THIS JUDGMENT IS PUBLISHED IN REDACTED FORM. THE UNREDACTED JUDGMENT IS SUBJECT TO AN ORDER FOR PRIVACY DATED 5 AUGUST 2020 AND PENDING FURTHER ORDER OF THE COURT THE UNREDACTED FORM WILL NOT BE MADE AVAILABLE TO ANY NON-PARTY.

Neutral Citation Number: [2020] EWHC 2146 (Ch)

Case No:CR-2020-003149

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES COURT LIST

In The Matter Of A CARILLION PLC (IN LIQUIDATION)
And In The Matter Of THE INSOLVENCY ACT 1986
And In The Matter Of THE FINANCIAL SERVICES AND MARKETS ACT 2000

Skype Remote Hearing
Date: 07/08/2020

Before :

I.C.C. JUDGE JONES

- -

Between :

THE FINANCIAL CONDUCT AUTHORITY	**Applicant**
- and -	
CARILLION PLC (In Liquidation)	**Respondent**

- -
- -

Mr Javan Herberg Q.C. and Mr Ajay Ratan (instructed by **The Financial Conduct Authority**) for the **Applicant**
Ms Catherine Addy Q.C., Mr Farhaz Khan and Mr Benjamin Archer (instructed by **Womble Bond Dickinson (UK) LLP**) for the **Respondent**

Hearing date: 23 July 2020 and 5 August 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.............07/08/20................

I.C.C. JUDGE JONES

Covid-19 Protocol: This judgment was handed down by the judge at a remote hearing and by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 09:30pm on 07 August 2020.

I.C.C. Judge Jones:

A) Publication

1. The publication of this judgment must be subject to ensuring that it does not refer to information which would be prohibited from publication by ***section 391(1) of the Financial Services and Markets Act*** ("***FSMA"***). The reasons for this are set out below. In practice it means that part of the published judgment will be redacted. The reasons also deal with the fact that this application has been given a different title number and file to the winding up file for Carillion Plc (In Liquidation) ("Carillion"). That will continue to be the case until further order. Access to the file by anyone who is not a party to the application is prohibited under the terms of ***Rule 12.39 of the Insolvency (England and Wales) Rules 2016***. The exception is the final judgment in redacted form, which will identify where the substantive redactions have been made.

B) Overview

2. The issue is whether the automatic stay conferred by ***s130(2) of the Insolvency Act 1986*** ("***section 130(2)***" and "***the Act***") will apply should the Applicant ("the FCA") wish to decide whether to impose sanctions under ***ss91 and 123 FSMA*** for breach of the Listing Rules and/or contravention of the ***EU Market Abuse Regulation*** (EU No.596/2014) implemented in the UK by ***the Financial Services and Markets Act 2000 (Market Abuse) Regulations 2016 (SI 2016/680)*** (***"MAR"***). The outcome depends upon whether the process required to decide whether to impose sanctions (including the decision) is an "*action or proceeding"* within the meaning of ***section 130(2)*** taking into consideration the purpose of that provision and whether Parliament intended these sanction provisions to fall within its scope.

3. Whilst the answer must be specific to ***sections 91 and 123 FSMA***, the FCA is understandably concerned that it may affect many other actions taken by it under FSMA. A list of some two hundred possibilities has been presented. The FCA is in any event concerned that it has applied the sanction process with which this decision is specifically concerned in a significant number of cases over the past two decades. It is, as the FCA describes it, "a novel point".

4. The issue requires an examination of ***the Act's*** statutory history and scheme in addition to case law to explain how the words "*action or proceeding"* and similar terms have been defined and applied not only under ***section 130(2)*** but also under ***section 126 of the Act*** and the moratorium for administrations now to be found in ***paragraph 43(6) of Schedule B1 to the Act*** ("***Paragraph 43(6)***"). It requires consideration in particular of the insertion of ***section 130(3A) of the Act*** and of the decisions in respect of ***Paragraph 43*** in ***Re Railtrack Plc*** [2002] 1 WLR 3002 and ***Re Frankice (Golders Green) Ltd (in administration) and others*** [2010] EWHC 1229 (Ch), [2010] Bus. L.R. 1608 ("***Re Frankice"***). It is also relevant to refer to case law applying ***Article 20 of the Model Law*** ("***Article 20***") in the form applied by the ***Cross-Border Insolvency Regulations 2006***.

5. It is also necessary to identify the role of the FCA, the nature of the relevant FSMA sanction process, and to appreciate how this will inter-relate with the statutory scheme and purpose of liquidations. In broad terms, on the one hand there is the public interest and importance in ensuring the FCA can fulfil its statutory duties notwithstanding insolvency of a party concerned. On the other hand, the liquidation needs to be carried out, realisations distributed to creditors and the company dissolved. There is potential tension between the two statutory regimes.

C) Privacy

6. On the face of it this is an issue of public interest which should be addressed in open court applying general principles of open justice (see ***Khuja v Times Newspapers Ltd* [2019] AC 161 at [12-14]).** However, *[redaction]* an order was made prior to the hearing before me under ***Rule 12.39(9) of the Insolvency Rules 2016*** prohibiting access to the relevant parts of the court file by anyone who is not a party to the application.

7. The reason for that and why an application was made for this hearing to be in private is the statutory prohibition against publication which applies to ***sections 91 and 123 FSMA***. The starting point for the sanction process is service of a "Warning Notice" under ***sections 92 and 126 of FSMA*** respectively. ***Section 391(1) FSMA*** provides in respect of the Warning Notice (which is a warning notice within ***section 391(1ZB)***, a subsection which identifies notices given under 14 sections of ***FSMA*** including ***sections 92 and 126 FSMA***) that:

> *"(a) neither the regulator giving the notice nor a person to whom it is given or copied may publish the notice,*
>
> *(b) a person to whom the notice is given or copied may not publish any details concerning the notice unless the regulator giving the notice has published those details, and*
>
> (c) *after consulting the persons to whom the notice is given or copied, the regulator giving the notice may publish such information about the matter to which the notice relates as it considers appropriate".*

8. In my judgment the word *"publish"* must have its widest meaning and, similar to decisions concerning the advertisement of winding up petitions, means not just printing or distributing but also announcing or otherwise giving notice of its existence.

9. I reach that conclusion from the words used and from the applicable parts of the statutory scheme. As explained later below, service of a Warning Notice provides the opportunity for representations both by the recipient and designated third parties before a decision is made. Those representations may lead to a decision to discontinue the process. The content of the Warning Notice will inevitably refer to actions or omissions (as appropriate) not only of the recipient but also of other relevant individual participants. They are likely to be identifiable even if not named. Publication will mean the alleged actions or omissions will be open to scrutiny and comment in the general public arena before any representations have been made. This may not only affect rights of privacy but also have adverse commercial consequences,

whether related to market prices or business opportunities or general trading or otherwise. Parliament plainly does not intend that to occur until after the consultation process identified in ***section 391(1)(c) FSMA***.

10. That construction is also consistent with the statutory intent within ***s.391 of FSMA*** for Warning Notices falling outside ***subsection (1ZB)*** for which there is a blanket prohibition upon publication.

11. In this case there is no Warning Notice but a "Draft Annotated Warning Notice". That has been served to provide the opportunity to make representations relevant to the decision to issue a Warning Notice. As such, ***section 391 of FSMA*** does not strictly apply. However, it would obviously be right, as a matter of judicial discretion, to reach the same decision concerning privacy as would be reached if the Warning Notice existed and no decision to publish had been made pursuant to ***section 391(1)(c) FSMA***.

12. I have been referred by counsel to ***Greystoke v FCA*** [2020] EWHC 1011 (QB) as the most recent case to set out the principles governing private hearings at paragraphs 21-28. Applying those principles, I was satisfied that a hearing in private was strictly necessary. Weighing the potentially conflicting rights under ***Articles 8 and 10 of the European Convention*** the scales are tipped heavily in favour of privacy. In reaching that decision the duties of confidence derived from ***section 391 of FSMA*** is the significant element in the balance. It is clear the statutory regime intends all Warning Notices to be private unless and until any details are published by the FCA insofar as that is permitted. There was concern that identification might arise if the name of Carillion was mentioned within the court list or otherwise. As a result, I also directed when the hearing began that (until further order) the application should be listed as "In re A Company" and be provided with its own title number rather than be placed on the file and use the title number of the petition upon which the Carillion was compulsorily wound up.

13. The hearing having been held in private and the court file suitably restricted, and relevant individuals suitably protected as a result, the FCA's position is that Carillion can be referred to. Carillion agrees and I accept that it can be named in this judgment. That is because the published judgment is sufficiently redacted to avoid reference to actions or omissions (as appropriate) of Carillion or others which are the subject of the "Draft Annotated Warning Notice". The redactions are to avoid identifying the alleged actions or omissions which might be the subject of a Warning Notice and to address any consequent risk that relevant individuals might be identifiable. Plainly, however, the order under ***Rule 12.39 of the Insolvency Rules 2016*** was correctly made and should continue. The position may alter either because of a decision following consultation under ***section 391(1)(c) of FSMA*** or because a future Warning Notice is superseded by a decision to proceed and, therefore, a Decision Notice. If so, the embargo can be lifted and the file be restored. In the meantime, this judgment can be published with the redactions which avoid offending the intentions of ***section 391(1) of FSMA***.

D) The Application and Section 130(2)

14. The application seeks (i) a declaration as to whether, pursuant to ***section 130(2)***, the Court's leave is required for the FCA to issue a 'Warning Notice' under ***ss92 and 126 of FSMA*** and (ii) if so, for such leave to be granted.

15. ***Section 130(2)*** provides that as a consequence of a winding up order *"no action or proceeding"* shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose. ***Subsection 3A***, inserted on 18 November 2015 by ***Finance (No. 2) Act 2015 (c. 33), Sch. 8 para. 29***, provides that the reference to an action or proceeding includes action in respect of the company under ***Part 1 of Schedule 8 to the Finance (No. 2) Act 2015*** (enforcement by deduction from accounts).

16. The cause for this application is that the FCA may wish to issue a "Warning Notice" setting out its proposed disciplinary action for breach of (i) the Listing Rules it has made under rule making powers conferred by ***s.73A of the FSMA 2000*** and/or (ii) contravention of ***MAR***. At this stage there is a draft "Annotated Warning Notice" which was sent to the Official Receiver as liquidator of Carillion on 23 April 2020. The possible application of ***section 130(2)*** was drawn to the FCA's attention on 3 June 2020.

E) This Hearing

17. This hearing has been listed with expedition because of the potential expiry of a limitation period. Under ***s91(6) and (7) FSMA*** the FCA has three years within which to begin the sanction process by issuing a Warning Notice starting with the date on which it first knew of the alleged contravention. There is a concern that this date may be 25 September 2020.

18. This is the first time this issue has come before the Courts. It being a novel point of importance with potentially wide ramifications (see paragraph 3 above), it would have been preferable for it to be listed before a High Court Judge. That was not requested when listing was sought and the matter came before me. Time restraints meant that it would be wrong to adjourn and the parties wanted it to proceed.

F) The Facts

19. *[redaction]*

20. *[redaction]*

21. *[redaction]*

22. *[redaction]*

G) Submissions

23. Practicality leads me to only provide a thumb nail sketch of the key submissions made by counsel. I wish to make clear that it does not reflect or do justice to the extent of the learning and detail provided by both sides' counsel both in their skeleton arguments and during the hearing.

G1) Submissions for the FCA

24. The submissions of Mr Herberg QC, leading Mr Ratan, on behalf of the FCA included the following key points from which to conclude that ***section 130(2)*** does not apply:

(1) The core cases make clear that ***section 130(2)*** and its predecessor provisions back to ***s.87 of the Companies Act 1862*** are principally concerned with court actions and court proceedings (see ***Re Arm Asset Backed Securities SA (No.2)*** [2014] EWHC 1097 (Ch); [2014] B.C.C. 260 per Nugee J at [9(4)]). Although this has been expanded to include what are described as "quasi-legal proceedings", for example arbitrations, the expansion of meaning does not extend to the FCA's regulatory functions. The sanction process, which requires the Warning and Decision Notices, is not quasi-judicial but an internal decision-making process. It is disconnected from the statutory purposes of liquidations.

(2) There is authority extending the scope of the statutory moratorium imposed by an administration (originally ***s.11(3)(d) of the Insolvency Act 1986*** and now ***Paragraph 43(6)***) beyond the actions or proceedings prohibited under ***section 130(2)***. However, that is a different insolvency process with different purposes, tests and wording. The high-water mark of those cases is the decision of Mr Justice Norris in ***Re Frankice***. Whilst it is accepted that this decision is to be followed by this Court (the position being reserved should this matter proceed further), it still would not extend the meaning of the ***section 130(2)*** prohibition to the FCA's potential Warning Notice or any Decision Notice or Final Notice.

(3) The FCA's internal decision-making processes do not fall within the the purposes of the ***section 130(2)*** stay identified by Lord Justice David Richards in ***Mortgage Debenture Ltd (in administration) v Chapman*** [2016] EWCA Civ 103. This is not a case of a creditor seeking to obtain priority and thereby undermine the statutory waterfall. Even if the FCA was to impose a penalty, ***section 130(2)*** would only apply at the time of and to prevent court proceedings for enforcement of that sum as a debt under ***section 390(2) FSMA***. Absent a penalty, public censure would not impact on the assets available for distribution. Nor is it a case for which the statutory procedures for determining claims by proof of debt can be applied.

(4) The FCA does not act as a tribunal. Its processes are not quasi-legal. It conducts an administrative process making decisions through its Regulatory Decision Committee ("the RDC") which has regard to the FCA's priorities and policies (including matters of legal interpretation adopted by it). It has no power to require attendance or the provision of information. The right to make

representations pursuant to principles of fairness exists within that regime but they are not to be confused with quasi-legal proceedings. Whilst there is a statutory right to make a reference to the Upper Tribunal (Tax and Chancery Chamber ("the Upper Tribunal"), this is to provide the subject of the notice the ability to ask for a fresh review of the facts and matters. It does not turn the FCA's regulatory role and procedure into an action or proceedings.

(5) The prohibition within ***section 91(6) FSMA*** against the FCA taking *"**action** against a person under this section after the end of the period of 3 years beginning with the first day on which it knew of the contravention unless **proceedings** against that person, in respect of the contravention, were begun before the end of that period* […]" (emphasis added) does not define the nature of the FCA's decision making process for the purposes of ***section130(2)***.

(6) It is also important to appreciate that the same statutory process (requiring the issue of a Warning Notice and allowing for representations in response) applies to a wide range of regulatory processes of the FCA, extending well beyond the field of financial penalties and public censures. The full list runs to some 200 different processes or provisions. Yet this point has never been raised before and, in any event, it cannot have been Parliament's intention that the FCA's role in such matters should be subject to the filtering control of the court.

25. Should those submissions not be accepted, permission should be granted for the following key reasons:

(7) The court's broad discretion should be exercised to give effect to the public interest in the FCA applying its regulatory role to the extent that it decides it right to do so.

(8) It would be inappropriate to prescribe any conditions which interfere in the statutory, regulatory process. Although, in this case the FCA accepts that it would not enforce any penalty without specific permission.

(9) The public interest outweighs any time and expense to be incurred by the Official Receiver as liquidator, although it is far from clear whether or indeed why that would be incurred. It should be irrelevant whether any FCA decision will impact upon any claims which may later be sought to be commenced.

G2) Submissions for the Liquidator

26. The key submissions of Ms Addy Q.C., leading Mr Archer and Mr Khan, that ***section 130(2)*** applies may be summarised as:

(1) The words *"action or proceeding"* are not defined in the Act. Accordingly, they should be interpreted *"in the sense which best reflects their ordinary and natural meaning and accords with the purposes of the legislation"*: ***R (Good Law Project) v Electoral Commission*** [2018] EWHC 2414 (§33, per Leggatt LJ).

(2) The underlying purpose of the stay is to enable office-holders to go about their business unimpeded and without unnecessary distraction in carrying out their statutory function and, in doing so, to preserve the limited assets of the company in the best way for distribution amongst creditors or, in the case of an administration, and where possible, so as to enable the company to be rescued as a going concern.

(3) A broad and wide construction in the context of that purpose is appropriate (see in ***Re International Pulp and Paper Co*** (1876) 3 Ch. D 594 Jessel MR, ***Eastern Holdings Establishment of Vaduz v Singer & Frielander Ltd*** [1967] 1 WLR 1017, Buckley J *at 1021,* ***Langley Constructions (Brixham) Ltd v Wells*** [1969] 1 WLR 503 at 509 B-D).

(4) The language has been held to encompass: criminal proceedings (see ***R v Dickson*** [1991] BCC 719 and also in the context of administration and whether a criminal proceeding constituted an *"other proceeding"* ***Re Rhondda Waste Disposal Ltd*** [2001] Ch 57); proceedings before tribunals and arbitrators (see ***Bristol Airport plc v Powdrill*** [1990] Ch 744 and ***In re Railtrack plc*** above, in the context of companies in administration); the levying of distress (***Re Memco Engineering Ltd*** [1986] Ch 86, a decision on the words as used in ***section 231 of the Companies Act 1948***); and the recovery of quasi-criminal penalties (***Re Briton Medical and General Life Assurance Association*** (1886) 32 Ch. D 503 (a decision on the words as used in section 85 of the Companies Act 1862). The provision may also apply to proceedings taken by a statutory regulator.

(5) There is clear authority (including at appellate level) that for present purposes there is no material distinction between ***section 130(2)*** and the relevant provisions for administrations of ***paragraph 43(6) of Schedule B1 to the Act***, originally ***s.11(3)(d) of the Insolvency Act 1986*** (see ***Re Frankice***, ***Bloom v Harms Offshore AHT "Taurus" GmbH & Co KG*** [2009] EWCA Civ 632 and ***Mortgage Debenture Ltd (in administration) v Chapman*** (above).

(6) *"Other proceedings"* in ***s.11 of the Insolvency Act 1986*** include quasi-legal proceedings such as arbitrations (see ***Bristol Airport v Powdrill*** above at 765-766, Browne-Wilkinson VC). Whether it is a legal process depends upon the nature of the decision, the circumstances in which it is made and the procedure applied (see ***Re Frankice*** (above) at [38-39 and 47-48]).

(7) These disciplinary proceedings have a procedure and separation of powers between the FCA and its RDC which when added to the nature of the decision comes within the broad meaning of the words used in ***section 130(2)***. The ability to refer the matter to the Upper Tribunal, which will plainly be proceedings and endorses or supports that conclusion.

(8) It is a conclusion consistent with the wording of ***section 91 FSMA, sub-sections (6)-(7)*** concerning the limitation period and ***section 389*** which lays down the requirement for a 'notice of discontinuance' identifying 'the proceedings', appears within FSMA under the heading "*Conclusion of proceedings*".

And on the basis that permission is required:

(9) In the circumstances which are highlighted in the witness statement filed on behalf of the liquidator, any leave should only be granted on terms which satisfactorily address the concerns he identifies and that, if and to the extent that the FCA and/or the Court considers that that is not possible, no leave should be granted to the FCA.

H) The Statutory Regime – The FCA

27. "Particular" functions of the FCA are prescribed within specific sections of ***FSMA*** and in carrying out those functions it also has the general duties under ***section 1B FSMA*** of making rules, technical standards and codes, giving general guidance under ***FSMA*** and determining the general policy and principles by reference to which it will perform its particular functions. It must do that, insofar as reasonably possible, in accordance with (amongst other requirements) its strategic and operational objectives. These include a strategic objective to ensure financial markets function well and an integrity objective to protect and enhance the integrity of the UK's financial system.

28. A "particular" function to which those general functions and objectives apply is its role under ***Part 6 FSMA*** concerning the "Official List" of securities traded on a UK regulated market. That function requires it (amongst other matters) to make rules known as ***"Part 6 Rules"*** and to impose penalties for their breach (see ***sections 73A and 91 FSMA***). The ***Part 6 Rules*** apply to those seeking admission of securities to trading on a regulated market or offering securities to the public in the UK, and to listed issuers. They include the Prospectus Rules and the Listing Rules.

29. Another FCA "particular" function is to protect the interests of those using the UK's financial markets and exchanges and to ensure their orderly operation. For that function the FCA has powers to obtain information, enter premises under a warrant, require the publication of information and corrective statements, suspend trading in financial instruments and to impose penalties or issue censure (see ***sections 122A-123C of Part 8 FSMA***). ***Part 8 FSMA*** gives the FCA powers to sanction conduct amounting to civil market abuse. This applies (amongst other matters) to ***MAR***. ***Article 15 MAR*** prohibits market manipulation.

30. It is to be concluded from these provisions and from ***FSMA*** as a whole that the FCA's role is regulatory but with wide powers which can result in decisions affecting individual rights and duties. Those decisions may impose penalties and/or restrictions or other consequences including under ***sections 91 and 123 FSMA***. For the purposes of ***section 91 FSMA***, ***section 93*** requires the FCA to have a policy statement about the imposition and amount of the penalties. That policy must have regard to the nature of the requirement contravened, the seriousness of the contravention, whether it was deliberate or reckless and whether the person upon whom the penalty may be imposed is an individual.

31. ***Section 93, subsections (6) and (7) FSMA*** provide that *"action"* may not be begun under ***section 91 FSMA*** "*after the end of the period of 3 years beginning with the*

first day on which it knew of the contravention unless proceedings against that person, in respect of the contravention, were begun before the end of that period" (my underlining for reference, not necessarily emphasis). The FCA is to be treated as knowing of a contravention if it has information from which the contravention can reasonably be inferred. *"[P]roceedings against a person in respect of a contravention are to be treated as begun when a warning notice is given ... under **section 92**"* (my underlining for reference, not necessarily emphasis)

32. ***Section 92 FSMA*** provides that there must be the following procedure for the purpose of action to be taken under ***section 91 FSMA***: First, a Warning Notice if the FCA *"proposes to take action"*. It will state the amount of the proposed penalty and/or the terms of a proposed statement. Second, a Decision Notice if the FCA *"decides to take action"* against a person under ***section 91 FSMA***. If a decision *"to take action"* is made, that person may refer the matter to the Upper Tribunal (***section 92(7) FSMA***). Third, a Final Notice confirming the substance of the Decision Notice if no reference to the Upper Tribunal has been made or alternatively the determination of the Upper Tribunal (or any court on appeal) (***section 390 FSMA***).

33. ***Sections 126 and 127 FSMA*** provide similar requirements for Warning and Decision Notices as part of the procedure for sanctioning conduct amounting to civil market abuse under ***section 123 FSMA***. There are additional, equivalent requirements inserted for the other available remedies of prohibitions, suspensions or restrictions. A person in receipt of a ***section 123 FSMA*** Decision Notice may also refer the matter to the Tribunal. There is the same right for a Decision Notice.

34. ***Section 395*** of FSMA provides that the FCA will decide its procedure for decisions which create the obligation to give Warning and Decision Notices. However, it includes a specific requirement that the decisions giving rise to the Warning Notice and to the Decision Notice must be made by a person not directly involved in establishing the evidence on which the decision is based or by two or more persons who include a person not directly involved in establishing that evidence.

35. ***Section 393 FSMA*** provides for circumstances in which a third party is entitled to a Warning and Decision Notice. For example, ***subsections (1) and (4)*** provide that *"If any of the reasons contained in a warning notice to which this section applies relates to a matter which – (a) identifies a person ("the third party") other than the person to whom the notice is given, and (b) in the opinion of the regulator giving notice, is prejudicial to the third party, a copy of the notice must be given to the third party"* (see ***Macris v FCA*** [2017] 1 WLR 1095). A person to whom a copy of the notice is given may make representations to the FCA. There are also rights to refer the decision resulting in the Decision Notice to the Tribunal if the third party is identified and any of its contents are prejudicial to them. A third party can also refer a failure to give a copy of the notice if alleging it should have been given.

36. The FCA's procedure is contained in the "Decision Procedure and Penalties Manual" ("DEPP"), a module of the FCA Handbook. It is unnecessary to dissect the DEPP procedure but it is necessary to provide an overview of the approach adopted.

37. Under DEPP, a Warning Notice provides the opportunity for the recipient to understand the FCA's intentions and reasons and to respond by written and/or oral representations to it. For that purpose not only will the Warning Notice, which is in a

prescribed form, provide details about the action the FCA proposes to take but the recipient will also have access to material relied upon for the decision to issue the Warning Notice and any secondary material which in the FCA's opinion might undermine its decision.

38. Therefore, whilst not dissimilar to a letter before claim and answer or to the requirements under ***section 16 of the Company Directors' Disqualification Act 1986***, the Warning Notice is a formal part of the decision-making process. This is also evidenced by the requirements of ***sections 389(1) and (3) FSMA*** that a notice of discontinuance must be served identifying *"the proceedings which are being discontinued"* should the FCA decide within a reasonable time that a Decision Notice will not be issued (my underlining for reference, not necessarily emphasis).

39. The decision to give a Warning Notice and a Decision Notice may be made by a member of the FCA's staff or the RDC. In the case of notices issued pursuant to ***sections 92(1)/(4) and 126(1)/127(1) FSMA***, DEPP provides that the decision maker will be the RDC. It is a committee of the FCA Board to which it is accountable for its decisions generally. It is separate from the FCA's executive management structure and, apart from its Chairman, none of the members of the RDC are FCA employees. It may meet as a full committee, but will ordinarily meet in panels, which generally include the Chairman (or a Deputy Chairman) and at least two other members, and each member of the panel is entitled to vote on the matter under consideration. It has its own legal advisers and support staff who are separate from the FCA staff involved in conducting investigations and making recommendations to the RDC. There is prescribed guidance for managing conflicts of interest an RDC member may have.

40. If FCA staff consider that a Warning Notice should be given, they will make a recommendation to the RDC, usually a preliminary investigation report. The RDC may ask FCA staff to provide further explanations or information. The RDC will satisfy itself whether the action recommended is appropriate in all the circumstances. If so, it will settle the Warning Notice and make any associated decisions. The Warning Notice will specify the time allowed for written and oral representations which must be not less than 14 days and may be extended.

41. If oral representations are requested following service of a Warning Notice, a meeting with the RDC will follow. That will have a formal procedure enabling FCA staff to respond but not to ask questions. There will be a right to reply, orally and in appropriate cases subsequently in writing. The RDC members may raise any points or questions about the matter during the meeting and ask both FCA staff and the recipient to provide additional information in writing. They do not have the power to require people to attend or to provide information.

42. The RDC members will not meet or discuss the matter with the FCA staff responsible for the case whilst the Warning Notice is extant without other relevant parties being present or having the opportunity to respond. The RDC's decision will be based upon a review of all the written and (if any) oral information. Its decisions have regard to FCA priorities and policies including on matters of legal interpretation.

43. If a Decision Notice results, it must be in the prescribed form and set out the reasoned decision on the issues in dispute with a summary of the key representations. It may identify a sanction. That may be a potentially unlimited financial sanction or a public

censure. The RDC will settle the wording and make any associated decisions. If not, the RDC will notify the relevant parties and a notice of discontinuance is required.

44. A reference to the Upper Tribunal whether by the recipient of the Decision Notice or by a third party receiving a copy pursuant to ***section 393 FSMA*** will result in a *de novo* decision.

45. Under ***section 133 FSMA*** the Upper Tribunal has jurisdiction to hear any evidence (even if unavailable to the RDC) and to make its own findings of fact. ***Section 133 FSMA*** provides that any reference to the Upper Tribunal in connection with an exercise of ***sections 91 and/or 123 FSMA*** (being a *"disciplinary reference"*) will require the Upper Tribunal to determine any subsequent appropriate action to be taken by the FCA, although the FCA remains the primary decision maker for public law purposes following any reference. By contrast, on a reference of any other matter the Upper Tribunal acts on a more restricted basis: it is constrained (by section ***133(6A) FSMA***) as to the findings it can make and it is not empowered to determine the matter for itself.

46. Settlement discussions are possible at any stage of the enforcement process including prior to the issue of a Warning Notice. There is an early settlement discount scheme for cases involving financial penalties. The FCA will invite settlement discussions at the end of its investigation.

47. In this case, if a Warning Notice is served the RDC will be the decision maker subject to a referral to the Upper Tribunal. That Warning Notice will set in train the formal process which from the beginning will potentially involve the Official Receiver as liquidator. In principle the Official Receiver as liquidator could decide to do nothing, although that decision could only be made after consideration of the matter in accordance with the duties of office. Alternatively, the decision could be made to make written and/or oral representations to the FCA or to request a referral to the Upper Tribunal. In either case, the Official Receiver as liquidator will be involved in the representation process described above. If the outcome of the representation stage is favourable to the company, there will be formal discontinuance pursuant to ***section 389 FSMA*** under the Chapter heading "*Conclusion of proceedings*" (my underlining for reference, not necessarily emphasis). If not, the Decision Notice will be sent.

48. The last stage following a Decision Notice is for the FCA to issue a Final Notice giving effect to the regulatory action which is being imposed. ***Section 390 FSMA*** provides that a Final Notice is to be issued in two situations. First, where the RDC has issued a Decision Notice and the matter has not been referred to the Upper Tribunal. Second, where the matter has been referred to the Upper Tribunal and the Final Notice reflects its decision.

49. The notice will be in prescribed form and contain all the detail to be expected setting out the terms of the decision, its requirements, for example details of payment of any penalty, and the details concerning publication. ***Section 390(9) FSMA*** provides that if a penalty is not paid by the end of the specified period, it may be recovered as a debt due.

I) ***The Statutory Regime – Liquidations***

50. A winding-up petition is a collective remedy for the benefit of creditors to enable an insolvent company to be placed under the control of an office holder to achieve the necessary investigations, collection and realisation of assets and the distribution of the net realisations in accordance with the statutory waterfall before the company ceases to exist as a result of dissolution. The introduction of an independent office holder combined with the machinery of a liquidation concerning proof of debts should usually (but not necessarily) lead to a quicker and less expensive route for determining matters in issue. It is not in the interests of creditors to have the company's assets used for the costs and expenses of the liquidation when they could otherwise be distributed.

51. Those general principles can be identified within the context of (amongst others) the ***section 130(2)*** cases of ***Re Exchange Securities & Commodities Ltd*** [1983] BCLC 186 and ***New Cap Reinsurance Corp Ltd v HIH Casualty & General Insurance Ltd***, orally per Etherton J., as he then was, approved by the Court of Appeal [2002] EWCA Civ 300, [2002] 2 BCLC 228. As explained by the Court of Appeal in ***Mortgage Debenture Ltd (in Administration) v Chapman*** (above at [12]-[13]), Lord Justice David Richards giving the sole reasoned judgment of the unanimous court:

> *"In the case of liquidation and bankruptcy, the purpose of these provisions is essentially twofold. First, given that the property of the company or individual stands under the statute to be realised and distributed, subject to any existing interests, among the creditors on a pari passu basis, the moratorium prevents any creditor from obtaining priority and thereby undermining the pari passu basis of distribution. Secondly, given that both a liquidation and bankruptcy contain provisions for the adjudication of claims by persons claiming to be creditors, the moratorium protects those procedures and prevents unnecessary and potentially expensive litigation. In circumstances where the potential liability of the company or bankrupt is best determined in ordinary legal proceedings, as for example is often the case with a personal injuries claim, the court will give permission for proceedings to be commenced or continued, but usually on terms that no judgment against the company or individual can be enforced against the assets of the estate."*

52. It is in that overall context and bearing in mind that liquidators need time to assess the position of a company following their appointment (sometimes a considerable period in the absence of required books and records) that legislation has provided for stays in compulsory liquidations since ***section 87 of the Companies Act 1862***. In that statute the prohibition applied to any *"suit, action, or other proceeding"* being commenced or continuing without permission of the court. As Ms Addy Q.C.'s skeleton argument explains, the word *"suit"* was used historically to encompass proceedings in the Court of Admiralty. Following the absorption of that Court into the High Court in 1875 the language became otiose and was subsequently, by the Companies (Consolidation) Act 1908, reduced to *"action or proceeding"*. That language has since remained unchanged for over a century. In contrast, the use of tribunals, arbitrations and a variety of statutory bodies to stand in place of the courts in a wide variety of circumstances has proliferated over the years.

53. Consistently with its predecessors, ***section 130(2)*** recognises that there may be circumstances in which the prohibition against any *"action or proceeding"* may need to be lifted. The statutory regime conducted by the office holder may not be appropriate or best. Those circumstances cannot be defined or listed and, therefore, the court has been conferred with an unfettered discretionary power to grant

permission. The court applies a test of what is right and fair according to the circumstances of the case. As Mr Justice Briggs observed when addressing ***section 130(2)*** within the context of the automatic stay under ***Article 20 of the Model Law*** in the form applied by the ***Cross-Border Insolvency Regulations 2006*** in ***Cosco Bulk Carrier Co Ltd v (1) Armada Shipping SA (2) TX Pan Ocean Ltd*** [2011] EWHC 216 (Ch), [2011] 2 All E.R. (Comm) 48, [2011] BPIR at [47-48]:

> *"[47] There is a long line of English authority, both at first instance and in the Court of Appeal, that in considering whether to permit proceedings which would otherwise be stayed by what is now **s130(2)** nonetheless to continue, the court is given 'a free hand to do what is right and fair according to the circumstances of each case': see* **Re Grosvenor Metal Co Ltd** *[1950] Ch 63, at 65 per Vaisey J,* **Re Suidair International Airways Ltd** *[1951] Ch 165,* **Re Redman (Builders) Ltd** *[1964] 1 WLR 541,* **Re Aro Co Ltd** *[1980] Ch 196, at 209 and, most recently,* **Bourne v Charit-Email Technology Partnership LLP** *[2009] EWHC 1901 (Ch), [2010] 1 BCLC 210, at 212–213.*
>
> ***[48]*** *In the latter case, Proudman J also noted that, in a case where **s 130(2)** clearly imposed a stay, the starting point was that proceedings were not generally to be permitted against a company in liquidation, so that the court should, subject to the overriding objective, adopt the primary objective of achieving an orderly resolution of all matters arising in the winding-up for the benefit of the creditors as a whole. She also noted that previous authorities recognised that, in general, the resolution of disputed matters within the machinery of a liquidation was likely to be cheaper and quicker than if left to ordinary proceedings, and that the often limited resources of the office-holder meant that the court should be cautious before exposing liquidators to the burden of coping with difficult and time-consuming litigation. That was, of course, a purely domestic case. Proudman J also noted that, on the authority of* **Re Bank of Credit and Commerce International (No 4)** [1994] 1 BCLC 419*, at 426, the Companies Court is not required to investigate the merits of the underlying dispute, beyond satisfying itself that there is a genuine arguable claim, before giving permission for the commencement or continuation of proceedings which would otherwise be stayed by s 130(2)."*

54. As also most helpfully set out in that skeleton, ***the Act*** provides a comprehensive scheme of moratoria on actions and proceedings against companies and individuals subject to formal insolvency processes:

> ***Section 130(2)*** *applies to companies in compulsory liquidation and governs any "action or proceeding";* ***section 228*** *of the Act applies to unregistered companies (and is otherwise in the same terms as* ***section 130****);* ***section 113*** *of the Act provides, on the application of the liquidator, for a stay of any "action or proceeding" against a company being wound up in Scotland;* ***paragraph 43(6) of Schedule B1*** *to the Act provides for a moratorium on, amongst other things, any "legal process" without the permission of the Court of consent of the administrator; and* ***section 285 of the Act*** *permits the Court to stay any "action, execution or other legal process" against a bankrupt. Furthermore,* ***section 126 of the Act*** *allows an application to be made for a stay after the presentation of a petition but before the winding up order of any court proceedings or "any other action or proceedings" and similar provision is made for unregistered companies in* ***section 227****."*

55. There has been debate over the differences in the objectives of liquidations and administrations and the relevance of that to the construction of their respective provisions prohibiting proceedings. The distinctions are referred to by Lord Justice David Richards in ***Mortgage Debenture Ltd (in administration) v Chapman*** (above) as follows:

> *"An administration may be a prelude to a liquidation or, once an administrator gives notice of an intention to make distributions to creditors, may become a substitute for a liquidation. In such circumstances, the purposes described above apply also to the moratorium in the case of an administration. But before that point is reached, the principal purpose of an administration*

> *is either to rescue the company itself as a going concern or to preserve its business or such parts of its business as may be viable. The purpose of the moratorium is to assist in the achievement of those purposes. The moratorium on legal process against the property of the company best preserves the opportunity to save the company or its business by preventing the dismemberment of its assets through execution or distress. The moratorium on legal proceedings serves the same purpose by preventing the company from being distracted by unnecessary claims. As Nicholls LJ put it* ***in In re Atlantic Computer Systems plc*** *[1992] Ch 505, 528, the moratorium provides 'a breathing space'. Once again, however, the court will readily give permission for proceedings to be commenced or continued where it is appropriate to do so."*

56. They are differences in purpose and objective which lead to a different approach being taken when deciding whether to grant permission (see ***Re Pan Ocean Co. Limited*** [2015] EWHC 1500 (Ch), [2016] B.P.I.R. 1541). In liquidations the right and fair test addresses the matters identified by Mr Justice Briggs in ***Cosco Bulk Carrier Co Ltd*** (above). In administrations the concern is to achieve the purpose of the administration as originally explained by the Court of Appeal in ***Re Atlantic Computers Plc (In Administration)*** (above).

57. It may be noted for completeness, that there is no express provision for a mandatory stay of an action or proceedings for a voluntary liquidation. However, nothing turns on that because the courts have always accepted that they have an equivalent discretionary power to grant a stay upon an application for directions under ***section 112 of the Act***. It appears most likely that the distinction arises because voluntary liquidations commence from the passing of the members' resolution and there could be significant delays and can still be delay before the appointment of a liquidator giving rise to opportunities for abuse to avoid an imminent hearing. Although it also follows the approach adopted for bankruptcies (see ***section 285 of the Act***).

58. Both parties accept that a debt resulting from a failure to pay a penalty in accordance with a Final Notice (see ***section 390(9) FSMA***) can be proved in the liquidation. There may be an issue whether it is provable as a debt under ***Rule 14.1(3)(b) of the Insolvency Rules 2016*** or as an expense of the liquidation under ***Rule 7.108***. That is an issue that I am not asked to decide by applying ***In re Nortel Gmbh (in administration)*** [2013] UKSC 52, [2014] AC 209 but it draws attention to the fact that the FCA may become added to the list of creditors who have provable debts as a result of a post liquidation decision resulting from the pre-liquidation duties and conduct of the company.

J) Construction of Section 130(2)

59. The construction of ***section 130(2)*** will be viewed from the perspective of the overall statutory scheme and context. The first provision within ***Chapter VI, Part IV of the Insolvency Act*** concerning a stay of any action or proceeding is ***section 126(1)***:

> *"(1) At any time after the presentation of a winding-up petition, and before a winding-up order has been made, the company, or any creditor or contributory, may—*
>
> *(a) where any action or proceeding against the company is pending in the High Court or Court of Appeal in England and Wales or Northern Ireland, apply to the court in which the action or proceeding is pending for a stay of proceedings therein, and*

> *(b) where any other action or proceeding is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the action or proceeding;*
>
> *and the court to which the application is so made may (as the case may be) stay, sist or restrain the proceedings accordingly on such terms as it thinks fit .....".*

60. I start with this provision because it is the first, it applies to the period before a winding up order is made and its wording is different to ***section 130(2)*** by reason of its reference to proceedings in the High Court or Court of Appeal and to any "*other"* action or proceeding. This wording provides potential scope for a restrictive construction of both ***sub-paragraphs***.

61. In ***Herbert Berry Associates Ltd v Inland Revenue Commissioners*** [1977] 1 WLR 1437 Lord Simon at p.1446 and Lord Russell at p.1448 echoed the potential for surprise expressed by Oliver J. in ***Re Bellaglade Ltd*** [1977] 1 All ER 319 that the courts had not restricted the application of the words *"action or proceeding"* (originally *"action, suit or proceeding"* in the ***Companies Act 1862, section 85***) to their primary meaning as a term of legal art. Namely, *"action"* meaning an issued claim form and *"proceeding"* meaning court claims started by any other means other than by claim form. They acknowledged, however, that the courts had established a broader meaning to include a power to injunct the levying of distress and enforcement by execution.

62. From the judgment of Stirling J. in ***Re Roundwood Colliery Company*** [1897] 1 Ch 373 it appears that this potentially surprising result can be traced back to a series of cases which removed doubts as to the width of jurisdiction expressed in the decision of ***In re Great Ship Co.*** 4 D.J. & S. 63. That approach is now too well established even to question. Furthermore, it was explained by the House of Lords in ***Re Smith (A Bankrupt) Ex p. Braintree District Council*** [1990] 2 A.C. 215) when addressing ***section 285 of the Act*** (the power *"to stay any action, execution or other legal process"* in a bankruptcy).

63. This decision concerned whether the insolvency court could stay proceedings for committal in the magistrates' court for non-payment of rates. The opinion of the House of Lords was that the warrant was part of the procedure for recovery of unpaid rates by distress with the predominant purpose of coercing payment. It was decided (see the speech of Lord Jauncey agreed by all at [230 F-G] that:

> *" ... the words "or other legal process" must be construed in the context of the underlying purpose of section 285, namely, the protection of the bankrupt's estate for all his creditors. It follows that proceedings by one creditor to enforce payment to himself are the sort of proceedings contemplated by the section. It cannot be in doubt that the issue of a warrant of distress would fall within the description "or other legal process." It would be both strange and illogical if the bankruptcy court could stay such proceedings but had no power to stay the next stage of the proceedings when distress had not been wholly successful. In my view, as a matter of pure construction, the words "or other legal process" in section 285(1) are quite wide enough to comprehend all the machinery provided by Part VI of the Act of 1967 for the recovery of unpaid rates, including proceedings for the issue of a warrant of commitment."* (my underlining for emphasis).

64. It may also be observed that this approach to jurisdiction and emphasis upon that identified purpose arises in the context of the overall feature that Parliament has always accepted that insolvency should be (directly or ultimately) a court controlled

process with the court having responsibility to ensure the insolvency process is achieved. That is why directions may always be sought. Whilst that is a feature which is usually referred to in the context of identifying the extraordinarily wide inherent jurisdiction of a court with insolvency jurisdiction, even to make directions in apparent conflict with express provisions of the legislation (see ***Donaldson v O'Sullivan*** [2008] EWCA Civ 879, [2009] 1 WLR 924 at 938, [41]), that underlying purpose of Parliament when passing insolvency legislation should always be borne in mind.

65. Whilst the above-mentioned construction of ***section 126(1) of the Act*** does no more for the purposes of this case than set the scene for the words *"no action or proceeding"* to be construed widely, the decision of ***Re Smith (A Bankrupt) Ex p. Braintree District Council*** (above) makes clear that ***section 130(2)*** must be construed in the context of its underlying purpose being the protection of the insolvent estate for all creditors. That is (of course) what has occurred (the following being in order of convenience and subject to further comment below):

a) Mr Justice Mervyn Davies in ***Re Memco Engineering Limited*** [1986] Ch 86 concluded that in the face of the *"consistent stream of authority"* identified in ***Herbert Berry Associates Ltd v Inland Revenue Commissioners*** (above), it was not open to him to decide that distress was not an *"action or proceeding"*.

b) In the case of ***Cosco Bulk Carrier Co Ltd*** (above) Mr Justice Briggs, as he then was, applied the automatic stay of ***Article 20 of the Model Law***, the scope and effect of which is expressly as if the company concerned had been compulsorily wound up and ***section 130(2)*** applied, to an arbitration.

c) In ***Re Arm Asset Backed Securities SA (No.2)*** [2014] EWHC 1097 (Ch); [2014] B.C.C. 260 Mr Justice Nugee at [9(4)] when addressing ***section 130(2)*** in the context of ***Article 20*** stated: *"There is ample authority which establishes that the term 'action or proceeding' has a wide meaning, including criminal and quasi-criminal proceedings (see* ***Re Briton Medical & General Life Assurance Association*** *(1886) 32 Ch. D. 503), interpleader proceedings (see* ***Eastern Holdings Establishment of Vaduz v Singer & Friedlander Ltd*** *[1967] 1 W.L.R. 1017) and proceedings on indictment (see* ***R. v Dickson*** *[1991] B.C.C. 719)".*

d) In ***Bristol Airport Plc and Another v Powdrill and Others*** (above), Sir Nicholas Browne-Wilkinson when Vice-Chancellor stated in the context of an administration and ***section 11 of the Act*** (now ***Paragraph 43(6)***) that:

> *"In my judgment the natural meaning of the words "no other proceedings . . . may be commenced or continued" is that the proceedings in question are either legal proceedings or quasi-legal proceedings such as arbitration. It is true that the word "proceedings" can, in certain contexts, refer to actions other than legal proceedings, e.g. proceedings of a meeting. In Quazi v.Quazi [1980] A.C. 744 the House of Lords held that a divorce by Talaq in Pakistan constituted other proceedings within the statutory phrase "judicial or other proceedings." But in that phrase the word "other" must have referred to non-judicial proceedings since judicial proceedings had already been expressly referred to. No such special feature is present in section ll(3)(d). Further, the reference to the "commencement" and "continuation" of proceedings indicates that what Parliament had in mind was legal proceedings. The use of the word "proceedings" in the plural together with the words "commence" and "continue" are far more appropriate to*

> *legal proceedings (which are normally so described) than to the doing of some act of a more general nature"* (my underlining for emphasis).

66. The conclusion to be drawn for this case is that the term *no action or proceeding"* in ***section 130(2)*** applies to legal proceedings or quasi-legal proceedings such as arbitrations. The comments to make are these:

    a) ***Article 20 of the Model Law*** creates an automatic stay upon recognition (in summary) of a foreign insolvency upon the *"commencement or continuation of individual actions or individual proceedings"* as well as staying execution and suspending disposal of assets. The following reference by Mr Justice Briggs, as he then was, in ***Cosco Bulk Carrier Co Ltd*** (above) is instructive to the legislative approach when actions and proceedings are referred to in general terms:

    > *"The Guide to Enactment [which] contains, at para 145, the following commentary upon the relationship between art 20 of the Model Law and arbitration proceedings: '145. Subparagraph 1 (a), by not distinguishing between various kinds of individual actions, also covers actions before an arbitral tribunal. Thus, article 20 establishes a mandatory limitation to the effectiveness of an arbitration agreement."*

    b) The reference to the words not distinguishing between various kinds of action is consistent with the approach Sir Nicholas Browne-Wilkinson V.C., as he then was, adopted in ***Bristol Airport Plc and Another v Powdrill and Others*** (above) when construing *"proceedings"* within ***section 11(3) of the Act***. That provision having prohibited winding up, appointment of an administrative receiver and enforcement of security added that *"(d) no other proceedings and no execution or other legal process may be commenced or continued"* (see paragraph 65(d) above). It is an approach which has nothing to do with the different purposes or objective of an administration except when deciding whether to grant leave.

    c) Whilst, as explained above, the policy and objectives behind the automatic stay for administrations differs from liquidations, that effects the operation of the discretion to grant leave not, as argued on behalf of the FCA, the construction of the word *"proceedings"*. For example, it is a construction applicable to arbitrations whether they arise in the context of a liquidation or an administration.

67. It might be argued that the approach of a wide construction for the words *"no action or proceeding"* is extended to the levying of distress and arbitrations because they can and should (subject to the grant of leave) be addressed by the liquidator applying the regime of proving for debts in a liquidation. If so, the same principle would be applied when identifying any other quasi-legal proceedings within ***section 130(2)***. However, binding authority establishes that is not so. In ***Re Burrows (Leeds) Ltd (In Liquidation)*** [1982] 1 WLR 1177 Mr Justice Slade was willing to accept a jurisdiction concession by Mr Mummery, as he then was, that *"proceeding"* included an information alleging an offence under ***s.146(1) of the Social Security Act 1975***. That decision was applied by the Court of Appeal in ***R v Dickson & Another*** (above) to proceedings with an indictment of supplying goods with false descriptions (see also ***In re Rhondda Waste Disposal Ltd*** [2001] Ch 57 and ***Re Smith (A Bankrupt) Ex p. Braintree District Council*** (above)).

68. It is important to note, however, that identification of a quasi-legal proceeding does not in itself lead to the conclusion that it is a *"proceeding"* within the meaning of *"no action or proceeding"* as applied to ***section 130(2)***. Sir Nicholas Browne-Wilkinson V.C. was describing the type of *"proceeding"* which might apply, not (obviously) providing a new definition. It is still necessary to ask whether the proceeding concerned is one which falls within the underlying purpose of ***section 130(2)***, the protection of the insolvent estate for all the creditors (***Re Smith (A Bankrupt) Ex p. Braintree District Council*** above).

69. This is demonstrated by the decision of the Court of Appeal in ***Re Railtrack Plc*** (above), which also identifies an additional requirement for consideration. In deciding that a decision of a regulator affecting individual rights within a procedure similar to legal or quasi-legal proceedings was not subject to the administration prohibition of ***section 11(3)(d) of the Act***, the Court of Appeal made clear that a quasi-legal characterisation might not be sufficient. Attention was drawn in that case to the fact that individual rights may not be the essential feature of the decision. It may still be a strategic or policy decision in the public interest, for example.

70. As to procedure, it was observed that administrative decisions may include quasi-legal procedures to give effect to the principles of justice requiring a fair hearing but still in the context of a strategic or policy decision. Therefore, it is necessary when asking if a process is a *"proceeding"* to also address the nature of the decision within the context of the purpose of ***section 130(2)*** and whether, for example, it is a regulatory decision which Parliament cannot have intended to fall within the control of the insolvency courts under ***section 130(2)***.

71. That approach can be found at paragraphs [31-38] in the judgment of Lord Woolf CJ. In a nutshell, the role of the decision maker under the relevant statutory powers was significant and a distinction should be drawn, for example, between an appointee determining individual rights affecting a company in liquidation and one who has a broader public interest role which is relevant to the determination and its process. The line may be difficult to draw but in that case Parliament had entrusted the rail regulator with a decision which was concerned with the interests of the rail network even though it had a specific impact upon the company concerned. As Lord Woolf CJ said:

> *"I would regard it as surprising if his supervisory role relating to the running of the railway as a whole should be subject to the control of the administrator or (other than by way of judicial review) the court."*

72. The drawing of that line was addressed by Mr Justice Norris in ***Re Frankice (Golders Green) Ltd (in administration) and others*** (above). As submitted on behalf of the FCA, care must be taken applying that decision because it addressed an administration with its different purposes and wording. However, Mr Justice Norris was specifically concerned with the meaning of *"legal process"* in the context of ***Paragraph 43(3)***. The change of wording from its predecessor, ***section 11(3)(d) of the Act*** which prohibited the institution or continuance of *"legal process (including legal proceedings, execution, distress and diligence)"*, is not significant and is attributable to "modernisation".

73. The case was concerned with an extant review hearing before a regulatory panel of the Gambling Commission to consider revocation of the company's gaming licences held under ***the Gambling Act 2005***. If a *"legal process"*, the review hearing was automatically stayed by ***paragraph 43(6) of Schedule B1*** and the review hearing the next day could not proceed without permission of the court. Mr Justice Norris said this:

> *"38 ...[I]t is clear that legal process and legal proceedings are not confined to claims by creditors against the company; they include claims against the company by third parties: see Biosource Technologies Inc v Axis Genetics plc [2000] 1 BCLC 286. Second, it is plain that the legal process and legal proceedings are not confined to civil proceedings. Criminal proceedings are also caught by the moratorium, see: In re Rhondda Waste Disposal Ltd [2001] Ch 57... Thirdly, it is plain that the relevant legal process or legal proceedings are not confined to proceedings before a court of law. It covers proceedings before tribunals, before arbitrators and before statutory adjudicators.*
>
> *39 The question is: what guidance do those single instances give in relation to the instant case? For my part, I have looked at the words "legal process…against the company". I think the word "process" suggests something with a defined beginning and an ascertainable final outcome and which, in the interim, is governed by a recognisable procedure. I think the word "legal" indicates that that process must in some sense invoke the compulsive power of the law, and it suggests that the procedure must be quasi-legal in nature. One indicator of that might be that the process results in an appeal rather than, for example, reconsideration by means of judicial review, but I accept the submission of Mr Bompas [counsel for the Gambling Commission] that an appeal, of itself, does not determine whether a process is a legal or administrative one."*

74. That reasoning does not rely upon the distinctions which exist between the purposes of liquidations and administrations. The starting point is his acknowledgement that the term was not restricted to court proceedings and raised the question whether the process is a legal process albeit not before a court of law. He explained that ***Re Railtrack Plc*** [2002] 1 WLR 3002 did not decide that regulatory decisions could not be *"legal process"*. However, if they are a legal process, there will remain the underlying question whether they are proceedings intended by Parliament to be covered by the ***section 130(2)*** prohibition. He referred to the following passage in the judgment of Lord Robertson in the earlier case of ***Air Ecosse Ltd v Civil Aviation Authority*** 3 BCC 492 before the Inner House of the Court of Session, which although in the minority in that case was impliedly approved by the Court of Appeal in ***Re Railtrack Plc***, to explain the distinction, the drawing of the line (effectively mirrored by Lord Woolf in the passage quoted above at paragraph 68):

> *"I also take the view that it is unlikely that Parliament would intend to limit the powers which it has conferred upon the CAA by the terms of an insolvency statute. It must be assumed that the CAA will exercise these powers strictly in accordance with their statutory remit and in a judicial fashion. I find it difficult to envisage what benefit will accrue to members of the public who make use of air transport if leave of the court has to be obtained before the CAA can consider an application for the revocation of a licence held by an operator company which is subject to administration order. It may be of importance to the survival of the company or to the advantageous disposal of its undertaking that its licence should not be revoked. It may also be . . . that some procedure can be devised within the administration process whereby leave of the court can quickly be granted or refused. These are not, however, matters which fall within the general objectives of the CAA under section 4 of the [Civil Aviation Act] 1982 . . . to which their activities must be directed."*

75. In the case before him Mr Justice Norris was not influenced by the existence of a right of appeal. That would not alter the nature of the underlying process (see his reference to ***Kavanagh v Chief Constable of Devon & Cornwall*** [1974] QB 624 at [39-40]). He was influenced by the fact that the regulatory proceedings had a defined beginning and an ascertainable final outcome. They were conducted under a *"defined and recognisably legal procedure"*. There was a reasoned decision capable of appeal. There was *"no public policy that regulatory decisions or decisions to enforce regulated conduct could not fall within the scope of the moratorium"*. They would produce a decision directly concerned with the individual rights of the company, licence holder. He concluded from those factors that the review hearing before a regulatory panel of the Gambling Commission to consider revocation of the company's gaming licences was a *"legal process"* within the meaning of ***section 130(2)***.

76. Whilst these decisions provide guidance for construction and are not to be read as rewriting ***section 130(2)***, there is a further guide to Parliament's intention from the insertion of ***subsection 3A*** on 18 November 2015 by the ***Finance (No. 2) Act 2015 (c. 33), Sch. 8 para. 29***. It expressly includes action in respect of the company under ***Part 1 of Schedule 8 to the Finance (No. 2) Act 2015*** (enforcement by deduction from accounts) as an *"action or proceeding"* prohibited by ***section 130(2)***.

77. In briefest of summary ***Schedule 8*** provides remedies for HMRC to assist the collection of unpaid tax by requiring a deposit taker of sums received from the taxpayer to pay the appropriate amount to HMRC. It is a process which provides for: information and "hold" notices from HMRC; duties to notify HMRC; cancellation or variation of the "hold" notice; the ability to object to a "hold" notice; consideration by HMRC of objections; decisions by HMRC following receipt of objections; appeal to the county court concerning a "hold" notice; and a deduction notice for an extant decision.

78. There is no guidance explaining its inclusion. However, the following points can be made. First, it is to be concluded that it forms the type of decision and process made outside of legal proceedings which Parliament intends to be subject to the *"no action or proceeding"* prohibition. Second, it illustrates the width of the meaning of those terms in the context of quasi-judicial proceedings because this procedure is a unilateral decision process, albeit with procedures recognisable as traditional legal process. Third, as Ms Addy Q.C. submitted, the need for its express inclusion is that the "hold" notice directly affects a third party, the holder, and only indirectly (albeit of crucial importance) the debtor company in liquidation. Those points all lead to the conclusion that its insertion is not only in line with the case law considered above but it is also instructive.

79. In my judgment applying all the matters above, I must decide whether the Warning Notice is a *"proceeding"* in the sense of a quasi-judicial proceeding which falls within the underlying purpose of ***section 130(2)***, the protection of the insolvent estate for all the creditors. I must consider both the nature of the decision and the procedure used. I must also consider whether the decision is made within a statutory context which Parliament would have intended to be subject to the supervision of a court with insolvency jurisdiction.

K) Decision – Does Section 130(2) Apply?

80. Applying that approach, it is readily apparent that sanction decisions concerning both the ***Part 6 Rules*** and civil market abuse under ***MAR*** will be specifically directed at the actions or omissions of the company concerned. The overriding issue will be whether there has been a breach by the company of statutory obligations and/or rules and regulations made pursuant to statutory powers. The consequences, if any, will penalise the company.

81. These are matters which could have been left to the civil courts or been the subject of criminal offences. In either case there would have been legal proceedings. Instead, Parliament has chosen to authorise a statutory body to both prosecute and determine the alleged breach subject to the potential for the decision to be made by the Upper Tribunal upon referral. Parliament has entrusted the FCA and the Upper Tribunal to conduct the proceeding instead of the civil or criminal courts. If the matter had been left solely within the jurisdiction of the Upper Tribunal, it would have been undisputable that this will be a *"proceeding"*. The fact that the procedures would not be identical to those under the ***Civil Procedure Rules***, for example, would make no difference.

82. The fact that the Upper Tribunal's jurisdiction is ancillary opens for argument the possibility that its referral role arises because of the principles of fairness within the context of an administrative, regulatory process and procedure. However, it is equally apparent this is not the case. A referral at the request of a recipient of a Decision Notice is not an appeal. The Upper Tribunal will address the matter afresh, effectively on the same basis as the FCA would have through the RDC. Whilst that same basis could be an administrative, regulatory process and procedure, the nature of the decision and the process applied by the Upper Tribunal, as by the FCA/RDC, "cries out" as a *"proceeding"*.

83. In that regard it is of note that whether before the RDC or the Upper Tribunal, a decision is made upon individual responsibility and liability. That is its nature. There is a process for that decision which identifies the claim of breach, presents the facts and matters and the supporting and opposing evidence relied upon, listens to representations and reaches a decision. It is a process which starts with the formality of a Warning Notice and requires a Notice of Discontinuance of *"proceedings"* should the FCA decide not to issue a Decision Notice or the Upper Tribunal conclude that a Final Notice will not be issued. All these are features of *"proceedings"*.

84. I do not consider that the decision as to whether the process is a *"proceeding"* will turn upon a micro-analysis of the procedures adopted. The matter needs to be considered in the round. However, I do not in any event consider what has been submitted on behalf of the FCA to be an absence of independence outside of the Upper Tribunal, *"modest requirements of separation"*, to be significant. The fact that the FCA, whether through its staff or the RDC, is the investigator, prosecutor and decision maker and to that extent lacks independence is attributable to the decision of Parliament to use a statutory body to deal with these matters rather than the courts. In any event there is the available exception establishing independence through the involvement of the Upper Tribunal under the rights of referral. I also do not consider

it should be concluded that the decision is made by a decision maker who does not act impartially and that, therefore, these are not *"proceedings"*.

85. Reliance was placed by the FCA on the fact that the RDC does not have power to require people to attend or to provide information. However, that is hardly inconsistent with a non-inquisitorial court *"proceeding"*. Reliance was also placed on the fact that decisions have regard to FCA priorities and policies including on matters of legal interpretation. However, that means no more in this context of assessing the nature of the decision and its procedure than that regard is had to the priorities and policies established under and in accordance with the FCA's particular and general statutory functions. Any court hearing such *"proceedings"* would also consider and apply them when determining breach and sanction.

86. As to legal interpretation itself, it is not being suggested that this interpretation is other than the proper application of the established law or of the law as understood by the FCA upon legal advice without that understanding being challenged or the challenge determined.

87. This will not be a decision of strategy or policy. Of course, the existence of the power to sanction and the process to decide whether the right to sanction exists and should be applied promote the objects of strategy and integrity. However, the decision is whether the company has committed a breach and should be subject to sanction not whether a decision should be reached to promote or achieve such objects.

88. It is no coincidence that the word *"proceedings"* is used by FSMA when referring to the Notice of Discontinuance (***section 389 and its heading***) and to the limitation period (***section 93(6) and (7) FSMA***). It is right to say that this was not for the express purpose of referring to ***section 130(2)*** but it does reflect within ***FSMA*** the nature of the decision and the decision making process.

89. That leads to the underlying question of whether these *"proceedings"* are ones which Parliament intended to fall within the ambit of ***section 130(2)***. It seems unarguable that the underlying purpose of ***section 130(2)***, the protection of the insolvent estate for all its creditors, applies. An immediate stay is required. The liquidator will need time to investigate the position before being able to respond to a Warning Notice or to permit the company to continue to make representations whether to the FCA Enforcement, the RDC or the Upper Tribunal depending upon the stage at which the liquidation occurs.

90. Time may be needed to ensure resources are not diverted from other essential matters. For example, although this is entirely hypothetical, the need to take legal proceedings and obtain urgent injunctive relief because of the very actions or omissions relied upon by the FCA. The office holder will certainly need time to be able to assess the relevance to creditors of the Warning and/or Decision Notice, including the potential effect of a penalty. To decide what to do in the best interests of creditors. As a further illustration of the potential problems, that may depend first upon having time to identify the creditors and there may be an absence of books and records. It is no answer that time can be extended by the FCA, it may not be willing to do so for the best of motives and a decision of the insolvency court may be required.

91. The stay may also be needed in the context of achieving realisations for the benefit of the liquidation. At the other end of the liquidation process, the absence of the stay might be relevant to and/or delay distribution and/or dissolution. Those are all matters to be addressed, potentially, before the court with insolvency jurisdiction if the FCA wishes to proceed with a Warning Notice and the resulting procedure.

92. To adapt the words of Lord Woolf, it would also be surprising to find that this particular statutory role of the FCA would not be subject to the control of the insolvency court for a company in liquidation. It is of course correct that the *"proceedings"* arise as part of the FCA's statutory duties including its general duties of formulating policy and fulfilling the integrity and strategic objectives. In the context of the subject of this potential Warning Notice it will be acting as a body required to ensure the markets function well and with integrity as defined within ***section 1D(2) FSMA***. That is a context in which Parliament has considered it right for the FCA or the Upper Tribunal to reach decisions as to whether the ***Part 6 Rules*** have been breached and/or there has been market abuse in breach of ***MAR*** justifying sanction.

93. However, that role within this part of its particular functions requires it to hold and determine quasi-legal proceedings in accordance with a procedure which is fit for that purpose. It is not surprising that this specific process and type of decision should be subject to the provisions of ***section 130(2)*** when it is a process and decision directly and specifically concerned with the insolvent company. It is a decision which will affect creditors whether it impacts the conduct and operation of the liquidation, its cost and expense, any distribution if the FCA becomes a creditor through the sanction of a penalty or otherwise howsoever.

94. It is unsurprising that statutory measures protecting the company for the benefit of all its creditors apply. This is not a case where the court with insolvency jurisdiction would be assuming a supervisory role to ensure the markets function well and with integrity. It is a case where *"proceedings"* will result in a decision whether penalties or other remedies should be imposed upon this company because of its pre-liquidation actions or omissions. This is precisely the context for the ***section 130(2)*** stay. This conclusion is entirely consistent with the insertion of ***subsection 3A of section 130 of the Act***.

95. The answer to the first issue is that leave is required before a Warning Notice can be given.

L) Leave?

96. The myriad of possibilities has been narrowed down for the purposes of the application for leave. I have before me a draft consent order conditional upon this court deciding that ***section 130(2)*** applies. Subject to the discretion of the court and based upon matters agreed between the parties in correspondence, the Official Receiver as liquidator is content for leave to be granted but on the term that any financial penalty imposed by the FCA shall not be enforced against the assets of the company without further leave from the Court.

97. I am satisfied from the evidence describing the potential grounds for a Warning Notice that it is in the public interest for the FCA to pursue its process should it decide that a Warning Notice should be given. In the absence of grounds of opposition, it follows that leave should be given subject to considering the imposition of a condition.

98. My concern is that the condition originally proposed, namely that there should be no execution of any penalty imposed without permission of the court, may not address the question whether leave should have been granted in the first place if a penalty might be imposed. It is not to be assumed that I consider this to necessarily be a relevant matter on the issue of leave. There is an argument (and I deliberately put it no higher than that) that ***section 130(2)*** should not be used to prevent rights from being enforced through means outside the statutory liquidation scheme when that scheme does not provide an alternative remedy. However, there is no doubt that the question raises a matter of material interest to creditors of the company and is of potential relevance to the exercise of the court's discretion.

99. I floated a proposal that leave should be granted on condition that no penalty will be imposed without further leave. However, it was submitted on behalf of the FCA that this would be inappropriate because it would effectively fetter the statutory powers of the Upper Tribunal. Ms Addy Q.C. submitted that it would be no fetter but the provision of a "gateway" by which the FCA might obtain permission to proceed. Both sides would have wished to develop their arguments but logistically that was impractical at the hearing on 5 August 2020 when judgment was to have been handed down. I considered subsequent outline submissions by email. I was prepared to allow the parties to agree a timetable to argue the matter further provided the issue could be resolved by a decision before the possibility of a penalty being imposed might arise. Understandably the parties wanted closure at this stage. I also bear in mind that this is a matter which might prove to be academic. The FCA has made clear, as I understand it, that it does not seek a penalty in this case.

100. I have decided that it would not be right on the basis of the submissions giving rise to my judgment to leave the position on the footing that no financial penalty may be imposed without further application for sanction.

101. I will grant leave to the FCA to commence and proceed against Carillion with the statutory process required to impose sanctions under ***sections 91 and 123 FSMA*** including for the avoidance of doubt by a Warning Notice and a Statutory Notice but upon terms that:

    a) there should be no execution of any penalty imposed without permission of the court (as agreed);

    b) the Application may be restored at the request on notice of Carillion to decide whether permission should not extend to the imposition of a financial penalty and, in which case, the burden of proof for any such decision will remain upon the FCA.

    c) (for the avoidance of doubt) the leave to commence and proceed includes leave to impose a financial penalty should the Application not be restored and otherwise determined in accordance with sub-paragraph (b) above.

Order Accordingly