the Regulator of the decision to sell the shares in CWL out of the Severstal Group, in a way that would terminate the Guarantee. Mr Williams knowingly assisted in those failures by means of his emails of 13 and 21 May 2010 to Severstal, negotiating for the purchase of CWL on the basis that there was no requirement under the Guarantee for Severstal to inform the Trustees or Regulator of the proposed sale. He thus knew that there had been no notification, did nothing to rectify this, and negotiated expressly on the basis that there was no need to do so and that it should not be done in order to avoid the need for Gillico to offer a replacement guarantee; and*

*24.2. the transaction whereby the shares in CWL were sold to Gillico for £1, with no equivalent replacement for the Guarantee put in place for the Scheme”.*

Together, this series is referred to as “the Williams series”.

Was Mr Williams a “party to” the Williams series?

62. It is not disputed by Mr Williams that he was a “party to” the transaction under which the shares in CWL were sold to Gillico. The Panel agrees with that concession. Therefore, the only dispute is whether he was also a party to the failures to notify the Trustees or the Regulator.
63. The meaning of “party to” is expressly stated by section 38(6)(a) to “include those persons who knowingly assist in the act or failure”. This explains why paragraph 24.1 of the Warning Notice refers to Mr Williams having knowingly assisted.
64. The Regulator relies on Mr Williams’ emails of 13 and 21 May 2010 as providing clear evidence that Mr Williams knew the importance of secrecy to the sale transaction and that it was therefore essential that he, as well as Severstal, did nothing that might alert the Trustees or the Regulator to the existence of the proposed sale before it had been completed. It was not disputed by Mr Williams before the Panel that had the Trustees or Regulator become aware of the potential sale, then steps could have been taken so as to cause the Guarantee to be triggered, the

most obvious route being by an exercise of the Regulator's power to wind up the Scheme under section 11 of the Pensions Act 1995.

65. The Panel agrees with the Regulator about the importance of these emails and that they provide clear evidence that Mr Williams knew that it was crucial to maintain secrecy around the sale.
66. Miss Ovey relies upon two main arguments in support of the position that Mr Williams did not knowingly assist Severstal in its failures to inform the Trustees or Regulator:
  - 66.1. First, it is said that Severstal did not need any help or support from Mr Williams in failing to inform the Trustees or Regulator of its decision to sell CWL out of the Severstal group. Accordingly, Mr Williams did not provide any "assistance".
  - 66.2. Second, it is argued that because Mr Williams was not himself under any legal duty to notify the Trustees or Regulator, he cannot have assisted (or been a party to) the failures to notify the Trustees or Regulator. Further, it is said that it was not a course of action that Mr Williams could reasonably be expected to have taken, in the absence of a duty to do so.
67. The Panel does not accept either of these arguments.
68. It is not correct to say that Mr Williams did not provide Severstal with any assistance. Mr Williams assisted Severstal by ensuring that he maintained the secrecy of the transaction. He did this by refraining from taking (at least) two steps which one would have expected a potential purchaser to have taken:
  - 68.1. Mr Williams did not contact CWL's management prior to signing the 2010 SPA with a view to discussing the future management of the business post-sale. This was an extraordinary omission for a potential purchaser who, at least on Mr Williams' case, intended to continue the operation of the business. This omission was of particular importance because the legal obligation to notify the Regulator and the Trustees of Severstal's decision to relinquish control of CWL fell on CWL (under Regulation 2(2)(f) of the Pensions Regulator (Notifiable Events) Regulations (SI 2005/900) in respect of the Regulator; and Regulation 6(1)(b) of the Occupational Pension Scheme (Scheme Administration) Regulations 1996 (SI 1715/1996) in respect of the Trustees).

- 68.2. Mr Williams also did not make contact with the Trustees in advance of Gillico entering into the 2010 SPA (despite having previously met with them in December 2009 and knowing the strength of their opposition to a sale whereby the Guarantee would fall away). In his witness statement to the Panel, xx xxxxxxxx (the solicitor advising the Trustees at the time) explains that: “*I would have expected Mr Williams, as a potential purchaser of CWL, to have made contact with the trustees prior to the sale to discuss the future of the Scheme, as would be the norm for any credible purchaser*”. The Panel agrees that this would have been a normal step to take.
69. As for Miss Ovey’s second point, the Panel does not accept that it is necessary for a party to be under a legal duty before he can be said to have provided assistance by refraining from acting in a certain way. Where a party refrains from taking action which he perceives may be taken, and in particular which in the ordinary course it would be reasonable to take, that party may be said to have provided assistance. The Panel notes in this regard the statements of Warren J in the *Bonas* case [2011] Pens LR 109 at paragraphs 87 and 88.
70. Accordingly, the Panel considers that, at the very least, Mr Williams did provide ‘assistance’ by maintaining the secrecy that was essential to the transaction.
71. Furthermore, if it were necessary, the Panel also considers that Mr Williams could rightly be described as a ‘party to’ the Williams series without needing to rely on the extended definition encompassing knowing assistance. In this regard, whilst it is useful to look separately at each of the individual acts or failures to act which are said to make up the Williams series, it is more important to consider the acts or failures to act taken together as a *series*. The correctness of this approach is supported by the language of section 38(12)(a) which refers to the Regulator being of the opinion that the target “*was a party to a series of acts or failures to act*”. When viewed in this way, the answer to the question whether, put compendiously, Mr Williams was a “party to” the secret share sale of CWL, is obvious: he clearly was.

### ***The Act test***

72. It is common ground that the time requirements under section 38(5)(b) and (c) are met in this case (which they clearly are). However, there is a dispute over whether the “*main purpose test*” or the “*material detriment*

*test*” is met. Satisfaction of either of these tests will suffice in order for the Act test to be met.

73. Although the “*main purpose test*” is the second test mentioned in section 38(5)(a), the Panel will consider it first.

Main purpose test

74. Before considering more factual elements of the main purpose test, there is an important point of statutory construction that it is necessary for the Panel to decide. This point arises because the Regulator’s case is that the “*main purpose test*” is satisfied by preventing recovery from OAO Severstal under the Guarantee, rather than by preventing recovery of the section 75 debt from CWL: it being the case that CWL itself was not in a position to satisfy the section 75 debt and its own ability to do so was not prejudiced by its sale.

*Construction of section 38(5)(a)(i)*

75. Section 38(5)(a) provides that:

*“(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 (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”.*

76. On behalf of Mr Williams, Miss Ovey argues that, in order to engage section 38(5)(a)(i), the “*main purpose*” in question must be to prevent recovery of the section 75 debt “*from the employer*”. Preventing recovery from a guarantor, as is relied upon by the Regulator in the present case, does not fall within the legislation.

77. Miss Agnello and Mr Spink oppose this argument, submitting that Miss Ovey's approach involves unjustifiably reordering the words in section 38(5)(a)(i) so as to change their meaning, in the following way:

*“to prevent the recovery from the employer 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”*

78. They contend that the natural meaning of the language used in section 38(5)(a)(i), without reordering, is clear and that this includes preventing the recovery of a section 75 debt by preventing a claim under a guarantee in respect of that debt. Support for this approach is found in the (admittedly *obiter*) comments of Warren J in the *Bonas* case at paragraphs 93 and 95:

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

*Accordingly, for an act or failure to act to prevent payment of the whole or part of a debt within the ambit of section 38, that act or failure must prevent payment by the debtor or must prevent the exercise of a right possessed by the creditor (such as a right against a guarantor or the effective realisation of a security) in respect of the debt.”*

79. Mr Spink also submits that the approach favoured by the Regulator and the Trustee accords with a purposive construction of the provision. The mischief at which the provision is aimed is equally engaged by a situation in which a parental guarantee is terminated or removed. Furthermore, the grant of such guarantees is a common feature of occupational

pension schemes. Accordingly, to exclude guarantees from the ambit of section 38(5)(a)(i) would give rise to an obvious lacuna in the legislation.

80. The Panel considers that the Trustee and Regulator's construction of section 38(5)(a)(i) is correct for the reasons outlined above. In particular, the Panel agrees that the ordinary meaning of the language is as explained by Warren J. Accordingly, section 38(5)(a)(i) includes preventing the recovery of a section 75 debt by preventing a claim under a guarantee in respect of that debt.
81. Miss Ovey put forward a number of further arguments in support of Mr Williams' preferred construction, which the Panel did not consider provided grounds for altering their view.
82. First, reliance was placed by Miss Ovey on statements made by the Minister of State for Pensions when introducing the clause that became section 38 of the Act (Standing Committee Proceedings 27 April 2004, Hansard Columns 767-769). These statements included reference to CNs serving to replace "*the section 75 debt, which could otherwise be recoverable from the employer*" and other similar statements.
83. However, the Panel does not consider that these statements satisfied the well-known test for relying on references to Hansard as laid down in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 per Lord Browne-Wilkinson at 634D.
  - 83.1. First, in the Panel's view, section 38(5)(a)(i) cannot be described as "*ambiguous or obscure*" or having "*a literal meaning which leads to an absurdity*". Like Warren J in *Bonas*, the Panel considers the ordinary meaning of the language used in the section to be clear.
  - 83.2. Second and in any event, the statements relied upon from the Hansard extracts could not be said clearly to disclose "*the legislative intention lying behind the ambiguous or obscure words*" and were not (in the words of Lord Bridge at 617B) directed to the "*very issue*" the Panel has to consider. The extracts simply do not address the present issue of whether or not a guarantee could be caught by section 38(5)(a)(i). The Minister of State's understandable focus on the prevention of recovery from the employer (as the paradigm case) cannot fairly be read as excluding the possibility of recovery from other parties.

83.3. In discounting the passages from Hansard relied upon by Mr Williams, the Panel has also taken into account the guidance of Lord Hoffmann in *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 at paragraph 40.

84. Second, Miss Ovey relied upon the distinction between:

(a) preventing *recovery* which is addressed by section 38(5)(a)(i); and

(b) preventing *liability from arising* which is addressed by section 38(5)(a)(ii).

Since it was common ground between the parties that section 38(5)(a)(ii) only applies to preventing (or reducing) a liability from arising on the part of the employer, Miss Ovey submitted that section 38(5)(a)(i) should be construed in a similar manner by treating the word “recovery” as meaning recovery from the employer who is under the liability.

85. Linked to this point, Miss Ovey also argued that even if section 38(5)(a)(i) did extend to recovery by enforcement of liabilities incurred by third parties (i.e. non-employers), the provision was only engaged once liability on the part of the third party had arisen. Accordingly, where a liability on the part of the third party had yet to arise, there could be no question of recovery (and therefore of “preventing” recovery) from the third party.

86. Applied to the facts of the present case, no liability ever arose under the Guarantee because the Guarantee had fallen away before it was called upon. Accordingly, as Miss Ovey continued, although the present case was one in which liability under the Guarantee was prevented from arising, such a situation is not covered by the legislation because:

86.1. it would not fall within section 38(5)(a)(ii) because, as is common ground, this provision only applies to preventing liability on the part of employers from arising, not on the part of third parties; and

86.2. given that no liability under the Guarantee had arisen, it could not be said that “recovery” under the Guarantee had been prevented for the reasons explained in paragraph 85 above (even if, contrary to Miss Ovey’s primary case, section 38(5)(a)(i) itself was not limited to the recovery of debts from employers).

87. Despite the ingenuity of these two related arguments, the Panel does not accept them. As explained above, the Panel considers that the ordinary meaning of the language used in section 38(5)(a)(i) extends to

preventing recovery under a guarantee. The concept of “recovery” addressed in 38(5)(a)(i) is a wider concept than that of liability for the section 75 debt which is addressed in section 38(5)(a)(ii).

88. Further, the Panel sees no reason why section 38(5)(a)(i) should be limited to addressing the situation of preventing recovery only once liability has been established and should not also address the situation of preventing recovery prior to liability being established. It seems clear to the Panel that steps taken prior to liability for the section 75 debt arising are capable of having the effect of preventing its recovery.
89. In the present case, steps taken to terminate the Guarantee, which took place prior to liability for the section 75 debt arising, have served to prevent recovery of the section 75 debt. Put differently, by preventing liability from arising under the Guarantee, that in itself has served to prevent the recovery of the section 75 debt (and therefore may fall within section 38(5)(a)(i)).
90. This approach is consistent with the fact that the language of section 38(5)(a)(i), by referring to “a debt which was, or might become, due”, expressly considers the possibility of steps being taken to prevent recovery prior to liability for the section 75 debt arising. This is confirmed by section 38(8) which provides that, for the purposes of section 38, references to a debt under section 75 include a contingent debt under that section. Thus, it is clear that section 38(5)(a)(i) envisages situations in which the recovery of the section 75 debt is prevented prior to liability for that debt arising.
91. Finally, some (admittedly small) reliance was placed by Miss Ovey on the heading to section 38 which states “*Contribution Notices where avoidance of employer debt*”. The Panel does not consider that the heading provides any assistance to determining the point under consideration which Miss Ovey realistically conceded was a “*very straw in the wind type point*”.
92. Accordingly, the Panel concludes that the prevention of liability arising under the Guarantee was capable of falling within section 38(5)(a)(i).

*Main purpose in the present case*

93. The Panel must now consider whether one of the main purposes of the Williams series was to prevent the recovery of the section 75 debt by preventing a call from being made under the Guarantee.

94. The parties referred the Panel to paragraphs 90 and 91 of the *Bonas* decision in which Warren J considered whether the “main purpose test” had both subjective and objective elements:

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

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

95. Although the point was not decided by Warren J, the Panel also sees the force of the argument that there is, at least to some extent, a subjective element to the “main purpose test”. The Panel did not understand either Mr Spink or Miss Agnello to dispute that some regard should be had to Mr Williams’ subjective purpose.
96. In respect of the objective element to the main purpose of the Williams series, the termination of the Guarantee was clearly something that was capable of being, and was in fact, achieved by the Williams series. Objectively, this was a very obvious purpose of the Williams series. It is,

therefore, not surprising that Miss Ovey did not contest that the objective element of the test was satisfied.

97. Accordingly, the main argument before the Panel was whether the main purpose test was satisfied after taking into account Mr Williams' subjective intentions.

98. In support of their case, Miss Agnello and Mr Spink rely heavily on the contents of Mr Williams' email of 21 May 2010. In particular, they refer to the statement contained in that email:

*"If we go back to first principles we are trying to avoid Severstal paying the £21m"* (underlining added)

and also to Mr Williams' reference to "**Shared Risk**".

99. In short, they state that this email is compelling evidence that the main purpose test is satisfied on the part of Mr Williams. It clearly evidences that Mr Williams fully intended, by entering into the Williams series, to bring about a situation in which Severstal could avoid its liabilities under the Guarantee. This was essentially a joint enterprise, in which, as regards the termination of the Guarantee, Mr Williams and Severstal shared a joint purpose.

100. In the submissions made on behalf of Mr Williams, Miss Ovey attempts to explain the contents of his email of 21 May 2010 by claiming that the above statement reflected Mr Williams' perception of Severstal's purpose but not his own purpose. However, as pointed out by Mr Spink, in Mr Williams' own witness statement, he admitted that:

*"I was looking to agree a deal which would...avoid anything which would give rise to an immediate debt of £21 million which Severstal would have to pay under the Guarantee".*

101. Miss Ovey submits that Mr Williams' subjective intention was simply "*to enter into a transaction which he saw as presenting him with a sufficiently attractive possibility of financial return*". Miss Ovey even goes as far as to suggest that "*the Guarantee was irrelevant to Mr Williams' purposes*".

102. In support of her case, Miss Ovey relies on the following propositions:

102.1. the terms of the 2010 SPA were the subject of genuine negotiations between Mr Williams and Severstal;

- 102.2. both Mr Williams and (as far as he was aware) Severstal had a genuine intention that CWL should develop a business of supplying and selling Severstal Group products;
- 102.3. both Mr Williams and Severstal genuinely intended that there should be an early substantial improvement in the financial position of the Scheme and Mr Williams effected such an improvement.
103. Mr Spink's principal response to these propositions is that they are irrelevant to whether or not the "main purpose test" is satisfied. They do not detract from the fact that it was a main purpose of Mr Williams to cause the Guarantee to terminate. The Panel agrees. Further, as regards paragraph 102.3, the Panel does not accept that either Mr Williams or Severstal intended an "improvement" in the financial position of the Scheme in the light of the termination of the Guarantee of which they were of course well aware.
104. There was a debate amongst counsel as to the precise meaning of the word "purpose" and similar terms such as "motive", "reason", "objective" and "effect". The Panel does not consider it necessary to attempt to formulate a comprehensive definition of the word "purpose" as used in section 38(5)(a), or to substitute alternative words, in order to determine the issue in the present case. Instead, the Panel considers that it is more helpful to focus on the facts and to consider whether, in that specific context, it can be said that the "main purpose test" is satisfied.
105. On the facts of this case, the Panel is satisfied that one of the main purposes of the Williams series was to prevent the recovery of the section 75 debt from Severstal even taking into account Mr Williams' own subjective intentions. The contemporaneous documents (in particular Mr Williams' email of 21 May 2010) evidence that the fundamental driver for the sale of CWL to Gillico was the need to bring about a termination of the Guarantee. Hence, the importance of maintaining secrecy over the sale so as to avoid a call being made under it. Mr Williams knew that, without the sale serving to terminate the Guarantee (before a call under it had been made), the transaction would not take place. Accordingly, the termination of the Guarantee was crucial not only to Severstal, so that they could save themselves (on Mr Williams' calculations, £16 million) but also to Mr Williams so that he could acquire CWL for his own financial benefit. In the Panel's view, it is therefore consistent with the ordinary meaning of the word 'purpose' to describe preventing a call from being made under the Guarantee as one of the main purposes of the Williams series.

106. The fact that Mr Williams ultimately may have wanted to make money for himself through running CWL as a successful business does not, in the Panel's view, mean that the termination of the Guarantee was not one of the main purposes of the Williams series. If this was correct, a similar point could be made in respect of Severstal, on the basis that its ultimate aim was to save itself money. However, where the termination of the Guarantee was fundamentally necessary to the financial gain sought by Mr Williams (in other words, the gain could not have come about without it), in the Panel's view, it is correct to describe Mr Williams intending, as one of his main purposes, the termination of the Guarantee.
107. The Panel also considers that it is accurate, as Mr Spink submitted, to describe Mr Williams and Severstal as taking part in a joint enterprise, with a joint main purpose to bring about the termination of the Guarantee.
108. Finally, under the subject of the "main purpose test", the Panel was addressed on two particular factual issues by Mr Spink. Whilst the Panel does not consider that these issues have great bearing on whether the "main purpose test" is satisfied, it is appropriate to address them.
109. First, Mr Spink disputes the suggestion in Miss Ovey's skeleton argument that the question of Mr Williams buying the shares in CWL was reopened in about early May 2010. Mr Spink says that this is inconsistent with Mr Williams' own previous statement (in his letter to the Regulator dated 5 December 2011) that it was in "March/April" 2010 that the subject was raised again. More importantly, it is also inconsistent with the fact that xx xxxxxxxx sent to Mr Williams a copy of the Guarantee on 24 February 2010 under a covering email which stated "*as discussed*". Mr Spink says that discussion of the Guarantee between Mr Williams and xx xxxxxxxx would only have made sense if they were considering a possible share sale to Mr Williams.
110. It seems to the Panel that, on the balance of probabilities and in the absence of any explanation provided by Mr Williams as to the content of his discussions with xx xxxxxxxx at this time (Mr Williams, despite providing a witness statement to the Panel, refused to offer himself for cross examination), discussion about the Guarantee at that time can only have taken place if a possible share sale to Mr Williams was then being contemplated, and the Panel therefore finds that it was. Furthermore, it seems improbable that, were the possibility of a share sale to Mr Williams only to have resurfaced in about early May 2010, a draft SPA would have been produced by 11 May 2010 with the sale completing about a month later.

111. Second, Mr Spink heavily criticises the suggestion which appeared for the first time in Mr Williams' witness statement served in January 2015 that xx xxxxxxxx had informed Mr Williams in February 2010 that Severstal would stand behind the Guarantee because *"they were too big a company to simply walk away"*. In his witness statement, Mr Williams suggests that he continued to believe *"irrespective of the legal consequences of Severstal selling the share capital in CWL they would stand behind the Guarantee"* up at least until the end of May 2010 (and possibly thereafter).
112. Whilst the Panel does not rule out the possibility that xx xxxxxxxx used these words at some point early on in his discussions with Mr Williams, it rejects Mr Williams' evidence that this sentiment was repeated, or that Mr Williams believed it to be the case, at any point after his email of 21 May 2010, the contents of which are wholly inconsistent with an understanding that Severstal would stand behind the Guarantee.
113. Accordingly, the Panel is satisfied that the "main purpose test" is met.

Material detriment test

114. In light of the Panel's decision that the "main purpose test" is satisfied, it is not strictly necessary to consider whether the "material detriment test" is also satisfied. However, since the Panel received submissions on this issue, it will also address briefly the "material detriment test".
115. The "material detriment test" is defined in section 38A(1) as follows:

*"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)"*

116. Also of relevance, section 38A(4) provides that:

*"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)..."*

117. Section 38A(5) provides that “*scheme obligation*” under section 38A(4) 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*”. It is common ground between the parties, and accepted by the Panel, that “*scheme obligation*” included OAO Severstal’s obligation under the Guarantee.
118. The Regulator submits that the Williams series had a materially detrimental effect on the likelihood of Scheme benefits being paid because it enabled OAO Severstal to extricate itself from its liabilities under the Guarantee without interference from the Trustees or the Regulator, the latter of which had statutory powers to wind up the Scheme and thus trigger a call on the Guarantee.
119. The Regulator argues that it is clear that the test is satisfied by a simple comparison of the position before and after the Williams series. Beforehand, the Guarantee was in place, providing (given the parlous financial state of CWL) the only realistic route to payment of the Scheme benefits in full. Afterwards, the Guarantee was gone and the only support for the Scheme was provided by CWL.
120. The main response made on behalf of Mr Williams is that, because the Guarantee was inherently terminable and it was within Severstal’s gift to take steps to terminate it, it had no market value. Reflecting this fact, the Scheme actuary did not include the Guarantee as a Scheme asset within Scheme valuations. Accordingly, termination of the Guarantee following the sale of CWL out of the Severstal group did not cause the Scheme to lose an asset of any value and thus the “material detriment test” is not satisfied.
121. Further, Miss Ovey argues that when considering the position of the Scheme before and after the sale of CWL, regard should also be had to

the potential for seeking a CN against Severstal, as a result of the termination of the Guarantee. The value of the CN proceedings against Severstal has turned out to be £8.5 million and this represents a fair reflection of what was likely to be available under the Guarantee had a call been made under it. Accordingly, as Miss Ovey put it “*there is scope for argument...that the 8.5 million that was actually paid satisfies the amount of the material detriment*”. In effect, the amount now recovered from Severstal has cancelled out any material detriment.

122. The Panel rejects the arguments put forward on behalf of Mr Williams for the following reasons:

122.1. Miss Ovey’s submissions focussed on the effect of the 2010 SPA rather than on the totality of the Williams series. This followed, no doubt, from her prior argument that Mr Williams was only a “*party to*” the 2010 SPA. However, as explained above, the Panel considers that Mr Williams was a party to the Williams series. The detriment caused to the Scheme by the secrecy element of the Williams series was that it prevented a call being made on the Guarantee when there was a high (if not inevitable) probability that the Guarantee would have been triggered had the sale process not been kept secret from the Trustees and the Regulator.

122.2. The Panel does not accept that it is necessary for the Regulator to attempt to ascribe a monetary value to the Guarantee. The concept of “value” falls most naturally when considering the effect on Scheme assets (as suggested by section 38A(4)(b)), whereas the termination of the Guarantee in the present case falls more obviously within section 38A(4)(d) as affecting a “scheme obligation”. When seen in the context of section 38A(4)(d), the impact of the Williams series on the “scheme obligation” under the Guarantee, was to cause it no longer to exist. In circumstances in which the Guarantee represented the only realistic chance of the members’ benefits being paid in full, its termination can fairly be said to have “*detrimentally affected in a material way the likelihood of accrued scheme benefits being received*”. Indeed, the value of the Guarantee to the Trustees (despite its terminable nature) was recognised not only by Severstal and its advisers but also by Mr Williams who admits in his witness statement that he was aware of the “*heavy reliance*” that the Trustees placed on the Guarantee.

122.3. The Panel does not consider, when determining whether the “material detriment test” has been satisfied, that it is appropriate to take into account amounts which might be (or even have been) recovered (including by way of settlement) from other targets under the same CN proceedings. It would be circular to rely upon the potential recovery under a CN in order to undo detriment to the Scheme, when considering whether the “material detriment test” has been satisfied. Furthermore, Miss Ovey’s argument appeared to rest on the proposition that were the Guarantee to have been called in, all that would have been obtained from Severstal was £8.5 million. The Panel sees no grounds for making this assumption given that the Guarantee covered all of the section 75 debt.

123. Accordingly, the Panel concludes that the “material detriment test” has also been met in the present case.

#### ***The Reasonableness test***

124. The final test to consider is the Reasonableness test. This requires consideration of not only whether it is reasonable to issue a CN to Mr Williams at all but also in what amount. As stated above, the amount of the CN sought in relation to Mr Williams by the Regulator is £382,136.

125. Section 38(3) provides that a CN may only be issued if:

*“(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).”*

126. The matters listed within section 38(7) are the following:

*“(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..."*

127. In determining whether a CN should be issued to Mr Williams, the Panel has had regard to whether it was reasonable for Mr Williams to act, or fail to act, in the way that he did (as required by section 38(3)(d)(i)) as well as to all of the matters listed in section 38(7). The Panel has also had regard to the objectives of the Regulator as set out in section 5 and to the matters listed in section 100.

128. On the premise that the preceding three statutory tests had been satisfied, the parties addressed only a limited number of further points under the specific test of reasonableness. These points are included in those addressed below which are the points that the Panel considers most relevant to the question of reasonableness in the present case. Where a matter listed in section 38(7) is not addressed below, this is because the Panel considers such matter to have little or no bearing on the question of reasonableness on the present facts.

129. Although each point is addressed separately, the Panel considers that its task is to have regard to all relevant matters in the round and to decide in light of them all whether it is reasonable to issue a CN in the sum sought or at all.

#### Degree of involvement of Mr Williams

130. The first matter which the Panel considers relevant to whether or not it is reasonable to issue a CN against Mr Williams is the degree of his involvement in the Williams series. The Panel agrees with the Regulator's description that Mr Williams was "*pivotal*" to the events which took place. Without Mr Williams, the sale transaction would not have gone ahead.

131. The extent of Mr Williams' involvement in promoting the sale transaction, by which the Guarantee would terminate, is amply demonstrated by the contents of his email of 21 May 2010. This was, at one point, described by Miss Ovey during her submissions as "a sales pitch". It is also relevant that, until Mr Williams and xx xxxxxxxx began their discussions about the Guarantee in late February 2010, Severstal had up to that time represented to the Trustees that it would stand behind the Guarantee and did not "*envisage any circumstance when the connection [between CWL and Severstal] would be broken*". Based on the facts referred to in the two preceding sentences, it may reasonably be inferred that Mr Williams was, if not the driving force, at least instrumental in the change in Severstal's approach by encouraging Severstal to walk away from the Guarantee and sell CWL to Mr Williams' company.

132. In the Panel's view, Mr Williams' high degree of involvement supports the reasonableness of issuing a CN to him.

Whether it was reasonable for Mr Williams to act or fail to act in the way that he did

133. The Panel does not consider that it was reasonable for Mr Williams to act or fail to act in the way that he did for the following reasons:

133.1. Mr Williams knew that his offer to purchase the shares in CWL was not acceptable to the Trustees.

133.2. Mr Williams knew that the Trustees placed great reliance on the existence of the Guarantee.

133.3. Mr Williams must have appreciated that the loss of the Guarantee would undermine the security of the members' benefits under the Scheme (which its loss then did). Mr Williams knew the difference in financial worth between the covenants of CWL and Severstal.

133.4. Mr Williams knew that the course of action that he and Severstal were contemplating ran the risk of causing the Regulator to seek a CN, yet he was prepared to take that risk.

134. The Panel also considers its earlier findings in relation to the "main purpose" and "material detriment" tests to support its view that it was not reasonable for Mr Williams to act or fail to act in the way that he did.

## Working Capital Adjustment

135. The Regulator justifies the issue of a CN against Mr Williams in the amount of £382,136 on the basis of Mr Williams' personal receipt of this sum which was paid by Severstal under the 2010 SPA ostensibly as a working capital adjustment to the purchase price. The Regulator argues that this sum, if truly a working capital adjustment, should have been made available to CWL and even if not, was nonetheless a benefit that Mr Williams received from the transaction which it is reasonable to strip from him.
136. As explained above, Mr Williams claims in his evidence to the Panel that the payment of £400,000 (despite being expressly recorded in the 2010 SPA as a working capital adjustment) was in fact a payment meant for him personally in return for his services. Mr Williams says that this payment had been agreed separately, in undocumented form, with xx xxxxxxxx. In his letter to the Regulator dated 5 December 2011, Mr Williams stated that the monies were paid as "*part of associated costs for the run down of the company*".
137. The Regulator and the Trustee question whether Mr Williams' account is correct. They rely on:
- 137.1. The absence of any documentary record of the alleged side agreement between Mr Williams and xx xxxxxxxx and ask rhetorically why it could not have been recorded openly.
- 137.2. The fact that by the time that the 2010 SPA was entered into, the wind down of CWL's business was almost complete.
- 137.3. Severstal's own denial (in the witness evidence that it had put before the Panel) that the payment was intended as anything other than a working capital adjustment meant to be used by CWL. In the absence of hearing oral evidence from the Severstal parties and in light of the general criticism made of the Severstal witnesses' evidence by the Regulator and the Trustee in their skeleton arguments, the Panel places no weight on this factor.
- 137.4. If Mr Williams was to be paid for his services, such payment should have been by way of salary and not by a single lump sum, taken in advance of the services that he was to perform.

- 137.5. The fact that a cash flow forecast for CWL prepared by Mr Williams in around June 2010 appeared to make provision for Mr Williams' own salary payments (which would be inconsistent with Mr Williams' remuneration being otherwise provided for).
- 137.6. The payment was not included in Gillico's accounts in any form or in Mr Williams' tax return (and he appears to have made no provision for the payment of any tax in respect of it).
138. In support of Mr Williams' version of events, Miss Ovey took the Panel to a number of email exchanges between xx xxxxxxxx and Mr Williams and/or his accountant which suggest that the working capital adjustment calculation was always expected to arrive at a fixed figure of £400,000 (rather than anything else). Whilst the Panel does consider that these exchanges provide limited support for Mr Williams' version of events, in the Panel's view, they are also consistent simply with a recognition that the figure for the working capital adjustment was always going to reach the cap of £400,000 (rather than that there was a separate agreement that this sum was for Mr Williams' remuneration).
139. Ultimately, however, the Panel agrees with the Regulator that it does not matter whether or not the payment to Mr Williams was made pursuant to some form of side agreement between Mr Williams and xx xxxxxxxx. Even on Mr Williams' version of events, it was a personal benefit that he received as a result of the Williams series and inevitably served as an inducement to enter into the 2010 SPA. Whether or not Severstal knew that Mr Williams intended immediately to take the payment and use it for his own ends (or agreed to him doing so) has no material relevance, in the Panel's view, to whether it is reasonable to issue a CN against Mr Williams.
140. Finally, in respect of the payment to Mr Williams, Ms Ovey submitted that, even if these monies had been paid to CWL as working capital, they would have quickly been expended by CWL given its financial state and would not have benefited, at least to their full extent, the Scheme. The Panel considers this point to be of little importance. Although it might be true that the payment of £382,136 that Mr Williams received would not have directly benefited the Scheme if it had been paid to CWL, this does not detract from the facts that:
- 140.1. this was still a benefit that Mr Williams received from a course of conduct which the Panel considers that it was not reasonable for him to follow; and

140.2. that course of conduct caused material detriment to the Scheme by way of the loss of the benefit of the Guarantee.

#### Benefits conferred by Mr Williams

141. Miss Ovey referred the Panel to the allegedly extensive benefits that Mr Williams contributed to CWL and the Scheme by his work in completing the wind down of CWL. Amongst other things, these included:

141.1. the saving of fees which would have been charged by an insolvency practitioner;

141.2. the maximisation of the proceeds of sale of the Elland premises; and

141.3. managing the affairs of CWL in such a way that it was able to continue to pay contributions to the Scheme until August 2012.

142. The Panel agrees that these are factors that should be taken into account under the Reasonableness test. However, in the Panel's view, if account is going to be taken of the benefits which Mr Williams brought to CWL and the Scheme then account should also be taken of the detriment that he caused. As stated in the paragraphs above, Mr Williams was responsible, at least in part, for the termination of the Guarantee. In the Panel's view, the loss of the Guarantee, which extended to the entire section 75 debt, far outweighed the alleged benefits which Mr Williams might have brought the Scheme following the sale of CWL to Gillico. Accordingly, this factor provides no ground for it not being reasonable to issue a CN in the amount sought against him.

#### Financial circumstances of Mr Williams

143. In advance of the hearing before the Panel, Mr Williams served an affidavit in which he set out his assets and liabilities and stated that his net asset position was in the order of £52,000. On the back of this evidence, Miss Ovey submits that it would not be reasonable to issue a CN against Mr Williams because it would force him into bankruptcy and that the costs of seeking any recovery would be disproportionate to the benefit to be gained.

144. In response, the Regulator submits that Mr Williams unjustifiably received the sum of £382,136 which he has used for his own personal ends. What a target chooses to do with monies that he has obtained (whether he uses them to buy an asset for a third party or dissipates them) does

not detract from the fact that the monies were received by the target and put to his own use. If Mr Williams were able to defeat a CN on the basis that he had paid the money that he had received away, this would turn the CN regime into a “*rogue’s charter*”.

145. Further, the Regulator submits that a distinction should be drawn between the issuing of a CN and its enforcement. The points relied upon by Mr Williams may be taken into account at the stage of enforcing a CN at which time, for example, an agreement might be reached for payment by way of instalments (or some other similar accommodation). Alternatively, if Mr Williams is truly unable to pay his debts, then the bankruptcy regime is appropriate. A trustee in bankruptcy will then be responsible for the payment of creditor claims, using such assets as are available to the trustee (including, potentially, the retransfer of the £300,000 paid by Mr Williams to xxxxxxx).
146. The Panel accepts that it is correct to draw a distinction between the issue of a CN 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 CN than to decisions over whether and how it should be enforced. Further, in the Panel’s view, 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. Accordingly, the Panel considers that the fact that Mr Williams has spent the £382,136 for his own purposes does not diminish the reasonableness of a CN being issued against him based on the sum that he did receive.

#### Joint and Several Liability

147. The Panel considers it relevant to address an argument that was put forward on behalf of Mr Williams which specifically addresses the quantum of the CN which is sought against him.
148. Miss Ovey refers to the fact that in the Warning Notice, a CN was sought against Mr Williams on a “*joint and several*” basis with the Severstal targets. Had a CN been issued against Mr Williams for the amount of £382,136 on a joint and several basis with the Severstal targets, then Miss Ovey argues that he would in practice only have been liable for one third of that headline amount. Miss Ovey says this follows because, if recovery in full had been sought against him, he would have been able to recover a two thirds contribution from the Severstal targets. In contrast, if

a CN is now issued against Mr Williams in the full sum of £382,136 (which, given the settlement with the Severstal targets, can only be on a sole basis), Mr Williams will not be able to claim any contribution from the Severstal targets and, therefore, will be liable for the full sum.

149. Accordingly, Miss Ovey submits that any CN that is now issued against Mr Williams should be limited to one third of £382,136 (i.e. £127,379).

150. The Panel understood Miss Ovey's argument on this point to be directed predominantly at the question of reasonableness rather than as an argument that the Panel lacked the jurisdiction to issue a CN against Mr Williams for £382,136 on a sole basis because it exceeded the relief that had been sought in the Warning Notice. To the extent that there had been any change in the Regulator's case, Miss Ovey did not rely on any grounds of procedural unfairness.

151. However, insofar as a jurisdictional challenge was being advanced on Mr Williams' behalf, the Panel rejects it because the Panel does not consider that the grant of a CN against Mr Williams in the sum of £382,136 goes beyond what was sought in the Warning Notice.

152. Insofar as Mr Williams is concerned, the Warning Notice sought a CN:

152.1. against Mr Williams;

152.2. in the sum of £382,136;

and additionally

152.3. as regards that sum, an order be made for joint and several liability with the Severstal targets.

153. The reasonable meaning of the Warning Notice was that sub-paragraph (c) above contained an additional request for the exercise of the Panel's power under section 40(8) which specifically provides for the possibility of joint and several liability across corresponding CNs. However, it was also implicit in the Warning Notice that were the relief in sub-paragraph (c) not to be granted, but instead only the relief in sub-paragraphs (a) and (b), then liability on the part of Mr Williams would default to the normal sole basis. The need to consider separately the question of "*joint and several*" liability from the other elements of the CN is consistent with the approach of David Richards J in *Storm Funding* [2014] PLR 73 at paragraphs 52 and 94 when considering CNs under section 47.

154. The point can also be tested by considering what the position would have been if no settlement had been reached with the Severstal targets but the Panel had gone on to determine that no CN should be issued against them. In such a case, if the Panel had nonetheless thought that a CN should be issued against Mr Williams, it could surely have been for £382,136 on a sole basis (if the Panel had determined that amount to be reasonable). It was clearly implicit in the Warning Notice that if no CN were made against the Severstal targets, then the amount specified in the Warning Notice could be sought against Mr Williams on a sole basis. The same must apply in circumstances in which the Severstal targets have settled with the Regulator.
155. It follows that, in the Panel's view, the CN now sought by the Regulator does fall within the relief sought in the Warning Notice and, therefore, there is no merit in the jurisdictional point. Given the Panel's view, it is not necessary to consider the separate question of whether the Panel can grant a CN in a form which goes beyond what is sought in the Warning Notice.
156. Accordingly, the only relevance of the argument put forward by Miss Ovey in relation to joint and several liability is to the question of reasonableness.
157. The Panel was addressed only very briefly on two related questions relevant to Miss Ovey's argument, namely whether:
- 157.1. Mr Williams could in any event have brought a contribution claim against the Severstal targets to recover a two-thirds contribution even if a CN had been granted in the sum of £382,136 on a joint and several basis with those targets; and
- 157.2. whether Mr Williams might now still be able to bring a contribution claim against the Severstal targets to recover a two-thirds contribution notwithstanding their settlement and that no CN would now be granted on a joint and several basis.
158. The relevance of these two questions was that, if either Mr Williams could never have made a successful contribution claim against the Severstal parties or, alternatively, he could still do so, then he would not be prejudiced by the issue of a CN against him for £382,136 on a sole (rather than joint and several) liability basis.

159. For the purposes of determining the present case, the Panel does not consider it necessary to resolve these interesting legal (and partly factual) issues which would warrant further submissions from the parties. This is because, even assuming the argument most in favour of Mr Williams, i.e. that he would previously have had a good claim for contribution against the Severstal parties which he now no longer has, the Panel nonetheless is of the clear view that it would now be reasonable to issue a CN against Mr Williams in the sum of £382,136 on a sole liability basis. In addition to all of the other factors considered above, this was the sum that Mr Williams personally received and has used for his own purposes. It is, in the Panel's view, reasonable that Mr Williams is made liable for this sum without having the ability to seek a contribution from other parties. Put another way, it would, in the Panel's view be unreasonable to allow Mr Williams to retain two-thirds of the sum that he received.

#### Deterrence

160. Finally, it was also submitted to the Panel by the Trustee that a CN should be made against Mr Williams (even if it would not be recoverable) to act as a deterrent to others. The Panel has decided that it would be reasonable to impose a CN on Mr Williams in the amount of £382,136 based on the individual circumstances of the case without the need to rely on the general deterrent effect.

#### Conclusion on reasonableness

161. In all the circumstances, and for the reasons set out above, the Panel considers that it is reasonable to issue a CN to Mr Williams in the amount of £382,136.

#### **Decision**

162. The Determinations Panel has determined that a Contribution Notice in the amount of £382,136 should be issued pursuant to section 38 to the Target listed in paragraph 3.1 above.

163. Such issue must not take place during the period within which this Determination may be referred to the Upper Tribunal (Tax and Chancery Chamber) (the "**Tribunal**") or, if this Determination is so referred, until the final disposal of the reference and of any appeal against the Tribunal's determination.

164. **Appendix 1** to this Determination Notice contains important information about the rights of appeal of directly affected parties against this decision.

Signed:

Chairman: Andrew Long

Dated: 24 April 2015

## Appendix 1

### Referral to the Tax and Chancery Chamber of the Upper Tribunal (“the Tribunal”)

Any person who receives this Determination Notice as a directly affected person (pursuant to Section 96(2)(d) of the Act), or any person who appears to the Tribunal to be directly affected by this Determination, may refer this Determination to the Tribunal.

Under paragraph 2(2) to Schedule 3 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (S.I. 2008/2698) (the “Tribunal Rules”) a reference notice must be received by the Tribunal no later than 28 days after the date this Determination Notice is given. The Tribunal may extend this period under Tribunal Rule 5(3)(b). A reference to the Tribunal is made by way of a written notice signed by you and filed with a copy of this Determination Notice. The Tribunal’s address is:

The Tax and Chancery Chamber of the Upper Tribunal  
45 Bedford Square  
London  
WC1B 3DN  
Tel: 020 7612 9700

The detailed procedures for making a reference to the Tribunal are contained in section 103 of the Act and the Tribunal Rules.

You should note that the Tribunal Rules provide that at the same time as filing a reference notice with the Tribunal, you must send a copy of the reference notice to The Pensions Regulator. Any copy reference notice should be sent to:

Determinations Panel Support  
The Pensions Regulator,  
Napier House  
Trafalgar Place  
Brighton  
BN1 4DW.

Tel: 01273 811852

A copy of the form for making a reference FTC3 ‘Reference Notice (Financial Services)’ can be found at:

<http://www.tribunals.gov.uk/financeandtax/Documents/forms/FTC31.doc>