Ombudsman's Determination

Applicants	(i) Dalriada Trustees Limited (company number NI 38344) (**Dalriada**); and (ii) Mr E
Scheme	Optimum Retirement Benefit Plan (the **Scheme**)
Respondents	(i) Mr Gordon Craig (in his capacity as a trustee of the Scheme); and Mr Martin Kelly and Mr Gerard Reilly (in their capacity as former trustees of the Scheme) (the **Trustees**); and (ii) Dalriada

Complaint Summary

1. Dalriada has referred the following matters of dispute, which Mr E has joined within his complaint:

   1.1. the Trustees failed in their duties to the Scheme, including (but not exhaustively) failing to comply with statutory requirements, guidance from The Pensions Regulator (**TPR**) and governance requirements;

   1.2. the Trustees did not adequately inform members of the Scheme of the nature, suitability and performance of the underlying investments, nor provide an adequate indication of the value and security of their benefits;

   1.3. the Trustees failed to obtain independent investment advice and/or undertake sufficient due diligence with regard to the investments made on behalf of the members and the Scheme;

   1.4. the Trustees invested the members' funds in high-risk, unregulated, illiquid investments/assets that were inappropriate and did not comply with the regulations governing pension scheme investments, which ultimately resulted in material losses of members' funds as a result of the failure of said investments;

   1.5. the Trustees breached the investment duties imposed on trustees under Part 1 of the Pensions Act 1995;

   1.6. while a Statement of Investment Principles was produced for the Scheme, the evidence indicates that neither the requirements of that statement, nor indeed the investment strategy and principles outlined therein, were followed or implemented at all by the Trustees;

   1.7. the Trustees failed to act upon requests from members in respect of their benefits in a timely fashion;

1.8. the Trustees failed to maintain adequate records in relation to the investments made on behalf of the members;

1.9. the Trustees allowed and facilitated the payment to numerous "Introducers"[1] of substantial sums from Scheme funds, for referring new members to the Scheme;

1.10. Mr Gordon Craig personally profited from his position as trustee to the Scheme;

1.11. the Trustees facilitated and/or allowed pension liberation in the Scheme; and

1.12. the Trustees failed to operate the necessary controls to ensure the effective and transparent administration of the Scheme.

2. Mr E has also separately complained that:

2.1. his requests to transfer out of the Scheme have been ignored;

2.2. he believes that his pension benefits have been lost; and

2.3. he has joined Dalriada's referral, as outlined in paragraph 1 above.

Oral Hearing

3. I held an oral hearing on 30 March 2022 (the **Oral Hearing**), as part of my investigation. I considered it necessary to do so because it appeared to me, from the evidence that I had received, that the Trustees might be personally liable for the losses caused by their acts and omissions.

4. Mr Craig did not attend the Oral Hearing. TPO had notified Mr Craig's representative of the Oral Hearing, several weeks before sending his representative the formal Notice of Hearing. Neither Mr Craig nor his representative responded to those communications, or to TPO's follow-up communications. When it became apparent that neither Mr Craig nor his representative would be attending the Oral Hearing, without having provided good reason why I should not proceed in their absence, I reviewed the position and exercised my discretion to conduct the Hearing without him. The Oral Hearing was attended by Mrs E, as Mr E's representative, two representatives of Dalriada, and the two other Respondents, Mr Kelly and Mr Reilly.

Summary of the Ombudsman's Determination and reasons

5. Having fully considered the evidence and submissions presented in writing, and those provided at the Oral Hearing, I uphold the complaints. In summary:

5.1. I have found that the Trustees have committed various breaches of trust by:

[1] "Introducers" is defined in paragraph 36 below.

5.1.1. failing to take steps to manage the various conflicts of interest that existed, in breach of section 249A of the Pensions Act 2004 (**the 2004 Act**), and Clause 5.1 of the Trust Deed (Section D.2 below); and

5.1.2. failing to act in accordance with the investment requirements and duties imposed on them by Part 1 of the Pensions Act 1995, the Investment Regulations and case law[2] (Section D.3 below).

5.2. In addition, I have found that Mr Craig has committed the following breaches of trust:

5.2.1. committing a fraud on the power of investment (Section D.3.8 below);

5.2.2. paying Scheme funds to companies outside the scope of his powers under the Trust Deed (Section D.4.1 below);

5.2.3. making payments out of the Scheme's funds to himself outside the scope of his power to do so under Clause 20 of the Trust Deed (Section D.4.2.1 below);

5.2.4. acting outside the scope of his powers under the Trust Deed in making payments to three individuals, namely Mr Dowd, Mr Jenkins and Mr Ewing and/or by failing to exercise due skill and care in employing those individuals (Section D.4.2.2 below);

5.2.5. acting outside the scope of his powers under the Trust Deed in using Introducers[3] and paying them fees far in excess of the market rate (Section D.4.3 below);

5.2.6. acting outside the scope of his powers under the Trust Deed in making or arranging loans to the Scheme's members (Section D.4.4 below);

5.2.7. applying the balance of the Scheme's fund other than in a legitimate manner and/or without fulfilling his equitable duty to act with due care and skill (Section D.5 below); and

5.2.8. failing to comply with the requirements of the 2004 Act, section 249A, (Sections D.6 and D.7 below).

5.3. I have found that Mr Kelly and Mr Reilly have acted in breach of trust by:

5.3.1. charging and accepting fees for their services as Trustees at a rate that was excessive and unreasonable (Section D.4.3.1 below); and

5.3.2. breaching their duty under Clause 5 of the Scheme's Trust Deed by failing to report matters to TPR promptly, or even to investigate whether they had a duty to do so, <u>as soon as reasonably practicable</u>

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[2] In Mr Kelly's and Mr Reilly's case, these breaches of trust apply only to any extent that Post-2017 Investments were made.

[3] "Introducers" is defined in paragraph 36 below.

after becoming aware of certain investments made and issues that existed in relation to the Scheme. This also amounted to a breach, by Mr Reilly and Mr Kelly, of their equitable duty of care (Section D.8 below).

5.4. I have also found that there has been maladministration on the part of the Trustees, by failing to have due regard for: TPR's Code of Practice No.13 (the **2013 Code**), published in November 2013, entitled 'Governance and administration of occupational defined contributions trust-based pension schemes'; and TPR's Code of practice no: 13: 'Governance and administration of occupational trust-based schemes providing money purchase benefits' (Sections D.2, D.4, D.6 and D.8 below).

Jurisdiction

6. Mr E has brought a complaint, raising concerns against the Trustees, which I have accepted for investigation under section 146(1)(a) and (c) of the Pension Schemes Act 1993 (the **1993 Act**).

7. Dalriada has also made a referral against the Trustees. Subject to my comments at paragraph 9 below, I have accepted Dalriada's referral against Mr Craig, in his capacity as a current Trustee, under section 146(1)(e) of the 1993 Act.

8. Pursuant to section 146(1)(e) of the Pension Schemes Act 1993 (the **1993 Act**), I may accept a referral of a dispute "between different trustees of the same occupational pension scheme". My acceptance of such a referral is subject to the requirement, under section 146(1A)(c), that the dispute is referred to me "by or on behalf of at least half the trustees of the Scheme".

9. Mr Kelly and Mr Reilly gave notice of their resignation from office as a Trustee on 30 August 2017, and 15 November 2017, respectively. This was given by email to Mr Ivor Jenkins, in his capacity as sole director of Optimum Financial Solutions Limited, the Scheme's principal employer, and named as the "Administrator" in the Scheme's Trust Deed. There is no suggestion that their resignation was rejected or otherwise not accepted by the Administrator. I have not, seen evidence that effect was given to Mr Kelly's or Mr Reilly's respective resignations[4], which would have been achieved by removing them formally by deed in accordance with Clause 16 of the Trust Deed (see Appendix 6). However, it is clear that Dalriada was appointed with *exclusive* powers to the scheme, by The Pensions Regulator, so any other trustees of record would have remained in name only. Regardless of the composition of the *current* trusteeship, however, I have jurisdiction to investigate and determine Mr E's complaint (who has

[4] While Clause 16.2 states that "The Trustee will be treated as having resigned on the expiry of any notice specified and otherwise on the date that the Administrator receives the notice.", Clause 16.2 goes on to require that "each Trustee and the Administrator will take all necessary action to give proper effect to the Trustees [*sic*] resignation.".

joined Dalriada's dispute) against the Trustees and to use my inquisitorial powers to seek to determine the truth of what has happened within the scheme.

10. Dalriada was named as a Respondent on Mr E's complaint application form. While Mr E made no substantive complaint against Dalriada, I have retained Dalriada as a Respondent to the Determination in respect of Mr E's complaint, for the avoidance of doubt for the purposes of carrying out my directions.

11. Dalriada has locus standi (standing) in its own right to seek recovery of trust assets and/or ask me to make a Determination of whether there has been a breach of trust by the Trustees in relation to the Scheme. In an action to have a breach of trust redressed, it has been confirmed that no issues usually arise between one beneficiary and another, or as between a beneficiary and the current trustees. The object is to secure the return of the trust property for the benefit of all the beneficiaries according to their respective interests (Young v Murphy [1996] VR19). I have considered this issue further below in the context of the Scheme Rules.

12. Dalriada, exercising the powers of the Trustees to the exclusion of the only other remaining Trustee (Mr Craig), also has the power to seek recovery of any assets of the Scheme applied in breach of trust and/or to seek remedy in respect of any such breaches. Dalriada also is a person responsible for the management of the Scheme, whom I may therefore give the opportunity to comment on any allegations contained in the complaint under section 149(1) of the 1993 Act and, under section 149(4) of the 1993 Act, I may obtain information from such persons and in such manner, and make such enquiries, as I see fit.

13. Under general trust law principles, any individual beneficiary has locus standi to require trustees to account for breaches of trust. I have the power to direct the Trustees to restore, or pay, to the Scheme, any assets which have been lost by reason of the breach of trust, or appropriate funds for such breach. If specific restitution is not possible, the personal liability of the Trustees, subject to potential relief from liability under any exoneration clause or under section 61 of the Trustee Act 1925 (**Section 61**), to the Scheme is to put it back into funds as if there had been no breach of trust.

14. Any money recovered by the Scheme as a result of my directions is available for the general benefit of all members, including Mr E, to the extent that they have been adversely affected. In *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862, Knox J quoted Lord Browne-Wilkinson at p 434 (House of Lords) in *Target Holdings v Redferns* [1996] 1 AC 421, who said that:

> "… the basic right of a beneficiary… is to have the whole fund vested in the trustees so as to be available to satisfy his equitable interest when, and if, it falls into possession. Accordingly, in the case of a breach of such a trust involving the wrongful paying away of trust assets, the liability of the trustee is to restore to the trust fund… what ought to have been there."

Detailed Determination

A Material facts

A.1 Background

A.1.1 The Scheme's establishment and merger with the Ocean and Clear Funds

15. On 12 January 2000, Optimum Financial Solutions Limited (**OFSL**) was incorporated, with Mr Ivor Jenkins appointed as one of two directors.

16. On 6 February 2013, Ocean Equities Financial Limited (**OEFL**) was incorporated, with Mr Robert Winstanley as director, and Peter Valaitis as the sole shareholder. According to records at Companies House, by 4 July 2013, Mr Craig, in his capacity as insolvency practitioner, was appointed as Administrator of the company. He was later appointed as Liquidator on 7 July 2014[5].

17. On 6 June 2013, Emfire Consulting Limited (**Emfire**) was incorporated, with Mr Thomas Murphy as director and sole shareholder. According to records at Companies House, by 20 December 2013, Mr Craig was appointed as Administrator of the company and, subsequently, as Liquidator on 30 December 2014[6].

18. It appears that both OEFL and Emfire had set up occupational pension schemes: the Ocean Equities Financial Occupational Pension Fund (the **Ocean Fund**) and the Clear Financial Solutions Occupational Pension Fund (the **Clear Fund**) (collectively known as the **Funds**), that they respectively sponsored. Mr Craig claims that he had approached both The Pensions Regulator and the "Pension Compensation Fund", about the Funds, but that neither entity had engaged with him, stating that the Funds were not regulated.

19. Mr Craig has submitted that there was a meeting in April 2015, where he and other individuals, including Martin Dowd[7] and Kenni James[8], discussed the Ocean Fund and its investments alongside OEFL and Emfire's positions. He has stated that there was an agreement that the members of the Funds needed a "new scheme to protect their interests". After discussing the situation with the former directors of OEFL and Emfire, and taking legal advice, Mr Craig has said there was a decision to incorporate the assets and liabilities of the Funds into the Scheme. According to Mr Craig, this was the primary reason that he accepted trusteeship of the Scheme.

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[5] According to records at Companies House, Mr Craig was removed as Liquidator following a High Court Consent Order on 27 November 2018. The subsequent Liquidator then submitted a claim against Mr Craig's insolvency bond in relation to payments made from the company's bank account after the company had entered into administration.

[6] As above, Mr Craig was removed as Liquidator following the same High Court Consent Order on 27 November 2018.

[7] See paragraph 25 below for an explanation of Mr Dowd's involvement in the Scheme.

[8] Payments were later made from the Scheme to Mr James. See, for example, Appendix 3.

20. On 30 June 2015, the Scheme was established by Trust Deed (the **Trust Deed**). Mr Craig was initially the sole Trustee and 'Optimum Financial Solution Ltd.' was the principal employer, although it was named in the Trust Deed as the "Administrator"[9] Mr Craig is an insolvency practitioner and director of Refresh Recovery Limited[10] (**Refresh Recovery**). Mr Craig and Mr Glyn Torr were both in office together as directors of Refresh Recovery, from 17 March 2011 to 22 June 2018.

21. Members were admitted to the Scheme. However, due to the unavailability of relevant paperwork, the dates of the first and last transfer into the Scheme have not been confirmed. Similarly, the number of members cannot be fully verified, but Dalriada has submitted that it believes that there are approximately 288 members who transferred approximately £13.4 million of pension benefits into the Scheme.

22. It seems that a minority of members were informed that the Scheme was an automatic enrolment occupational pension scheme (see paragraph 594.24 in Appendix 8).

23. On 1 July 2015, a Merger Deed was executed, under the terms of which the Funds assets and liabilities were merged with the Scheme[11]. In the Merger Deed, Mr Craig was named as the trustee of the Ocean Fund and was stated to be acting for Emfire, as its liquidator, in Emfire's capacity as trustee of the Clear Fund. The Merger Deed stated the following:

    23.1. Two deeds of amendment of the same date had been issued for the Clear Fund and the Ocean Fund, inserting a new clause (10.6 for both), which permitted the Clear Trustee and the Ocean Trustee (listed as Mr Craig) to transfer all assets and liabilities to the Scheme.

    23.2. The Optimum Trustee (Mr Craig) and the Employer (OFSL) had agreed with the Clear Trustee and the Ocean Trustee to effect a merger and accept a transfer of the assets and liabilities of the Funds to the Scheme on the terms set out in the Merger Deed (the salient terms are set out at Appendix 1).

24. On the same date as the merger referred to in paragraph 23 above (the **Merger**), the Scheme issued a Deed of Amendment, with the Scheme Rules attached. This named OFSL as the Principal Employer and noted that it had been incorrectly named in the Trust Deed. It outlined that membership of the Scheme was at the discretion of the Principal Employer upon such terms and conditions "as may be agreed individually between each Employee, his Employer and the Principal Employer." It also added the following clause, as clause 36:

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[9] OFSL's position as principal employer is apparent from various provisions of the Trust Deed and the fact that, in later documents governing the Scheme, OFSL was referred to as the Scheme's "Employer"[9], or "Principal Employer"[9].

[10] Refresh Recovery is currently in liquidation.

[11] Mr Craig has submitted that documentation for the merger of Ocean Fund members into the Scheme was not prepared by Turner Parkinson Solicitors until June/July 2016. However, TPO has received a copy of the Merger Deed, dated 1 July 2015.

"The Trustees may accept, in their absolute discretion, a transfer of the assets and liabilities of another Registered Scheme provided that the continued status of the Scheme as a Registered Scheme is not prejudiced."

25. The Pensions Ombudsman (**TPO**) has received a copy of an email sent to Mr Dowd on 23 October 2015 by Mr Nick Davenport, a Senior Partner of the law firm Turner Parkinson LLP, to which various draft deeds and notices associated with the Merger were attached. Mr Craig employed Mr Dowd as the Scheme's Business Development Manager (see Section A.1.5 below). In that email, in relation to the proposed transfer of the assets and liabilities of the Funds, Mr Davenport highlighted the need for Mr Craig to satisfy himself, "that he is not taking on, as a result of the Merger, unforeseen liabilities to the members of those schemes." Mr Davenport listed certain actions that he said needed to be fulfilled, as a minimum, before any of the Merger documents were entered into. One of the points listed was as follows:

"(c) The investments made using member contributions should be identified and valued (in this connection I understand one of the investments is a substantial loan to Real Time Claims Limited, which is under investigation for misconduct by the Ministry of Justice)".

26. On 2 November 2016, the Scheme issued a further Deed of Amendment, introducing the following sentence at the end of the membership eligibility paragraph:

"For the avoidance of doubt the Administrator may offer membership of the Scheme to persons who are not Employees of the Employers but of some other firm company or organisation approved by the Administrator or to persons who are unemployed."

27. During 2016, the Insolvency Service carried out investigations into OFSL having received a number of complaints. It does not appear that Mr Craig took any measures to inform the Scheme's current or prospective members of this occurring.

A.1.2 Mr E's Transfer into the Scheme

28. At the Oral Hearing, Mrs E informed me that Mr E had received a letter by post, addressed to him personally, at some point between July 2016 and September 2016. Mrs E submitted, at the Oral Hearing, that she was not aware that Mr E had made any online investigations into his pension arrangements and that to have done so would not have been in his nature. Mr and Mrs E had no investment experience and, at the Oral Hearing, Mrs E referred to her husband and herself as "naïve" in relation to financial matters. Prior to transferring into the Scheme, Mr E had held modest pension savings in arrangements provided by Scottish Widows, London Life and Phoenix Life.

29. Mrs E recalled, at the Oral Hearing, that Mr E had contacted the writer directly, as the letter had been addressed to Mr E personally. Mr E arranged for an individual named Andy Croston[12] to visit him at his home. No copy of that letter is available.

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[12] TPO has seen evidence that Mr Croston received payments from the Scheme; see Appendix 3.

30. Mr and Mrs E were both present at the meeting with Mr Croston. During that meeting, Mrs E recalled that Mr Croston discussed consolidating Mr E's various existing pensions "into one lump sum" and provided Mr E with a brochure, which, Mrs E commented at the Oral Hearing, looked professional and gave her and Mr E confidence in Mr Croston.

31. Following the meeting with Mr Croston, Mr and Mrs E read the brochure which contained the following statements:

    31.1. "By choosing us, you get the best of both worlds, a safe investment strategy that secures your funds as you head into retirement and a company that cares about your need and not just its own."

    31.2. "With specialist account managers at your side every step of the way, you'll enjoy the security we will provide you with, whether it's on the other end of the phone, the other side of the computer screen or a letter in the post, you will never have to worry about not knowing where your investment is: because we're here to serve you every step of the way."

32. Mrs E recalled that Mr Croston had stated that continuing to pay money into a pension scheme at Mr E's stage of life would not affect the return that Mr E would receive. Not having to make further pension contributions, and therefore being able to benefit from more of his wages each month, had appealed to Mr E. Being able to take 25% of his consolidated pension fund as a tax-free lump sum, which was not an option that Mr or Mrs E had heard of previously, was also attractive to Mr E, who was a man of modest means. Mrs E submitted at the Oral Hearing that Mr Croston had not mentioned any risk in transferring into the Scheme and that any mention of the word "risk" would have put her and Mr E off transferring into the Scheme.

33. According to Mrs E, before the meeting had ended Mr Croston had encouraged Mr E to sign the forms in order to transfer his pension funds into the Scheme, and Mr E had signed the paperwork then and there. While Mrs E was present at the meeting, she said that she did not read the application form herself.

34. Mrs E said that Mr E had recalled that, a couple of days after his meeting with Mr Croston, they had received a visit from another man, as Mr Croston had "forgotten to get paperwork signed". This other man waited in his car, outside Mr and Mrs E's house, and Mr E went out to meet him there. Mr E signed two copies of the additional paperwork and Mrs E recalls that the man took both copies away with him.

35. It appears that Mr E signed the Scheme's application form on 29 September 2016. The application form indicated that there was a "one-off formation fee of £1,000 covering the set-up and asset transfer" and an annual management charge of 0.75%.

36. My office has received from Dalriada a copy of a 'Pension Summary' in relation to each of the two pension arrangements from which he was transferring his funds into the Scheme. The Pension Summaries appear to have been prepared by an introducer, incentivised to generate new membership of the Scheme (**Introducer**). In each

Pension Summary, the scheme charges applicable, in which Mr E held his pension fund at the time (the **Ceding Scheme**), were compared with those that would apply under the Scheme and the following recommendation was given:

> "Having considered your personal circumstances and retirement planning goals and objectives we believe you would benefit from moving your existing plan to Optimum Retirement Benefits Plan."

37. From the comparison between the Ceding Schemes' charges and the Scheme's, it was clear that the 0.75% annual charge under the Scheme was higher than under one of the Ceding Schemes, which did not deduct charges as it was a 'with-profits' contract. The following explanation was provided:

> "Utilising these services to provide more active management and the potential for a greater fund at retirement naturally costs money…"

38. Despite there being no Ceding Scheme charges, in the comparison table, the following statement was made:

> "You can see that the total ongoing costs of the proposed plan are lower than the costs you are currently paying with your current plan; we also believe that there are a number of additional benefits you would receive by switching to the new provider."

39. The pension summaries each contained a disclaimer, stating that it was a summary report designed to highlight only the salient points from Mr E's "full pension review report" and that the summary report should be read "in conjunction with the full report".

40. While the pension summaries appear to have been signed by Mr E on 29 September 2016, Mrs E has no recollection of having seen them. Dalriada submitted, at the Oral Hearing, that there had been other members of the Scheme whose signature appeared on Scheme documentation but who did not recall ever having had sight of those documents.

41. Mrs E does not recall any discussion with Mr Croston concerning the way in which Scheme funds were invested, or any investment risk.

42. On 8 November 2016, the Scheme wrote to Mr E to confirm that it had received his funds from the Ceding Schemes. The letter was signed by Mr Craig and stated the following:

> "I [Mr Craig] am the Trustee of your pension and for your information would like to advise you that I am also a Chartered Accountant and a Licenced Insolvency Practitioner who is regulated by the Institute of Chartered Accountants of England and Wales. I also have an adequate Indemnity Policy in place with Lloyds of London."

43. On 29 November 2016, the Scheme sent a tax-free lump sum form to Mr E, saying that once it received Mr E's form back from him, it would have to carry out checks before

issuing his money, which could take between one to three weeks. Mr E returned this on 1 December 2016, having taken no financial or tax-related advice.

44. On 6 December 2016, the Scheme paid Mr E's 25% tax free lump sum to him. The money had come from Refresh Recovery Limited's bank account rather than from an account in the name of the Scheme or of the Trustee of the Optimum Scheme.

A.1.3 Mr Reilly's and Mr Kelly's involvement in the Scheme

45. On or around 12 January 2017, Mr Reilly and Mr Kelly signed a Deed of Appointment, which appointed them as Trustees. The Deed of Appointment stated that Mr Reilly and Mr Kelly were appointed as Trustees with effect from the date of that Deed. Although the Deed of Appointment was not signed until around 12 January 2017, it was dated 1 January 2017. Mr Craig was named as a 'Continuing Trustee'.

46. While Mr Reilly, who qualified as a Solicitor in June 1994, had no specific prior experience in relation to pension trusts before he was appointed as a Trustee, he has submitted that he had "extensive experience and knowledge of trustee duties in relation to his professional client accounts". Mr Reilly has submitted that additionally, as a company director, he had first-hand knowledge of fiduciary duties more generally. Mr Reilly's experience had included acting as a "trustee under the [Court of Protection]", which included dealing with trust accounts, and specialising in financial claims. Further, Mr Reilly had been appointed as Compliance Officer for BMD Law, in 2015. Prior to his appointment as a Trustee, Mr Reilly had acted for OFSL and, in particular, for Mr Jenkins, who was a longstanding client of Mr Reilly's, from around 2010, "on and off", for a number of years. Mr Reilly's work for OFSL included acting for it in "defending some debt actions", as OFSL was being chased for some outstanding debts, "making some claims for recoveries of money" and advising on "partnerships and things". Mr Reilly recalled that he had first met Mr Jenkins in 2008, as a "sort of client", Mr Allison, Mr Reilly's partner, had been instructed by Mr Jenkins.

47. At the Oral Hearing Mr Reilly said, that he had considered OFSL to be a profitable company. On questioning, Mr Reilly said that he had not been aware that OFSL was struggling financially in 2015; he had seen no reason to make enquiries about OFSL's financial position, and he would not have done so in relation to any of his clients provided his bills were being paid. Mr Reilly made no such enquiries before being appointed as a Trustee, as OFSL was not a new company and he, "knew of nothing that would adversely affect that company or the profitability of that company". In Mr Reilly's view, the fact that he was dealing with an insolvency company, and a chartered accountant of many years standing, provided him with sufficient assurance. According to Mr Reilly, "in our profession your word is your bond".

48. At the Oral Hearing Mr Reilly said, that he had been approached by Mr Jenkins to become a Trustee. Mr Jenkins had informed him that the Scheme needed another couple of trustees and that he considered Mr Reilly to be suitable for the role as he knew of Mr Reilly's integrity and that he would "do things properly". Mr Reilly submitted that he did not continue to act for OFSL during his term of office as a Trustee. Since

the Oral Hearing Mr Reilly has submitted, that it had been his understanding that Mr Craig had known of Mr Reilly's reputation and had wanted to appoint him for that reason.

49. Mr Kelly has said that he became involved in the Scheme as it was considering making investments into entities to whom he was providing regulatory consulting services. He has said that, "the idea that I was to become a trustee was ancillary to the main thrust of this discourse." At the Oral Hearing, Mr Kelly elaborated that the conversation concerning him becoming a trustee was with Simon Hooper and Mr Dowd. Mr Hooper was the business developer for the Rationale companies (see paragraph 51 below) and also for Emerging Market Minerals Plc (**EMM**), in which the Scheme and Mr Kelly held shares (see Appendix 4 below). Mr Kelly had known Mr Hooper for approximately 20 years and he had, on occasion over the previous 5 or 6 years, provided him with regulatory advice. The conversation had been in relation to the types of property investment that Mr Hooper and Mr Dowd might be interested in, for example care homes, homes of multiple occupancy and other kinds of property that might achieve a good revenue for the shareholders of the purchasing company. The Scheme was a shareholder in EMM, one of the companies that was considered for the property purchase, although Mr Kelly explained that the conversation was "conceptual" at that point. In some cases, those shareholders would have included the Scheme if the company used to purchase the property was a company in which the Scheme held shares.

50. Mr Kelly is a Regulatory Consultant, whose expertise has been in the regulatory sector concerning investments and whose previous experience included the following:-

    50.1. He worked with the Investment Management Regulatory Organisation for approximately five years, where many of the firms allocated to him for supervision were occupational pension schemes. He also worked on investigations into pension fund abuses.

    50.2. He was a Senior Compliance Adviser at Prudential for approximately two years. His work at Prudential included: ensuring compliance with the FCA Regulations with regard to investments; setting up a bank (Egg) in Dudley; running a unit trust operation; structuring the compliance effort throughout the whole company, including the direct salesforce; and looking at regulatory policy as it developed and new regulations as they came into effect.

    50.3. For approximately five years, in the 1990s, he was Head of Risk & Compliance for Russell Investments EMEA, which provided pension fund consultancy services.

51. Over the years, Mr Kelly has held directorships in approximately 19 companies, of which 11 are or were within the same group of companies, headed by Rationale Asset Management Plc (**RAM**), and remained dormant or had never traded. Many of the companies had never filed accounts or they had been struck off the register at Companies House.

52. In addition to receiving fees for his work as a Trustee (which I shall elaborate on in Section D.4.2.1 below), Mr Kelly billed Mr Jenkins separately for "any FCA work" and had been exploring an ISA product as an investment vehicle. He received £2,000 to £3,000 per month, plus expenses, for such work, although he said that he had been owed two or three months' payments when he resigned as a Trustee[13]. At the Oral Hearing, Mr Kelly confirmed that he had carried out work for OFSL during his time as a Trustee. This work was not strictly connected to the Scheme, he said it was in parallel.

53. Prior to being appointed as Trustees, Mr Reilly and Mr Kelly attended a Scheme meeting on 13 December 2016 (the **December 2016 Meeting**), where they say they first met each other. Mr Craig was not present at that meeting, which was attended by various individuals who were involved in running the Scheme including Mr Dowd. Matters that were discussed at that meeting included: the Scheme's rapid growth throughout 2016 with the use of Introducers; acknowledgement that Mr Kelly and Mr Reilly would be joining as Trustees and that Mr Kelly was to be appointed as Chairman of the Board of Trustees. Also discussed was an overview of the "Group" structure showing that: the Scheme owned various companies, including St James QROPS and Shawhill Seychelles, which had an office and bank account in Mauritius; a holding company "owned by Gordon Craig and purchased by the scheme"; and mention of a firm of stockbrokers that Mr Kelly was aware was potentially to be up for sale in the near future. There was an update on plans for the Scheme in relation to auto-enrolment and mention of the need to reduce the Introducers' fees to the "market standard fees in the new year". Mr Reilly requested copies of the Introducers' scripts, which Mr Martin O'Malley, the manager of the Scheme's Manchester office, was to provide.

54. Neither Mr Reilly nor Mr Kelly made any enquiry into the Scheme's investment portfolio before being appointed as Trustees. At the Oral Hearing, Mr Reilly referred again to his reliance upon Mr Craig's professional qualifications and longstanding experience as a Chartered Accountant and Insolvency Practitioner, as assurance that nothing was underhand. Mr Reilly also pointed out, that there was no legal requirement for him to have made such enquiries prior to his appointment as Trustee and that he had produced a list of all of the information he required shortly after his appointment as a Trustee, although he accepted, with hindsight, that he should have checked the investments. Mr Kelly stated, at the Oral Hearing, that he did not consider that anyone would have been permitted to divulge to him information regarding the Scheme's investments before he was appointed as a Trustee and that he had had no understanding of how the Scheme's assets were invested prior to his appointment.

55. However, prior to his appointment as a Trustee, Mr Reilly had asked for copies of the Trust Deed and Rules, but, when I questioned him at the Oral Hearing, he could not recall initially whether he had read them owing to the large volume of material that he had read overall. Later on in the Oral Hearing, Mr Reilly said that he had in fact read

[13] Mr Kelly informed Dalriada of this when he spoke to its representatives on 19 February 2018, shortly after Dalriada's appointment by TPR.

the Trust Deed and Rules, stating that doing so had informed him that an investment manager was in place in relation to the Scheme[14].

56. On 14 December 2016, payments began to be made from the dedicated Scheme bank account, which had been operational since 18 November 2016.

57. On 5 January 2017, Mr Reilly, who was engaged to work as a Trustee for two days per calendar month, informed Mr Craig and Mr Kelly by email, that he was compiling all the legislation and codes of practice relevant to their trusteeship. He noted that TPR's code of practice 13 (2016), would be "very helpful". Following on from this, he emailed again on 10 January 2017, in advance of the Trustees' first meeting, and suggested that it would be helpful if a number of them undertook TPR's Trustee Knowledge and Understanding course (the **TKU Course**) and included an agenda for the Trustees' meeting, listing various items concerning the Scheme's administration. Mr Reilly did not complete that course himself; he explained at the Oral Hearing that he had become seriously ill in March 2017 and had been unable to work until late June/early July 2017.

58. At the Oral Hearing, Mr Kelly submitted, that he had undertaken no research of his own regarding the role and requirements of a pension scheme trustee, as Mr Reilly had done this and had circulated what he considered were the relevant websites to look at. The file that Mr Reilly had arranged to be set up in the office had been "no good" to Mr Kelly, as he was not in the office himself. Mr Kelly said that he had not taken the TKU course, but he could not recall why he had not done so. Mr Kelly did, however, submit at the Oral Hearing that he had obtained a copy of the "Scheme particulars" and that he had read them as soon as he could once he had been appointed as a Trustee. He did not see the Scheme's Statement of Investment Principles (**SIP**) and had not been aware that there was one, explaining that he had considered establishing what the Scheme's assets were to take priority over establishing whether a SIP existed. Mr Kelly stated that he believed that he had no involvement in any investment decisions regarding the management of the Scheme's assets. Further, as Mr Reilly had taken on the role of investigating the Scheme's accounts, it would make no sense to duplicate Mr Reilly's work.

59. In February or March 2017, Mr Reilly and Mr Kelly met Mr Craig for the first time, at an arranged meeting held in a room at a football club.

60. Mr Reilly stated, in the Oral Hearing, that he had requested various Scheme documents and that, at that first meeting with Mr Craig in February 2017, based on the limited information that he had received, he recommended that Mr Dowd be dismissed as he was not providing value to the Scheme and Mr Reilly was not satisfied that Mr Dowd was following the correct procedures with regard to the Introducers. Mr Reilly said that he had also recommended that the Scheme's office in Manchester be closed down.

[14] The Trust Deed and Rules do not, in fact, state that an investment manager had been appointed in relation to the Scheme, although the SIP states that "The Scheme's Investment Consultant is Roderic Owen-Thomas who is the Discretionary Fund Manager at Logic Investments.".

His understanding had been that both of these recommendations had been actioned. Mr Reilly has no written evidence of this[15].

61. Since the Oral Hearing, Mr Reilly has submitted that, during that same meeting: he was led to believe that there was an investment manager in place in relation to the Scheme; and "The trustees had between them specifically resolved that there would be no new investments made from the Scheme assets without unanimous trustee approval, and in any case while Mr Reilly undertook the onerous task of acquainted [*sic*] himself with the assets of the Scheme and reviewing its investments, as well as compiling the relevant legislation and codes of practice." However, Dalriada's note of its meeting with Mr Reilly on 15 February 2018 states that Mr Reilly had informed Dalriada's representatives that it had been agreed in the first Trustees' meeting that no payments would be made without the agreement of "at least two of the Trustees". In a copy of a document presented to TPO by Mr Reilly, as a witness statement to the Police, Mr Reilly has stated that "in the initial trustee meeting I said anything done has to be sanctioned by two trustees"[16]. Mr Reilly has not explained the background against which he provided a witness statement to the Police, or even the name of the Police force concerned. The witness statement is unsigned and undated, so I cannot give it any particular evidential weight or accept that it was, in fact, submitted to the Police.

62. During the Oral Hearing Mr Kelly stated, that he had understood the "distribution office had ceased to do business" so there was, in effect, a "moratorium", with no new members joining the Scheme after his appointment as a Trustee. When Dalriada pointed out that it had evidence that £1,994,351 of transfers in had been accepted by the Scheme between 1 January and 23 March 2017, Mr Kelly said that he had not been aware of this, as he had no sight of the Scheme's bank account, but that he considered that those transactions would have been put in motion prior to the "moratorium on a proactive sales process".

63. Mr Kelly has submitted that, in March 2017, as he "could not get Mr Craig to agree to anything", he instructed Mr Davenport to draft a Deed of Removal in relation to Mr Craig, which was sent to Mr Jenkins on 24 March 2017, expecting that he would show it to Mr Craig. Mr Kelly's intention had been to be "a lever to get [Mr Craig] to the table", rather than to remove Mr Craig from his position as a Trustee.

64. Mr Reilly informed me, at the Oral Hearing, that he had not been made aware of the Insolvency Service's investigation, which is referred to in paragraph 27 above, until "later on". However, he was clearly aware of this within his first month as a Trustee, as a copy of a file note apparently dictated by Mr Reilly on 1 February 2017, refers to a telephone call that he had had with Mr Kelly and Mr Ewing, the Scheme's/OFSL's compliance officer (see paragraph 98 below), in which they had discussed, "the issues with regard to the DTI[17]". Further, Dalriada has supplied TPO with a copy of an email,

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[15] While he speculated that he might have said this in "one of the trustee emails", his memory was not precise and he had lost many emails on account of having replaced his laptop since then.

[16] Page 83 of that document.

[17] It appears, from that correspondence, that this was a reference to the Insolvency Service's investigation that I have mentioned in paragraph 27 above.

dated 20 February 2017, from Mr Kelly to Mr Ewing and with Mr Reilly and Mr Craig copied in, in which the "BIS [*sic*] enquiries" are mentioned. It is clear that, by early April 2017, Mr Reilly and Mr Kelly had become involved in corresponding with the Insolvency Service with regard to its enquiries. In an email exchange on 5 and 6 April 2017, in which Mr Reilly set out a report of the Scheme's investments and expenditures and further enquiries that he would need to make (the **April 2017 Report**), Mr Kelly responded with a suggestion as to how to take the matter forward with "BEIS[18]".

65. In the April 2017 Report, Mr Reilly:-

65.1. identified that several of the Scheme's investments had been made in companies that were and had been dormant[19];

65.2. queried the whereabouts of the paperwork in relation to an investment of nearly £1million in RAM, whether any due diligence had been carried out and how the investment had been secured;

65.3. identified the lack of any paperwork in relation to certain other investments; stated that he had raised queries with Mr Torr concerning invoices that he had discovered in relation to auto-enrolment and had been trying to arrange a meeting with Mr Haslam (the Scheme's accountant) on Mr Torr's advice; and

65.4. stated that he needed to speak with Mr Jenkins concerning OFSL's expenditure.

66. Additionally, in a further email to Mr Craig and Mr Kelly on 6 April 2017 (the **6 April 2017 Email**), Mr Reilly:

66.1. questioned why a demand for repayment of a loan from Shawhill Securities Limited (**SSL**) was issued on 22 March 2016 by Andy Haslam when the company (which Mr Reilly noted had the same registered office address as that of Refresh Recovery Limited's) had been dissolved on 15 March 2016;

66.2. stated that he had a list of people described on a spreadsheet as having bridging loans of £260,750, and that SSL's registered office was the same as Refresh Recovery Limited's; and

66.3. listed various "transactions with no paperwork", including investments in RAM that had occurred since his and Mr Kelly's respective appointment as Trustees and asked for information and paperwork in relation to those transactions, some of which were described as "investments".

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[18] i.e. to the Insolvency Service in relation to its investigation, mentioned in paragraph 27 above, which the Secretary of State for Business, Energy and Industrial Strategy (**BEIS**) had requested.

[19] For example, the April 2017 Report refers to a total investment of £1,013,040 having been made in Tulip Research Limited and states that the accounts for that company showed that it was dormant.

67. In the April 2017 Report Mr Reilly stated, that he had been able to identify "roughly at this stage where the £11,370,117.33 receipts have been applied", but that he would need to investigate fully the "voracity [*sic*] of allocation".

68. Mr Reilly has submitted that, having experienced a relapse of lung cancer, he underwent major surgery on 17 April 2017, and was therefore unable to work as a trustee of the Scheme or professionally, from that date. Mr Reilly did not arrange for anyone else to continue with his investigations in the meantime. During the Oral Hearing, Mr Reilly stated that he "became incredibly ill" in March 2017 and that his illness had involved "lifesaving surgery and serious, serious infections". In response to my second Preliminary Decision, which I issued following the Oral Hearing, Mr Reilly submitted that he had anticipated being away for approximately four weeks and, on the basis that the Scheme was in the "capable hands" of the other Trustees who, along with the Scheme's administrators, were aware of his ill health, he considered that there was "sufficient cover" in relation to the Scheme during that time. In fact, due to medical complications, Mr Reilly did not return from his sickness absence until late June or early July 2017.

69. Mr Reilly said, at the Oral Hearing, that when he returned from his sickness absence, he began to look into the Scheme's investments, pulling together all of the documentation and information.

70. Mr Reilly has submitted, in writing prior to the Oral Hearing, that he emailed Mr Craig and Mr Kelly, on 14 July 2017[20], about member complaints relating to transfers. In that email, Mr Reilly questioned some of the Scheme's 'investments'. Mr Reilly has submitted in writing since the Oral Hearing that, as a result of his further investigations, he produced a "Report on Investments" in August 2017 (the **August 2017 Report),** which led to a meeting between Mr Reilly, Mr Craig, Mr Jenkins and Mr Torr on 23 August 2017.

71. Mr Reilly said that, at the meeting on 23 August 2017, he had raised matters about which he was concerned with Mr Craig. Mr Reilly has submitted that Mr Craig threatened him as he did not like Mr Reilly's findings. At the Oral Hearing, Mr Reilly submitted, that once Mr Craig had calmed down, he informed Mr Reilly that his report was not based on "the whole picture" and that he needed to look at documents that he had not seen.

72. According to Mr Reilly, he sent his report to Mr Craig as there were many questions for Mr Craig to answer, although he had compiled the report not for Mr Craig but for himself and for the "authorities". However, the copy of the email containing the report that Mr Reilly sent to Mr Craig, following the meeting referred to in paragraph 71 above, was sent to TPO with a note from Mr Reilly, informing TPO that, while acknowledging Mr

[20] While Mr Reilly has sent TPO the content of that email, it is headed only with the date and time on which he purportedly sent the email. There is no evidence that the email was actually sent, or details of the recipient other than that it was addressed to "Gordon Martin".

Craig's professional qualifications, he had not believed Mr Craig at this stage, as Mr Craig was continuing to mislead him or withhold information from him.

73. On 30 August 2017, Mr Kelly sent Mr Jenkins his resignation notice, pursuant to clause 16.2 of the Trust Deed dated 30 June 2015, in which he said:

- He had been frustrated in his attempts to arrange trustee meetings, obtain sight of any accounts for the Scheme, secure fees for trustee services and arrange for Scheme monies held by 'Secure'[21] to be transferred to the Scheme bank accounts.
- He understood that Mr Reilly had also been frustrated in his attempts to build a picture of the transaction flow and resolve potential irregularities.
- He was unaware of any enquiries or investigations being undertaken into the Scheme for several weeks after his appointment, despite Mr Jenkins and the other trustees being aware.
- He referred to "the continuing damage this investigation[22] has caused and will continue to cause the scheme and its ability to take on new members" and stated that the Scheme's future was "more than bleak".
- He recommended that the Scheme be placed into "administration" in accordance with the Trust Deed, and would have proposed this had a trustee meeting been convened.

74. With regard to the penultimate bullet point listed above in paragraph 73, when I asked Mr Kelly, at the Oral Hearing, why he considered new membership of the Scheme to be so important, Mr Kelly replied that new membership would provide liquidity, which was important as he thought that "a lot of the administrative staff were paid out of the revenue that they generated from bringing in new membership". As far as Mr Kelly could see there was no income from any of the Scheme's investments.

75. Mr Kelly also stated, at the Oral Hearing, that he had resigned because he could not see where the Scheme was going; he could not see, "what the endgame on this was or what the way forward was for it". I queried whether Mr Kelly had had any concern for the Scheme's members and their investments? Mr Kelly answered that that was exactly what he had meant; his reference to a "way forward" had been meant "holistically, for anybody". Mr Kelly was unsure why he had not resigned earlier. However, he reiterated that nothing he could have done would have prevented the Scheme from reaching the condition that it was in; bringing in TPR any sooner would not have changed anything and, given HMRC's and BEIS' involvement, he was pretty sure that TPR knew about the Scheme in any case and no investments had been made after he and Mr Reilly had become Trustees. Mr Kelly has provided no evidence to support this apparent assumption that all investment activity had ceased on his and Mr Reilly's appointment.

[21] Mr Kelly has since confirmed that, by "Secure", he meant Refresh Recovery's proprietary bank accounts.
[22] Mr Kelly clarified, at the Oral Hearing, that he had been referring to HMRC's and BEIS's involvement.

76. At the Oral Hearing Mr Reilly said, that he had met with Mr Davenport in September 2017 and discussed reporting his concerns to TPR. TPO has received a copy of an email of 26 September 2017, from Mr Reilly to Mr Davenport which, it appears, had a further version of the August 2017 Report attached, which Mr Reilly has clarified was an evolving document. In that email, Mr Reilly stated that, "As we discussed I want to write to [TPR] advising that I am the trustee and what I have uncovered and what steps I propose to take." Mr Reilly asked Mr Davenport to draft him a letter to send.

77. Further emails between Mr Reilly and Mr Davenport during October 2017 indicate that Mr Davenport had intended to draft a report for Mr Reilly for him to send to TPR, and Mr Reilly had intended to submit a Triggering Event Notification form[23] to TPR, but Mr Davenport said he should refrain until Turner Parkinson had prepared a detailed letter about the Scheme. However, as there were unpaid fees in relation to Mr Davenport's previous work in relation to the Scheme, Mr Davenport was unable to carry out this work. Mr Reilly has submitted in writing that he had believed at the time that Mr Craig would pay these fees, although he acknowledged that, with hindsight, that may be viewed as "naïve". During this time, Mr Reilly had been unwell and a consequence of his ongoing illness, had caused further delay. On 19 October, as Mr Craig had still not paid Mr Davenport's fees, following Mr Davenport's earlier advice Mr Reilly drafted a "trigger notice" himself. However, Mr Davenport advised him, by email of the same date, to refrain from filing the notice until Mr Davenport had been able to prepare a "detailed letter to [TPR]" to accompany the trigger notice.

78. When I asked Mr Reilly, at the Oral Hearing, why he had not simply handed the matter over to TPR given that he was not well enough to expedite it himself, he replied that he had thought that the correct way to deal with the situation was to seek "a moratorium from the Court on everything, and then take action". However, Mr Reilly has produced no evidence that he prepared or made any Court application.

79. Mr Reilly has sent TPO a copy of a pro forma of a letter that he has said he sent to Scheme members on 25 October 2017, informing members that he had concerns about the security of the Scheme and that he intended to refer the matter to "the regulators" and that believed the best course of action would be to "wind up the scheme under the provisions of Section 24 of the Pension Schemes Act 2017". Mr Reilly stated, in that letter, that he would contact members with an update, "hopefully within the next 6 weeks".

80. Mr Reilly has submitted that he sent Mr Jenkins his resignation notice on 15 November 2017, having become frustrated by Mr Craig's failure to pay Mr Davenport's invoices to enable Mr Davenport to carry out the necessary work to prepare a report to TPR. In the email, Mr Reilly stated the following:-

- He had attempted to raise the issues he had found with Mr Craig, but the latter had failed to address them. Further, Mr Craig had continued to ignore requests, failed

[23] The triggering event notification regime applies only to master trust schemes. As the Scheme is not a master trust, it is unclear why Mr Reilly or Mr Davenport considered this to be the appropriate way forward in relation to the Scheme.

to attend meetings or provide information retained in either Refresh Recovery or the Scheme's bank accounts.

- Mr Haslam and Mr Torr were equally trying to avoid questions and had not provided information. Mr Haslam had been promising to provide the full set of accounts for over six months.
- Mr Kelly appeared to have been in a position of conflict and failed to advise him or OFSL of this.
- As far as he was aware, no investment appeared to have been made in accordance with the Scheme Rules.
- He believed that he now needed to report his findings to TPR and draw adverse inference from certain parties' omissions.

81. When I asked Mr Reilly, at the Oral Hearing, why he had waited until November 2017 to resign, he answered that, as a "solicitor to the Supreme Court", he would not have simply walked away (although he subsequently did). He had intended to remain in office in order to apply to the Court for a moratorium and "to start taking action on behalf of the members".

82. I have seen evidence that Mr Reilly continued to correspond with Scheme members in respect of their transfer requests after he had resigned[24], although he did not recall this when I questioned him about it at the Oral Hearing.

83. Mr Reilly has submitted that, following his resignation, he again became ill and was not fit to resume work until January 2018. Mr Reilly continued to correspond with Mr Davenport and with Mr Craig during January 2018, notwithstanding that he was no longer a Trustee. It seems, from email correspondence between Mr Reilly and Mr Davenport of which TPO has had sight, that Mr Davenport's fees remained unpaid. Mr Davenport recommended that Mr Reilly report his concerns to TPR.

84. Mr Reilly met with Mr Craig on 12 January 2018. At that meeting, Mr Craig apparently claimed that Mr Reilly's report was "wrong" and that he could provide the necessary information. However, Mr Reilly did not receive that information.

[24] Mr Reilly himself sent TPO a copy of an email from a Scheme member who was seeking confirmation that their funds were safe within the Scheme and asking when their transfer request out of the Scheme would be effected. That email had apparently been sent to Mr Reilly by the member on 24 November 2017 and referred to a letter, dated 20 November 2017, which Mr Reilly had sent to that member.

85. Mr Reilly has provided a copy of an email that suggests that he may have attempted to report his concerns to TPR on 10 January 2018[25]. However, Mr Reilly's communication with the Solicitors Regulation Authority (**SRA**) later in January 2018 (see paragraph 87 below) suggests that he had not, in fact, sent his report to TPR. While Mr Reilly has provided TPO with a number of variations of his report, he has been unable to provide evidence that this was sent to Mr Craig or TPR, prior to February 2018. Nevertheless, he has been able to evidence that he forwarded this email to Dalriada on 15 February 2018. A copy of the most complete report can be found at Appendix 5, which notably outlines a 'fund synopsis' as at 12 September 2017.

86. Mr Reilly has submitted that he reported matters to the SRA in early 2018 and also to the Police[26]. Mr Reilly has provided TPO with a copy of an email exchange between him and an Investigation Officer at the SRA. In an email dated 18 January 2018, the Investigation Officer, while acknowledging Mr Reilly's "draft report", made some enquiries of Mr Reilly concerning money belonging to an individual (whose personal data has been redacted), who seems to have been a member of the Scheme. The Investigation Officer stated:

> "But I do not understand why you have not told xxxxxxxxxxx[27] where her money is. Xxxxxxxxx needs to find out where her money is as soon as possible so that she can properly consider her options.
>
> Please provide the following information and explanations:
>
> 1) Where is xxxxxxxx money?
>
> 2) How much money is held on her behalf?
>
> 3) If you do not know the answer to either of these questions, please explain why."

87. Mr Reilly responded to that email on 25 January 2018, informing the SRA that he had resigned as a Trustee and had drafted "emails to the regulator which I will send Friday". Mr Reilly explained that he had not received all of the information that he had been promised that investments had been made without reference to him and seemingly without due diligence having been carried out, and stated that there was a "first charge on a hotel in Wales also independent valuations have been done." Mr Reilly provided all of the information that the Investigation Officer had requested, other than where the

[25] TPO has seen a copy of an email that Mr Reilly apparently attempted to send to TPR on 10 January 2018, which referred to his report, set out his concerns in relation to the Scheme and asked TPR whether it considered that the Scheme had experienced a "triggering event" and should be wound up. The email was sent by Mr Reilly to himself on 10 January 2018, but had an incorrect email address for TPR set out at the top of the email. Mr Reilly has submitted, in writing, that he received no notification that the email had not been delivered. In its Final Determination Notice of 20 April 2018, TPR stated that, despite Mr Reilly's references to having reported matters to TPR, there was no evidence that he had done so prior to Dalriada's appointment as a trustee of the Scheme.

[26] See paragraph 61 above, for my observations on the copy of that witness statement that TPO has received from Mr Reilly.

[27] The email exchange that TPO was sent had been redacted.

member's money was held, explaining that, as the Scheme operated pooled investments, he was unable to advise where her money had gone.

A.1.4 Dalriada's appointment by TPR

88. In February 2018, OFSL was wound up by the court following the investigation that had been carried out by the BEIS (see paragraph 27 above). During that investigation, the Official Receiver had established that OFSL: had not kept adequate records; had failed to provide information to the tax authorities and; had acted negligently in its duty to provide benefit statements to Scheme members[28]. The Official Receiver said the following about Mr Jenkins and his disqualification:

> "He gained personally from allowing his company to administer the pension scheme, while members were left in the dark about their savings, and for that we welcome this disqualification which seriously curtails his ability to run a limited company."[29]

89. On 13 February 2018, Dalriada was appointed by TPR as independent trustee of the Scheme, with exclusive powers, under section 7 of the Pensions Act 1995. It contacted Barclays Bank on 14 February 2018, to notify the Bank of its appointment and to instruct the Bank to freeze the Scheme's bank account, with no action to be taken without Dalriada's authority as a trustee of the Scheme. On the same day, Dalriada wrote to the Trustees, as affected parties, on 14 February 2018 and issued an announcement to Scheme members, with an explanation of its role and the action it had taken so far.

90. Dalriada's letter of 13 February 2018 (the **February 2018 Letter**) included the following:

> "Please take this letter as direction that you should take no action whatsoever in your current capacity in relation to this Scheme. You do not have the legal power to enter into any transaction with members, potential members or any other party as a trustee. You do not have the legal power to sign any document or process any payment in relation to the Scheme. You should make no statement whatsoever to any member of the Scheme and all queries should be directed to Dalriada Trustees Limited.
>
> …
>
> You must take no action with regard to surrendering, moving or otherwise realising any of the scheme's investments."

91. As an independent trustee appointed by TPR, Dalriada gained access to 28 boxes of Scheme documents on 14 February 2018, which had been kept at OFSL's offices. Dalriada met or spoke with each of the Trustees, as well as Mr Davenport and members

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[28] https://www.gov.uk/government/news/pension-scheme-negligence-lands-insurance-boss-seven-year-ban

[29] See reference 5.

of OFSL's administration staff. Summaries of those meetings and conversations are contained in Appendix 13 to this Determination.

92. Mr Craig did not respond to the February 2018 Letter. Dalriada made multiple attempts to meet with Mr Craig, but those meetings were all cancelled at short notice, by Mr Craig or his wife or associates[30], citing poor health and Mr Craig's attendance as a key witness at a hearing at Preston Crown Court.

93. Mr Reilly responded to Dalriada's request for information with a copy of a summary of the Scheme's investments.

94. On 21 February 2018, TPR issued a Determination Notice, giving the Panel's reasons for the appointment of Dalriada as Independent Trustee. It appears that Mr Reilly responded to this with: a copy of his investigation report into the Scheme's investments[31]; copies of emails relating to the Scheme; and information about his health, which he said had made him absent for the most part of early-to-mid 2017.

95. On 7 June 2019, the Secretary of State accepted Mr Jenkins' disqualification undertaking (see paragraph 88 above), which became effective from 28 June 2019. From that date, he was banned from directly or indirectly becoming involved, without the permission of the court, in the promotion, formation or management of a company.[32]

96. On 2 June 2020, Dalriada issued an update to the Scheme's membership by way of a further announcement. It stated that it had commenced an investigation of the Scheme to ascertain, amongst other matters: how it had been operated; what actions the Trustees had taken; and what was the value of the purported investments made on behalf of the Scheme. A summary of its findings is set out at Appendix 2.

A.1.5 Individuals involved in running the Scheme

97. Mr Reilly and Mr Kelly each charged the Scheme £4,000 per month as fees for their work as Trustees. Mr Reilly had agreed to work as a Trustee for two days per month in return for this fee. Mr Reilly said, at the Oral Hearing, that this fee level had been based on a report on average trustee fees, which had been prepared by PwC. Mr Reilly did not consider this to be overly generous, given that fees for his work outside the Scheme as a Solicitor, were based on his hourly rate of £250 per hour and, in practice, he worked considerably more than two days per month as a Trustee. Mr Reilly pointed out, at the Oral Hearing, that: he had sought legal advice to confirm that he could charge additional fees for his extra work; he had capped those fees at £20,000; and he

[30] Those associates included Mr Marshall Ronald and Mr Howard Young, both of whom had been solicitors before being struck off by the SRA.

[31] TPR's Case Team observed, in a letter to TPR's Determinations Panel dated 27 March 2018 in response to the various representations received from the Trustees in relation to the Scheme, that Mr Reilly appeared to have provided Dalriada with what appeared to be a "very early draft of his notes", while providing to the Panel a later version that had apparently been provided to Mr Craig prior to Dalriada's appointment, with no explanation as to why he had provided the two different versions of the report.

[32] See reference 5.

had obtained Mr Craig's agreement not to take his own fees, so that fees that would have been paid to Mr Craig could be used instead to fund Mr Reilly's additional work in relation to the Scheme.

98. Based on the information made available to TPO, it seems that Mr Craig and Mr Jenkins had a number of colleagues working alongside them in relation to the Scheme. I have listed the pertinent employees, their job description (if known) and the payments that they appear to have received (if any) between November 2015 and November 2016[33] below:

Employee	Job description	Payments received
Mr Gordon Craig	Trustee	£489,430
Mr Martin Dowd	Business Development Manager	£72,000
Mr Ivor Jenkins	Administrator	£74,500
Mr Andrew Ewing	OFSL's Compliance Manager	£7,000
Mr Andrew Haslam	Scheme Accountant	
Mr Glyn Torr		

99. Of note, Mr Dowd's employment contract with the Scheme, dated 1 September 2015, outlined a basic salary of £120,000 per annum, use of a company vehicle, and described his role as the following:

> "You are employed as an [*sic*] Business Development Manager and your normal duties will include achieving new business and maintaining any ongoing business and relationships with clients as well as any other assignments as required. We may at any time transfer you to any part of our business, or require you to do alternative or additional duties, if this is reasonably required for the purposes of our business.
>
> You warrant that you are entitled to work in the UK without any additional approvals and will notify us immediately if you cease to be so entitled at any time during your employment."

100. On 14 December 2015, Mr Dowd was charged with four offences, including conspiracy to convert criminal property (money laundering).

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[33] Based on the Scheme's and Refresh Recovery's bank account statements provided by Dalriada (see paragraph 618 below). TPO has received no details of payments made to these individuals after November 2016.

101. On 27 May 2016, Mr Craig wrote to Morgan Brown & Cahill, a legal aid law firm which, it seems, was acting for Mr Dowd, in relation to its and Mr Dowd's application to the court with regard to Mr Dowd's bail terms. In that letter, Mr Craig stated the following:

    101.1. He had purchased 60% of OFSL's shareholding, which required a FCA application before the shares could be amended to his name on Companies House.

    101.2. Mr Dowd was employed by OFSL as a Business Development Manager. His role was to visit and cultivate strong relationships with introducing Independent Financial Advisers and so he was required to travel abroad, as Mr Craig's business interests were mainly in Spain and Mauritius.

    101.3. In April 2016, Mr Craig had to travel to Mauritius to engage in activities that Mr Dowd usually undertook but had been unable to undertake due to his inability to travel. Mr Craig claimed that it was a fundamental requirement for Mr Dowd to be able to travel abroad, with reasonable notice, to fulfil his occupational contract whilst in Mr Craig's employment.

    101.4. Mr Dowd was a valuable employee who had shown a great work ethic and was an asset to Mr Craig's company and so he offered the Court a pledge of sureties in the sum of £125,000 in order to guarantee to the court that Mr Dowd would return to the UK after any international travel for work, and that he would appear at court.

    101.5. Mr Craig would put up and/or provide proof of his shares in Refresh Group shareholder funds, of which he held in excess of £500,000 as way of guarantee for Mr Dowd.

102. On 2 August 2017, Mr Dowd was convicted of conspiracy to money launder.

103. Mr Kelly submitted, at the Oral Hearing, that he had not been aware of the criminal charges against Mr Dowd until this became apparent at a meeting attended by Mr Kelly, Mr Dowd, Mr Dowd's solicitor and other individuals, in or around June 2017. Mr Kelly was informed of Mr Dowd's subsequent conviction shortly after its occurrence. Mr Kelly did not consider that this finding could affect the Scheme, on the basis that "it could not affect the past". Mr Kelly has since submitted, in writing, that he had also believed that Mr Dowd was no longer an employee in relation to the Scheme, that the prosecutions were unconnected to the Scheme's activities and that they were a matter of public record. Mr Kelly has submitted that he learned, after the Oral Hearing, that the subject matters of Mr Dowd's conviction pre-dated the Scheme's establishment.

A.1.6 Bank accounts used for Scheme funds

104. The Scheme did not have a bank account until November 2016. Instead, up until that point, the Scheme's funds were intermingled with those of Refresh Recovery Limited's, in the latter's bank account. As set out in Appendix 8, paragraph 566 below, Mr Craig claims that this is incorrect. However, I have had sight of the account's statements from

4 November 2015 to 14 December 2016, which evidence monies paid in and out of the account regarding at least 25 companies which had Refresh Recovery Limited appointed either as an Administrator or a Liquidator at the time. I shall address this more fully in my Conclusions (see paragraphs 321 to 323 below).

105. As mentioned in section A.1.3 above, both Mr Reilly and Mr Kelly have submitted that they were unable to obtain sight of any accounts for the Scheme, or access to the Scheme's bank account, despite Mr Reilly's repeated requests of Mr Haslam.

A.1.7 Use of Introducers

106. At least some of the Scheme's members, including Mr E, were persuaded to transfer into the Scheme by Introducers.

107. It seems, from correspondence that TPO has received, that at least some members were given incorrect information concerning the nature of the Scheme by their Introducers. For example, one member was surprised to learn that the Scheme was an occupational pension scheme, as they had been sure that their Introducer had been aware that the member was transferring from a personal pension scheme and wanted the same type of arrangement.

108. It is also evident, from a note of the December 2016 Meeting (see paragraph 53 above) and from copies of some of the Introducers' terms and conditions of which we have had sight, that the Introducers were being paid commission, in some cases far in excess of any industry norm.

109. As I have mentioned in Section A.1.3 above, Mr Kelly has submitted that he thought that new membership of the Scheme had ceased, as a result of the Scheme's office in Manchester putting its business on hold, when he and Mr Reilly were appointed as Trustees. Mr Reilly has submitted that he thought this had occurred following his recommendation to Mr Craig in February 2017. The bank statements of which we have had sight suggest that the vast majority of Introducers were no longer paid from the Scheme's bank account following Mr Reilly's and Mr Kelly's appointment. However, the Scheme made a payment of £12,500 to LG Group on 26 October 2017, and, as mentioned in paragraph 62 above, nearly £2 million of transfers into the Scheme were received during the first quarter of 2017.

A.1.8 Loans to members

110. A number of members appear to have accessed a proportion of their funds, shortly after transferring to the Scheme, in the form of a loan from one of a number of companies, some of which were named "Shawhill". One such company was SSL (see paragraph 66.1 above). These loans were due to be repaid to the relevant Shawhill company, with interest, when the member reached age 65. According to the records on Companies House, SSL was incorporated on 2 October 2014 and shared the Scheme's address, but it submitted no annual returns or confirmation statements. Mr Craig was its sole director and shareholder until its dissolution on 15 March 2016.

111. As I have mentioned in paragraph 53 above, it is evident from the notes of the 13 December 2016 Meeting that another Shawhill company, Shawhill Seychelles, was also linked to the Scheme.

112. I have seen evidence that: these loans were of an amount in excess of the 25% tax free pension commencement lump sum entitlement[34]; members agreed to repay the said loans on their 65th birthday; and such payments were on occasion made to members who were below the minimum pension age of 55.

113. It seems that the loan was presented to members, by their respective Introducers, as "cash back", representing a percentage of the funds that they transferred into the Scheme. However, I understand that members, in at least some cases, did not receive that full percentage, as charges had been deducted. Members were assured that the "cash back" would come from their investments not from their pension fund, and that the repayment would be made out of their investment proceeds.

114. The payment of the cashback to the members was made via the law firm RMJ Solicitors, which was closed down by the SRA in 2017, over concerns about breaches of the solicitors' accounts rules.

115. TPO has been informed that some members have incurred tax charges from HMRC in respect of the payments that they received on joining the Scheme.

116. A Business Plan that I have seen in respect of another of the Shawhill companies, Shawhill Limited (**SL**), stated that Mr Craig would provide the initial funding for SL. The Business Plan stated that "Incoming Payments" would come from "UK Companies as per invoices", and from "UK Banks", and that "Outgoing Payments" would be made to "Directors, shareholders, Introducers". Refresh Recovery, OFSL and Platinum Credit Services Ltd, were listed as SL's main clients. It was forecast that SL would have an annual turnover of £1,000,000 and annual outgoings of £800,000, with its account being "fully transactional" from September 2016.

A.2 Investment of the Scheme's funds

117. Due to the number of payments made to the companies listed in paragraphs 122 and 143 below, I have compiled a summary of the salient information in a table at Appendix 3.

118. In paragraph 25 above I have referred to legal advice provided to Mr Dowd by Mr Davenport in relation to the Merger before it went ahead. A substantial amount of the Ocean Fund's assets had been invested, by way of a loan, in Real Time Claims Limited (**RTC**). Dalriada has informed TPO that around £850,000 was loaned, for a five-year term and with an interest rate of 5%, with all interest to be rolled up until the end of the investment period. A settlement agreement, which appears to have been signed by Mr Craig and Mr Dowd and on behalf of RTC[35], was entered into on 4 April 2015, in respect

[34] In some cases, the loaned amount was equivalent to up to 40% of the members' fund under the Scheme.

[35] Mr Craig has made submissions concerning the validity of that document. I shall consider those submissions in paragraph 205 below.

of that loan by RTC, Mr Craig and Mr Dowd. Under the settlement agreement, Mr Craig had agreed to convert the loan to rights in the proceeds from a payment protection insurance (**PPI**) debt book, which represented an undefined sum. It seems that, notwithstanding Mr Davenport's concerns regarding the RTC loan, it was transferred into the Scheme when the Merger took place. Dalriada has since managed to recover the value of the Scheme's interest in the PPI debt book, which was approximately £122,000[36]; substantially lower than the amount invested.

119. As I have explained in paragraph 90 above, in the February 2018 Letter, Dalriada made it clear to the Trustees that they were to take no action in respect of any of the Scheme's assets. However, TPO has received a copy of a letter, dated 11 October 2018, from Mr Craig to RTC[37]. Notwithstanding the settlement agreement having been entered into in 2015, as explained in paragraph 118 above, Mr Craig stated, in the letter, that the five-year term in respect of each of the three investments had expired in June 2018 and October 2018, as applicable, and that, including compound interest to 24 October 2018, a total amount of £1,484,740.88 was now due.

120. Mr Craig went on to state that the investments had been made by Ocean Equities Financial Limited and Emfire Consulting Limited and that Mr Craig was the "court appointed liquidator" in respect of each of those companies. Mr Craig requested confirmation by return that the sum would be paid to his "liquidators account".

121. At least one other investment, in Silex (UK) Plc (**Silex**), transferred into the Scheme under the Merger. It was trading at a loss at the time of Ocean Equities Financial Ltd.'s purchase of 2,100,058 shares in it, Silex is currently in liquidation.

122. In addition, Dalriada and Mr Reilly have submitted that investments were made in the following companies. Notably, many of these companies had been incorporated shortly before the investment and/or were dormant or trading at a loss. I have reviewed the status of these companies at the approximate time that they received payments from the Scheme and have outlined this information, together with any relevant further observations about the investment, at Appendix 4:

    122.1. Tulip Research Limited

    122.2. Heather Research Limited

    122.3. Platinum Credit Services Limited

    122.4. Emerging Market Minerals Plc (**EMM**)

    122.5. Malta Boxing Commission Limited

    122.6. Civilised Investments Limited

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[36] This is, however, subject to a competing claim from a third party.

[37] At the Oral Hearing, I asked Dalriada where the letter had come from. Mr Kerrin confirmed that the letter had come from OFSL's office.

122.7. Regal Coins Limited

122.8. RAM

122.9. Merydion Corporation Limited (**Merydion**)

122.10. St James QROPS

123. Dalriada has provided evidence that a loan was made to Nail Tech Limited in or around October 2016.

124. Further, the following companies have been mentioned by Dalriada and/or Mr Reilly, or have been named as companies linked to the Scheme in the public domain, such as TPR's Final Determination Notice. However, I have been unable to evidence any payments made to these companies, or any shareholdings:

124.1. Volopa Capital Limited

124.2. R2R Management Services Limited

124.3. Bangor City Football Club Limited

125. The Scheme's bank statements indicate that investments were made in the following companies between 1 January and 14 July 2017, while Mr Reilly and Mr Kelly were Trustees:

125.1. RAM - £200,000

125.2. Platinum Credit Services Limited - £200,000

125.3. Merydion - £100,000

125.4. Templeton Chase - £50,000

126. In the 6 April 2017 Email (see paragraph 66 above), Mr Reilly listed the following "transactions with no paperwork":

126.1. Platinum Credit Loan: £200,000. He identified that there were two payments of £50,000 each on 10 February 2017, and a further two payments of £50,000 each on 13 February 2017. It seems that these four payments were the same ones identified in paragraph 125.2 above.

126.2. Rational [sic] Asset Management PLC: two payments of £300,000 each, on 15 February 2017 and 16 March 2017. He asked whether this was a loan and if so, whether the Scheme had any documents and/or security. If it was a share purchase, where were the certificates? These two payments appear to have been made by cheque, in addition to the payment to RAM of £200,000, which I have referred to in paragraph 125.1 above.

126.3. M J Briggs: payment of £6,000 on 20 February 2017. He asked whether any light could be shed on this transaction as there was no information indicating whether it was an expenditure, loan or investment.

126.4. Templeton Chase: £50,000 payment on 16 March 2017. He stated that the spreadsheet he had seen noted this as an investment. He wanted clarification on what the investment was and whether there was any corresponding paperwork.

126.5. Bangor City Football Scheme: £15,000 and Bangor City Football: £62,000. He highlighted that, once again, there was no paperwork and so he questioned whether these were loans or investments and if so, where were the loan agreements and/or share certificates and any due diligence documents?

127. With the exception of the Bangor City Football payments in paragraph 126.5 above, each of the transactions mentioned by Mr Reilly in the 6 April 2017 Email and set out in paragraph 126 above, is reflected in the Scheme's bank account statements, although the Templeton Chase payment appears (from the bank statement) to have been paid on 3 March 2017, not 16 March 2017. It should be noted that the two payments of £300,000 to RAM were paid by cheque, so, they could not be confirmed as investments based on the Scheme's bank account statements alone.

128. During 2017, it appears that Mr Craig was also involved in further investment planning. Notably, on 16 February 2017, he contacted the solicitor firm Fieldings Porter to confirm that:

> "the 2 schemes are backing and are in funds to finance Michael McMahon[38] and the SPV[39] that your firm are forming to complete the transaction as outlined. The funds are in place to advance the sum of £3.5million, of which £1,500,000 is currently in my client account (I am also a chartered accountant and principle of Refresh Recovery Limited."

129. The above was issued after receiving an email from Mr McMahon on 10 February 2017, which suggests that an offer had been made on two hotels in Birmingham and Coventry on the following basis:

> "1 – Rational [sic] Asset Management Plc will be the ultimate owner with an SPV[40] to be set up to hold the asset.
> 2 – 10k non-refundable deposit for exclusivity for 28 days.
> 3 – The asset will be funded via RAM (Rational [sic] Asset Management [sic])
> 4 – we plan to execute the purchase as quickly as possible. Exchange completion in 60 days (after the end of the exclusivity period) with 5% deposit
> 5 – our offer is conditional on receipt of supporting documentation and our due

[38] See paragraph 135 below for an explanation of how Mr McMahon became acquainted with Mr Kelly and the Scheme.

[39] Special purpose vehicle

[40] It seems that Merydion may eventually have been used as the SPV, as explained in paragraph 135 below.

diligence appertaining to said documents
6 – we will make an offer of £4.6 million for IBIS Coventry and IBIS Birmingham subject to HOTs and subject to contract."

130. At the Oral Hearing, Dalriada submitted that the transaction outlined in paragraph 128 above appeared to have been part of a venture capital exercise, with RAM, which had no or limited assets of its own, receiving payments from the Scheme in order to fund the purchase of the hotels. Dalriada understood that part of the Scheme's payment to RAM, for shares priced at £1 per share, were made via a nominee; Cornhill Capital Limited, which now goes by the name of Pello Capital Limited, although this is not shown in the Scheme's bank statements.

131. Mr Reilly had raised concerns in relation to "the development and purchase of this hotel for £1.9 million" which he had known about, as noted in the same file note of 1 February 2017, that I have referred to in paragraph 64 above. In that file note, Mr Reilly stated that Mr Kelly had informed him that "the interest is via a company that was owned by the pension fund" and that Mr Reilly had asked Mr Kelly for "all the details". At the Oral Hearing, Mr Reilly stated that he had asked for a copy of the hotel's valuation and for details of the proposed transaction, such as the proposed security to be taken. However, Mr Reilly said he had never received those details and had not heard whether the transaction had gone ahead.

132. Dalriada's report to Scheme members of June 2020, identified that, among other investments, payments totalling approximately £698,000 had been made to RAM by the Scheme, for a "purported shareholding in the company", and that investment was linked to a further investment by the Scheme in Merydion, of approximately £300,000[41]. In his email to the other Trustees on 5 April 2017, Mr Reilly referred to a total of £998,000 having been invested in RAM by the Scheme. However, TPO has itself only been able to evidence payments to RAM of a total amount of £800,000[42], made between 30 January 2017 and 16 March 2017 inclusive and £100,000 paid to Merydion (see paragraph 125.3 above).

133. TPO has seen a copy of an email, sent on 12 January 2017 by Mr Hooper to Mr Jonathan Golding, who was one of the directors of RAM, asking Mr Golding to arrange for Mr Kelly to be removed from office as a director, "to remove any conflict of interest that may arise between Rationale and the pension fund we are due to transact with", explaining that "[Mr Kelly] is being appointed as chairman of the trustee board today.". Mr Kelly ceased to be a director of RAM on that same day. However, as I shall explain in paragraph 136 below, Companies House records indicate that Mr Kelly maintained ultimate control over RAM until 17 February 2017.

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[41] The Scheme's bank statements show that a payment of £50,000 was made to Merydion in respect of a "secured loan" on 30 June 2017 and Mr Reilly has identified a payment, on 13 July 2017, as having been to Merydion, although the bank statement shows an account name of 'Optimum' and a reference of "VAG 2nd payment". It has not been disputed that the payment on 13 July 2017 was a payment to Merydion.

[42] See paragraphs 125 and 126.2 above, in which a payment of £200,000 to RAM was identified in the Scheme's bank statement, together with the two further payments, by cheque, of £300,000 each, which Mr Reilly identified in the 6 April 2017 Email.

134. Mr Kelly was later re-appointed as a director of RAM on 9 July 2018. When I questioned Mr Kelly about this at the Oral Hearing, he explained that, while he had been aware of the transaction referred to in paragraphs 128 and 129 above, he had not made any recommendation in that regard or been involved in RAM's investments and his day-to-day involvement had been on the decline. When he became aware that the Scheme was going to be investing in RAM, he resigned from his office as a director of RAM. Mr Kelly submitted that the transactions involving RAM had happened after that point. However, during the Oral Hearing, Mr Kelly submitted that he had loaned RAM £120,000[43], as he was a "supporter" of RAM and had "wanted the company to survive".

135. Mr Kelly had been involved in Merydion as a co-director alongside Mr Golding before selling it to Michael McMahon in February 2017, shortly after his appointment as a Trustee of the Scheme. At the Oral Hearing, Mr Kelly said, that he had been introduced to Mr McMahon by Mr Dowd after he had become a Trustee. Mr McMahon had been carrying out some property development work for the Scheme and was considering purchasing a hotel called Northrop Hall and needed a company with a bank account "to get it off the ground". Mr Kelly said that, as he was not "doing anything with" Merydion and it had a bank account, it was easier to switch company signatories and shares than it would have been to have set up a new company and a new bank account.

136. Records at Companies House[44] show that Mr Kelly had been a 'person with significant control' over Merydion, with ownership of at least 75% of the voting rights, from 6 April 2016 until 17 February 2017, when Mr McMahon bought Merydion and became the person with significant control. Merydion had itself been a 'person with significant control' of RAM from 14 July 2016 until 17 February 2017, owning 75% or more of RAM's shares[45]. Therefore, despite having resigned as a director of RAM on 12 January 2017, Mr Kelly still had a controlling interest in RAM, via Merydion, until 17 February 2017, so it is clear that payments amounting to £200,000 from the Scheme to RAM, as shown in the Scheme's bank statements were made while, according to records at Companies House, Mr Kelly had ultimate control of RAM.

137. On 25 August 2020, BEIS presented joint winding up petitions against RAM, Merydion and another connected company called Value Asset Management Plc (**VAM**), on the grounds of public interest. On 12 January 2021, a winding-up order was made against RAM, Merydion and VAM. The joint liquidators of those companies found that the companies "had been misleading their investors to obtain funds while failing to make any genuine investments"[46]. Following this, it appears that, at some point in April 2021,

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[43] It is evident, from RAM's accounts filed at Companies House, that Mr Kelly made this loan during the year ended 31 July 2018. However, it is not clear at what point in that year the loan was made.

[44] https://find-and-update.company-information.service.gov.uk/company/09755209/persons-with-significant-control

[45] https://find-and-update.company-information.service.gov.uk/company/10278737/persons-with-significant-control

[46] As stated in the Liquidator's progress report to members and creditors for the period 9 February 2021 to 8 February 2022, filed at Companies House on 15 April 2022.

Mr Kelly and Mr Simon Hooper (Mr Hooper being another of RAM's former directors) were charged with fraud[47].

138. Based on the Insolvency Service's press release[48], which was published on the Government's website on 21 January 2021, following the Insolvency Service's investigation, I am aware that RAM had obtained a total of £1 million of funding from the Scheme and Merydion obtained a further £300,000 from the Scheme[49]. It appears that these payments were in relation to the "hotel purchase" that Mr Reilly had referred to in his file note, that he had emailed to himself on 1 February 2017 (see paragraph 131 above).

139. Mr Davenport had raised concerns about some of the Scheme's other investments, some months before Mr Kelly's and Mr Reilly's appointment as Trustees. I have seen correspondence, sent over during the course of 23 March 2016 to 13 June 2016, between Mr Davenport and Lindsey Brock. It appears that Lindsey Brock was a member of OFSL's staff and who carried out some of the work in relation to the Scheme's administration, into which Mr Dowd was copied. The correspondence concerned the draft Scheme accounts, which Mr Davenport had had sight of. Mr Davenport raised a number of concerns about certain "investments" listed in the draft Scheme accounts, some of which were answered by Ms Brock:

139.1. "Asset backed scheme investments" had been referred to in relation to the loans to RTC, with no explanation or detail provided, such as the nature of the asset backing, whether the loans were secured, when the loans were to be repaid, whether the trustee considered these loans to be safe and why, how was the gain calculated, had any accrued interest been paid and, if not, what action had been taken to ensure payment. Ms Brock advised Mr Davenport that these were investments made under the Ocean or Emfire Fund (without specifying which Fund's trustee had made the investment), showing a growth of £263,689 "by way of loan note calculations applied to the scheme".

139.2. The accounts mentioned "scheme owned investment vehicles", the detail of which had been entirely omitted, with no gain or loss shown in the accounts. Mr Davenport was particularly concerned about, "what appears to be an investment of £150,000 in [OFSL]". Mr Davenport advised that, if the "investment" in OFSL was a loan, it would be an unauthorised payment, incurring tax charges.

139.3. "Bank investments" were mentioned in the Scheme accounts. Mr Davenport queried these and asked for fundamental details such as: what they were and why they had been chosen; which entities the investments had been made in; how the gain had been calculated; on what dates they had been acquired and at what cost.

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[47] https://www.offshorealert.com/four-charged-with-fraud-in-england-including-simon-hooper-again/

[48] https://www.gov.uk/government/news/property-investment-companies-wound-up

[49] TPO has not received a copy of the Insolvency Service's report.

139.4. Asset backed scheme investments were shown as £2,994,746 in one place and £1,390,225 in another. Mr Davenport asked for an explanation of the difference.

139.5. Members' contributions were shown as £4,164,304, whereas the total fund was shown as £5,027,993. Mr Davenport asked for an explanation of the difference.

A.3 Payments from the Scheme's funds

140. The bank statements that have been provided to TPO in respect of the Scheme are quite unclear. This is due in part to Mr Craig's intermingling of the Scheme's assets with those of Refresh Recovery in the latter's bank account until November 2016 (see paragraph 104 above). Once the Scheme's bank account was set up, Refresh Recovery Limited transferred a total of £750,000 to the Scheme's account between 22 and 28 November 2016. However, even after November 2016, when a separate bank account was opened for (as far as I understand) Scheme assets only, the descriptions given in respect of many of the payments are far from clear.

141. It appears from the statements that:-

140.1. The Refresh Recovery Limited bank account remained in credit, and did not appear at risk of having a 'nil' balance.

140.2. The name given to the Refresh Recovery Limited account was, "Refresh Recovery Limited", with an alias of "Refresh Estates A/C 3 (GC)". The account type was stated as: CBFM Business Current.

140.3. The Scheme's bank account was held in Gordon Craig's name and, as the bank statements are not in the name of the Scheme and make no reference to the account being a business current account or a 'client saver', the account appears to be a personal current account.

142. The information presented below in Sections A.3.1 to A.3.4 is based on TPO's best attempts at: performing a reconciliation of the bank accounts, not having had sight of any corresponding paperwork or explanation for the payments identified; and/or piecing together information from correspondence that TPO has received. I note that much of the £13.4 million, which appears to have been lost from the Scheme's fund, remains unaccounted for.

A.3.1 Payments to companies

143. TPO's reconciliation of the bank statements shows that payments, totalling £3,696,395.64, were made to the following companies:

143.1. Alldone Trading Limited: £15,000

143.2. Routeright Limited: £52,264.32

143.3. Templeton Chase: £287,486.09[50]

143.4. Vaughan Sports Management Limited: £77,000

143.5. Reid-Fotheringham Investment Strategies Limited: £415,890

143.6. Sandymoor Consultancy Limited: £172,000

143.7. PHI Consulting Limited: £3,000

143.8. Mistco (UK) Ltd.: £102,546

143.9. C.H. Vision Limited: £5,750

143.10. Osiron Services Limited: £7,385

143.11. Micore Leafield Ltd.: £332,545

143.12. Viceroy Securities Ltd.: £122,767.49

143.13. UKCC Marketing Ltd.: £2,712.99

143.14. RMJ Solicitors: £750,000

143.15. OFSL: £1,350,048.75[51]

144. TPO has received no explanation for these payments. The details that TPO has uncovered, during its investigation into Mr E's complaint and Dalriada's referral, in relation to the above payments, are set out at Appendices 3 and 4. Of particular note are the following details:

144.1. Andy Haslam is a director of Alldone Trading Limited. Previous directors also included Mr Torr; Emma Haslam and Christopher Haslam appear to be relatives of Mr A Haslam.

144.2. James Murray was a director of Osiron Services Limited and UKCC Marketing Ltd.

144.3. Mr William Brian Murphy was a director of both Reid-Fotheringham Investment Strategies Limited and Sandymoor Consultancy Limited.

144.4. Michael Corey[52] was a director of both Mistco (UK) Ltd. and Micore Leafield Ltd.

[50] Of which £50,000 has been listed by Mr Reilly in the 6 April 2017 Email as a transaction described as an investment (see paragraph 126.4 above).

[51] This consisted of: thirty-four payments that were made to OFSL from the Scheme's bank account, with the reference of 'Trustee(s)' between December 2016 and 31 October 2017, four payments of £188.39 from RRL's bank account between September and November 2016 inclusive, and one payment of £100,000 with the reference "*Optimum RB*".

[52] Mr Corey seems to have received payments from the Scheme via these companies in relation to his work as an Introducer, as outlined in Appendix 3.

144.5. RMJ Solicitors was closed by the Solicitors Regulation Authority in March 2017, as a result of its investigation into the firm[53].

144.6. Mr Kelly was a director of PHI Consulting Limited throughout his time as a Trustee. Accounts for a dormant company were filed at Companies House for the years ended 31 October 2017 and 31 October 2018, although Mr Kelly stated, at the Oral Hearing, that that had been a mistake, as PHI Consulting Limited had in fact been trading.

145. Regarding the payments to RMJ Solicitors, Mr Reilly gave details, at the Oral Hearing, of the steps that he took to try to recover the monies paid to RMJ Solicitors. Mr Reilly said that he had made contact with the SRA's intervening agent and had considered it necessary to look at RMJ Solicitors' indemnity insurance, as they had clearly acted either incompetently or fraudulently. However, due to Mr Reilly's illness, he took the matter no further.

146. Payments were also made to Turner Parkinson LLP, to a total net value of £78,020.36. I have seen no invoices for advice or services provided by Turner Parkinson LLP. However, copies of email correspondence between Mr Davenport and Mr Dowd and between Mr Davenport and Mr Reilly, which TPO has received, suggest that Mr Davenport did in fact provide advice and services in relation to the Scheme[54].

147. 34 payments were made to OFSL with the reference, 'Trustee(s)', between December 2016 and 31 October 2017, totalling £1,249,295.19.

A.3.2 Payments to individuals associated with the Scheme

148. As I have detailed in Section A.1.5 above, payments to individuals, including Mr Craig, of a total value of £642,930 were made between November 2015 and November 2016[55].

A.3.3 Payments to Introducers

149. Regarding the use of Introducers, which I have mentioned in Section A.1.7 above, it appears that, between November 2015 and November 2017[56], the Scheme paid approximately £684,436 to a number of Introducers. I have set out further detail of the various agreements (those of which I am aware), that the Introducers entered into in respect of the Scheme, in paragraphs 150 and 151 below.

150. The minutes of the December 2016 Meeting (see paragraphs 53 and 108 above) included the following points:-

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[53] https://www.legalfutures.co.uk/latest-news/solicitor-turned-blind-eye-to-pension-scam

[54] From those emails, it is evident that Mr Davenport prepared a number of Scheme deeds and announcements and reviewed and advised in relation to the draft Scheme accounts in 2016, as well as apparently intending to advise in relation to reporting matters to TPR in late 2017/early 2018.

[55] Continued payments to those individuals is not evidenced from the bank statements that I have seen after that date.

[56] As above.

- The Scheme had six main introducers under contract.
- The Scheme was receiving approximately 40 to 75 'clients' a month, "charging £2,000 flat fee per client"[57].
- The Introducers' new terms and conditions were discussed during the December 2016 Meeting, including the reduction of introducers' fees to "the market standard fees in the new year". It was noted, as action points, that: Mr Dowd was to "meet with all introducers in the new year to discuss maximum fees 4%"; and Ms Brock was to send Mr Reilly and Mr Kelly copies of "Application Form [*sic*] and Introducers [*sic*] Agreement". Listed as "AOB" was a note that Mr Reilly had asked Mr O'Malley questions concerning "lead generation and scripts used". It was noted, as an action point, that Mr O'Malley would provide the scripts to Mr Reilly.

151. I have not seen the terms agreed between the Scheme and each of the Introducers. However, I have seen documentation in respect of five[58] firms of Introducers being used and all of them have received some form of remuneration. I have seen details of arrangements in respect of three of the five firms, as below:

151.1. In the case of Michael Tyler Associates Ltd., it appears that the individuals associated with the firm were paid directly.

151.2. Mr Michael Corey appeared to have received payments to companies of which he was a director.

151.3. The terms agreed with European Product Sourcing House Limited (**EPSH**) and the LG Group Ltd. have been evidenced and were as follows:

- EPSH would receive a 20% marketing fee from all introductions made. This would be based on the client's pension value after costs and tax-free lump sums.
- The 20% fee would be structured as 4% paid directly from the Scheme and 16% paid from a SPV.
- EPSH would commit to introducing £3-£4 million of new introductions per month into the Scheme.
- 51-55% of EPSH clients' funds would be invested into EPSH's preferred DFM – Logic Investments.
- EPSH had agreed to pay 10% commission to "an SPV of Steve's choice for the funds invested into the DFM".

[57] At the Oral Hearing, Mr Reilly clarified that this fee was the "cost to the member of joining", not the fee charged by the respective Introducer. Mr Reilly did not consider this to be an excessive fee. He was, however, concerned about the amount that the Introducers were charging, which was separate from these £2,000 joining fees.

[58] Although I note that the Trustees' meeting minutes of 13 December 2016 referred to there having been six firms.

- The LG Group Ltd. would receive 6% commission based on the client's pension fund value.

152. At the Oral Hearing Mr Reilly submitted, that he had requested copies of the Introducers' scripts and contracts at the Scheme meeting on 13 December 2016, but that those were not supplied to him.

A.3.4 Other payments

153. Mr Reilly has referred to a speeding penalty notice and a hire car fee having been paid for Michael McMahon, although I have seen no detail of those payments.

A.4 Relevant provisions of Scheme documents

154. I have set out in Sections A.4.1 to A.4.4 below, a summary of the provisions of the Scheme's documents, that I consider relevant to my investigation, into the following:

- Whether the Trustees acted in breach of trust in their investment of the Scheme's funds and the extent, if any, to which they might rely on any exoneration or indemnity contained in any of those documents.
- Whether there have been conflicts of interest.
- Whether the Trustees took appropriate steps regarding members' transfer requests.

A.4.1 Relevant provisions of the Trust Deed

155. The Scheme's trustees' investment powers are set out in Clause 10 of the Trust Deed dated 30 June 2015, as amended by the Deed of Amendment dated 1 July 2015. This clause, alongside other pertinent clauses, is set out in Appendix 6.

A.4.2 Relevant provisions of the Scheme Rules

156. A member's right to a recognised transfer is set out in Rule 14 of the Scheme Rules found in the Schedule of the Deed of Amendment dated 1 July 2015 (set out in Appendix 6).

A.4.3 Members' Scheme application forms

157. The Scheme's application form, which Mr E signed on joining the Scheme, contained the following warning and clauses:

> "WARNING: There are a small number of Pension Operators offering their services to 'free up' pension funds i.e [sic] release cash through loans or other means. OPTIMUM RETIREMENT BENEFITS PLAN reinforce the efforts of HMRC, The Pension Regulator and other organisations by identifying and preventing these illegal activities which can result in significant tax charges for individuals involved in these unauthorised pension fund transfers.

The OPTIMUM RETIREMENT BENEFITS PLAN exists solely for the propose [sic] of providing members with pension benefits at their chosen retirement date (age 55 and beyond), consistent with existing pension legislation and within HMRC rules."

"I confirm to you as the trustee of the Optimum Retirement Benefits Plan, that I have been advised by you to take independent financial, legal and taxation advice on the proposed transfer to the plan and that I have made such enquiries and taken such financial, legal, taxation and other advice as I consider necessary concerning all possible implications concerning the proposed transfer and your trusteeship of the Optimum Retirement Benefits Plan. I acknowledge that you have not given me any tax advice concerning the proposed transfer or the implications of the proposed transfer on my circumstances or on the circumstances of any other person likely to be affiliated with or benefiting from the plan.

[…]

I confirm that I do not require you to complete any tax returns or other related information nor to establish a tax agent in respect of the proposed transfer in any jurisdiction as I shall take full responsibility for making all and any reports necessary in respect of any tax liabilities emanating from the proposed transfer or its execution making use of the information you supply to me on the affairs of the Optimum Retirement Benefits Plan. I therefore indemnify you against any and all claims arising in respect of any assessments for taxation matters and associated penalties and damages in connection with the proposed transfer to the Optimum Retirement Benefits Plan where you have followed my requirements above."

158. The application form also included terms and conditions, which were broadly the same as the Scheme Rules found in the Deed of Amendment dated 1 July 2015. However, instead of describing the Scheme as an occupational pension scheme, the application form said that the Scheme was an automatic enrolment occupational pension scheme and set out the employer's and employee's contributions to reflect the statutory minimum levels under auto-enrolment legislation.

A.4.4 The Scheme's Statement of Investment Principles

159. The salient provisions of the statement of investment principles (**SIP**) are set out in Appendix 7.

A.5 The Scheme's administration and governance

160. It seems, from correspondence sent to TPO and from the Official Receiver's comments in relation to the winding up of OFSL, that OFSL took on the role of Scheme administrator in addition to being the Scheme's Principal Employer.

161. I note, however, that Scheme members also wrote to Mr Craig and to Mr Reilly concerning their unfulfilled transfer requests and that members were sent a 'welcome letter' on joining the Scheme by Mr Craig. Other individuals have also been involved in aspects of the Scheme's administration. For example, in paragraph 139 above, I have referred to the correspondence between Mr Davenport and Ms Brock in respect of the Scheme's accounts. Despite requests, TPO has seen no evidence that any system of governance was operated in relation to the Scheme, or that any due diligence was conducted or system of control in place in respect of the appointment and monitoring of the Scheme's administrators.

162. During the Oral Hearing, I asked Mr Reilly and Mr Kelly about the December 2016 Meeting (see paragraph 53 above) and the reference in the note of that meeting to the appointment of a Chairman of the Board of Trustees. Mr Kelly and Mr Reilly replied that it had been intended that Mr Kelly would be appointed as Chair. However, Mr Kelly said that this was never "enacted", as they did not know how to do so or what the requirements were concerning quorum. Mr Reilly added that these difficulties arose due to Mr Craig's absence.

A.6 <u>Communications with Scheme members</u>

163. As I have explained in paragraph 36 above, TPO has received copies of Pension Summaries bearing Mr E's signature. Those Pension Summaries were apparently provided by a representative of the Scheme, although Mrs E does not recall having seen those documents. The Pension Summaries set out Mr E's existing pension benefits and any charges applicable under his existing pension arrangement and compared those with the charges that he would be subject to if he transferred into the Scheme.

164. Under the heading 'Key Benefits of Optimum Retirement Benefits Plan', the following were listed:

- "Low charges with total transparency
- A client focused company that offers ongoing support via telephone, email and post
- Accessibility – access to valuations online via a secure login 24 hours a day."

165. Once he had transferred into the Scheme, Mr E did not receive annual benefit statements. I have seen no evidence that the promised "secure login" providing access to valuation was actually put in place. Mrs E recalled, at the Oral Hearing, that the only person with whom Mr E had contact concerning the Scheme was Mr Croston. In order to ascertain the value of his fund under the Scheme, Mr E had to request a benefit statement (see Section A.7.1 below). It seems, therefore, that Mr E was unable to access his benefit statements via any "secure login".

166. On the information provided, it does not appear that annual benefit statements or Scheme-wide communications were ever routinely issued to its membership.

A.7 Transfer requests and requests to take benefits

A.7.1 Mr E's transfer request

167. Mr E received a letter from the Insolvency Service, dated 3 February 2017, informing him that BEIS was conducting a "fact finding enquiry" into OFSL's affairs. Mrs E informed me, at the Oral Hearing, that Mr E had heard later that OFSL had entered administration. On hearing of this, Mr E had contacted Mr Croston, who informed him that he had "left the company" and could not help him. Mrs E had then tried to contact "the company", but no one answered the telephone.

168. Mr E received a letter from the Scheme, dated 3 November 2017. This indicated that his original fund value had been £63,177.66, but its value as at that date was £45,565.10, due to the following deductions:

- Set-up fee: £1,000
- 0.75% Annual Management Charge 2016/17: £473.83
- 25% Tax Free Lump Sum Withdrawal: £15,794.41
- 0.75% Annual Management Charge 2017/18: £344.32

169. Upon receipt of the Scheme's letter dated 3 November 2017, Mrs E contacted the Scheme on Mr E's behalf to request a transfer, as she and Mr E were not happy with the fees that were being applied. Mr E's attempts to move his pension fund out of the Scheme were unsuccessful, despite Mr E having provided the necessary details. Mr E's subsequent attempts to contact the Scheme were also unsuccessful as the telephone was not answered.

170. Mr E later learned that there were issues concerning the Scheme. Mrs E contacted various organisations, including the FCA and Dalriada, in the hope of being able to access Mr E's fund under the Scheme.

171. On 30 June 2020, Mr E submitted a complaint to TPO. He complained that he had tried to transfer out of the Scheme but, after finding out about OFSL, he believed that his funds were lost. Mr E also complained about his introduction to the Scheme and the tax charge he received from HM Revenue & Customs (**HMRC**). However, these fall outside of TPO's legislative remit so do not form part of this investigation.

172. On 18 October 2021, Dalriada made a referral to TPO of a dispute with the Trustees collectively on behalf of all members of the Scheme. Mr E was notified of this development and confirmed that he also wished to join that complaint because his initial cause for concern appeared now to have been proven correct and Dalriada was well placed to expand upon the specific issues they had identified which had led to his loss.

A.7.2 Other members' requests

173. Dalriada has sent TPO correspondence evidencing that other members, aside from Mr E, had made transfer requests, or requests to take their 25% tax free lump sum on reaching age 55, that had not been fulfilled.

174. One member stated, that after she had chased repeatedly for her transfer request to be actioned, Mr Dowd had offered her a "payoff cheque" for approximately half of what she had been informed was the value of her fund in the Scheme. It appears that this member transferred into the Scheme on 9 April 2015, prior to the Scheme's official establishment.

175. Another member stated that he had not been informed of nor had he agreed to the Scheme's fees, of which he had incurred £4,000. He also highlighted that he had been waiting for a benefit statement for approximately a year but was repeatedly told that the Scheme was awaiting a software update every time he had asked. It appears that this member transferred into the Scheme on 15 August 2015, prior to the late October/early November 2015 date that Mr Craig claims is when funds began to transfer into the Scheme (see paragraph 567 in Appendix 8 below).

B The Trustees' submissions

176. Mr Craig, Mr Kelly and Mr Reilly have provided TPO with a number of written and verbal submissions. These are summarised at Appendix 8.

C The Applicants' submissions

177. The Applicants have also provided a number of written and verbal submissions. These are summarised at Appendix 9.

D Conclusions

<u>Order of conclusions</u>

178. I will consider Mr E's complaint and Dalriada's referral under the following headings, to determine whether the Trustees have committed any breach of trust and/or maladministered the Scheme, after addressing a number of points submitted by Mr Craig, Mr Kelly and Mr Reilly. While I have read and/or considered all of the parties' submissions (both made at the Oral Hearing and in writing) carefully and these are set out in the Appendices, I have referred here only to those material to the outcome of TPO's investigation into Dalriada's referral and Mr E's complaint:

D.1 The Scheme's status

D.2 Conflicts of interest

D.3 Investment of the Scheme's funds

D.4 Other payments out of the Scheme

D.5 Scheme assets not accounted for

D.6 Administration and governance of the Scheme

D.7 Information provided to members

D.8 Reporting to TPR

D.9 Member consent

D.10 The Trustees' liability

Jurisdiction

179. As outlined in Appendix 8, paragraph 561 below, Mr Craig has queried Dalriada's and Mr E's ability to bring a complaint to TPO. I have already addressed the capacity in which both Dalriada and Mr E can bring a complaint to TPO in paragraphs 6 to 14 above, and TPO explained this to Mr Craig early on in this investigation after which he had the opportunity to challenge this in the courts (as a jurisdiction decision of a public body) but he has not done so. However, for ease of reference, I will reiterate here, in paragraphs 180 to 182 below, why I do not accept Mr Craig's submissions in this regard.

180. Mr Craig has based his submissions concerning my jurisdiction on his having been appointed under section 22 of the Pensions Act 1995 (the **1995 Act**), (**Section 22**) and on Dalriada's appointment as independent trustee of the Scheme having been made under the 1995 Act, section 23.

181. Section 22 applies to a pension scheme:

"(a) if a person (referred to in this section and sections 23 to 26 as **"the practitioner"**) begins to act as an insolvency practitioner in relation to a company which, or an individual who, is the employer in relation to the scheme, or

(b) if the official receiver becomes—

(i) the liquidator or provisional liquidator of a company which is the employer in relation to the scheme,

(ia) the interim receiver of the property of a person who is the employer in relation to the scheme, or

(ii) the receiver and the manager, or the trustee, of the estate of a bankrupt who is the employer in relation to the scheme."

182. Mr Craig has implied that he was acting as insolvency practitioner in relation to OFSL. I have seen no evidence of this; there is no record at Companies House of Mr Craig having been appointed in that capacity and Mr Craig has supplied no evidence of that himself. On that basis, I do not accept Mr Craig's submission that Section 22 applied to the Scheme in relation to his involvement with OFSL. In any event, TPR appointed Dalriada as independent trustee of the Scheme under sections 7, 8 and 9 of the 1995

Act[59], not under the 1995 Act, section 23. Mr Craig's submissions regarding my jurisdiction to investigate Dalriada's referral and Mr E's complaint[60] do not therefore change my assessment, as set out in paragraphs 6 to 14 above.

183. Additionally, Mr Craig has submitted that Dalriada failed to make its referral to TPO within the time limits set out in Regulation 5 of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (the **1996 Regulations**), and that I should, therefore, have refrained from accepting Dalriada's referral. Mr Craig has also submitted that the point at which Mr E knew he had reason to complain should be investigated. I shall address that submission in paragraphs 185 to 187 below.

184. Regulation 5 of the 1996 Regulations sets out the time limit for making complaints and referring disputes to the Pensions Ombudsman:

"(1) Subject to paragraphs (2) and (3) below, the Pensions Ombudsman shall not investigate a complaint or dispute if the act or omission which is the subject thereof occurred more than 3 years before the date on which the complaint or dispute was received by him in writing.

(2) Where, at the date of its occurrence, the person by or in respect of whom the complaint is made or the dispute is referred was, in the opinion of the Pensions Ombudsman, unaware of the act or omission referred to in paragraph (1) above, the period of 3 years shall begin on the earliest date on which that person knew or ought reasonably to have known of its occurrence.

(3) Where, in the opinion of the Pensions Ombudsman, it was reasonable for a complaint not to be made or a dispute not to be referred before the end of the period allowed under paragraphs (1) and (2) above, the Pensions Ombudsman may investigate and determine that complaint or dispute if it is received by him in writing within such further period as he considers reasonable."

185. In accordance with Regulation 5 of the 1996 Regulations, an Applicant would need to bring a complaint within three years of the event being complained about happening, or within three years of when they first knew about it or ought reasonably to have known about it. Mr E received a benefit statement on 3 November 2017, and it was only after receiving this, when he attempted to transfer out, that Mr E experienced problems. I have seen nothing to suggest that Mr E ought reasonably to have become aware of his inability to access his pension fund under the Scheme before then. Consequently, his complaint to TPO, in June 2020, is within the three-year time period under Regulation 5(1).

[59] As stated in TPR's Order dated 13 February 2018, under which Dalriada was appointed as independent trustee in relation to the Scheme.

[60] Mr E having joined Dalriada's complaint, as noted in paragraphs 1 and 2 above

186. Mr E subsequently expanded his complaint to reflect Dalriada's. I have seen nothing to suggest that Mr E ought reasonably to have been aware of Mr Kelly's or Mr Reilly's respective appointments as Trustees of the Scheme, or their respective alleged actions in relation to the Scheme until Dalriada issued its announcement to members in June 2020, which informed the Scheme's members that there had been "two further trustees who purportedly resigned prior to Dalriada's appointment" in addition to Mr Craig. On that basis, a complaint including Mr Reilly and Mr Kelly could have been brought to TPO within the time limits set out in Regulation 5 at any time before June 2023.In any event, due to Dalriada's involvement in the Scheme, which led to considerable information and evidence becoming available to the members, I consider it reasonable for Mr E not to have made his complaint earlier, and so, had Mr E's expanded complaint not been made within the timeframe allowed by Regulation 5(2), TPO could still investigate and determine the complaint under Regulation 5(3) of the 1996 Regulations.

187. With regard to the application of Regulation 5 to Dalriada's referral. Dalriada was appointed by TPR as independent trustee of the Scheme on 13 February 2018. Following its appointment, Dalriada sought to ascertain: key information concerning the Scheme, including in relation to its membership, any assets remaining in the Scheme and investments and payments made using Scheme funds; and the likelihood of being able to recover any of the funds that had been invested or paid out of the Scheme. It is clear, from Dalriada's submissions under oath at the Oral Hearing, that this has been a lengthy and complex process. On that basis, to any extent that Dalriada may have had an awareness of the matters that formed the basis of its referral to TPO more than three years before it made its referral on 18 October 2021, I consider it reasonable for Dalriada not to have made its referral within that period. Dalriada made its referral approximately three years and ten months after its appointment by TPR and had, following its appointment, needed to carry out extensive investigations and recovery attempts. Even if Dalriada did make its referral outside the period of three years following the date on which it ought reasonably to have become aware of the acts or omissions that are the subject of its referral, I do not consider that the short further period beyond that three-year point was unreasonable. On that basis, I find that Dalriada's referral to TPO was made within Regulation 5(2) or, in the alternative as the case may be, Regulation 5(3) of the 1996 Regulations.

Procedure

188. On 15 December 2021, early on in this investigation, Mr Craig authorised TPO to correspond with his representative, Mr Howard Young, in relation to the investigation and informed TPO that Mr Young would act on his behalf "in all matters". As Mr Craig's confirmed representative, Mr Young was to be TPO's point of contact for Mr Craig, not a further recipient of correspondence from TPO in addition to Mr Craig.

189. On 15 December 2021, TPO responded directly to an email sent on 14 December 2021 by Mr Young and continued to send correspondence to that same email address, including notice of the Oral Hearing and supporting documents. TPO received no indication that that correspondence had not been received by Mr Young until Mr Craig

responded to the four emails that TPO had sent to both Mr Young and Mr Craig on 20 June 2022, to which my second Preliminary Decision was attached in three parts. Mr Craig responded to TPO's emails, stating that Mr Young had received no correspondence from TPO and that he had been awaiting TPO's response to his email of 14 December 2021.

190. Mr Craig has submitted that, had he received the notice of the Oral Hearing and supporting documentation, he would have submitted medical advice demonstrating that he was incapable of participating in the Oral Hearing. Mr Craig has also submitted that, had I been aware of Mr Craig's health issues, I would have considered it "unfair and prejudicial to hold any oral hearing until such time as Mr Craig's mental health [had] sufficiently improved to enable him to properly participate in an oral hearing.". Mr Craig considers that there should be a further oral hearing, "given the importance of the issues and the need for all relevant witnesses to be cross-examined".

191. Mr Craig has included a copy of a psychiatric report (the **Psychiatric Report**), which had been prepared for the ICAEW by a consultant psychiatrist (the **Consultant**) following an examination, by the Consultant, of Mr Craig's mental health, which had been conducted on 18 January 2022. The Consultant had been instructed by the ICAEW to consider the impact of Mr Craig's mental health condition on: his fitness to participate in disciplinary proceedings; and/or his professional competence. The Consultant's opinion, expressed in the Psychiatric Report, was that Mr Craig was not fit to attend any "tribunal hearings". The Psychiatric Report referred to a previous assessment of and report on Mr Craig's mental health from 2018, in which the Consultant had expressed the same opinion.

192. Despite having been aware of the referral and complaint made against him since 3 December 2021[61], Mr Craig refrained from raising his mental health issues as a reason why Dalriada's referral and Mr E's complaint should not be investigated until 7 October 2022, when Mr Young sent TPO his submissions in response to my second Preliminary Decision on Mr Craig's behalf. Instead, he nominated Mr Young as his representative. It is not uncommon for parties to be represented at oral hearings held by TPO; Mr Young could have attended the Oral Hearing on Mr Craig's behalf.

193. Mr Craig has submitted that service of the Notice of Hearing was not effected in accordance with Rule 18 of The Personal and Occupational Pension Scheme (Pensions Ombudsman) (Procedure) Rules 1995 (the **Procedure Rules**) (Method of sending or delivering documents etc.), a copy of which is set out in Appendix 10 to this Determination. This is not accepted. TPO had been supplied only with Mr Young's email address and had no reason to doubt that correspondence was being delivered to that email address. In any event, following the submission made that TPO's correspondence (the emails sent to Mr Young by TPO and the emails sent using 'We Transfer') had been quarantined by Mr Young's IT system, TPO granted Mr Craig a

[61] as evidenced by Mr Craig's wife's response to TPO's email of 24 November 2021 in which TPO informed Mr Craig of Dalriada's referral against him and the other Trustees.

significant extension of the time within which he was required to respond to my second Preliminary Decision.

194. Mr Reilly has submitted, or has at least implied, that the Oral Hearing procedure was flawed, pointing to paragraph 32 of the case of *Payne v Pensions Ombudsman* [2003] EWHC 3218, in which the judge referred to the previous case of *Duffield v Pensions Ombudsman [1996] PLR 285*, where it had been held that, in that particular case, the Pensions Ombudsman at that time had failed to adopt a fair procedure.

195. The circumstances in the case of *Payne* are quite different from those of this case. Contrary to that case and to Mr Kelly's submission, that the purpose of the Oral Hearing had been misrepresented to him, the List of Issues, that TPO sent to all of the parties three weeks prior to the date of the Oral Hearing, made it quite clear that I would be considering the Trustees' respective liability for the various identified breaches of trust, and that the scope of the Scheme's exoneration clause and section 61, would be considered. The case law forming the basis upon which a finding of whether or not the Trustees would be able to rely upon the exoneration clause under the Trust Deed, was set out in an Appendix to the List of Issues. Shortly after sending the Notice of Hearing to the parties, TPO sent my first Preliminary Decision to the parties, on 11 March 2022, in which my provisional findings were set out.

196. Distinguishing *Payne*, I have provided the parties with an opportunity to comment on my provisional conclusions, which I sent to each of the parties in the form of my Second Preliminary Decision on 23 June 2022. In reaching my Second Preliminary Decision, I considered the oral submissions made during the Oral Hearing as well as the further material submitted by Dalriada, Mr Kelly and Mr Reilly very close to, during or shortly after, the Oral Hearing. Material produced at late notice was permitted after appropriate consideration, with the parties free to comment on it then or seek further time in which to do so. That further material was then sent to the parties on 8 April 2022 by email. In fact, the parties were allowed more than three months to provide their further submissions in response to my second Preliminary Decision.

197. Mr Reilly has submitted that he was not provided with a hard copy of the hearing bundle, either in readiness for, or at, the Oral Hearing, despite repeated requests. That is not the case; Mr Reilly had access to the bundle during the course of the Oral Hearing. In any case, an electronic copy had been sent to him on 22 March 2022, prior to the Oral Hearing, which Mr Reilly could have referred to in preparation for the Oral Hearing.

D.1 The Scheme's status

D.1.1 <u>The Scheme's status as an occupational pension scheme</u>

198. It is not in dispute that the Scheme is an occupational pension scheme.

D.1.2 Structure of the Scheme's funds

199. I have seen no evidence that the Scheme's assets were segregated. In fact, as they seem to have been mixed at least in part with those of Refresh Recovery's, as I have observed in paragraph 104 above, it does not appear that the Scheme's assets could have been segregated. Therefore, I shall proceed on the basis that the Scheme's assets were pooled among its members.

D.2 Conflicts of interest

200. The following conflicts of interest have been identified, in relation to the Trustees:

Mr Craig:

200.1. It appears that, at the time of the Merger (see paragraphs 23 and 24 above), Mr Craig was trustee of the Ocean Fund and was acting on behalf of Emfire Consulting Limited, in its capacity as trustee of the Clear Fund, as well as being trustee of the Scheme.

200.2. Mr Craig informed Mr Dowd's solicitors, in his letter of support and guarantee for Mr Dowd's bail application (see paragraph 101 above), that he owned 60% of OFSL's share capital. While this has not been evidenced by any document filed at Companies House[62], on the basis that Mr Craig must have been aware that this information would likely be provided to the Court, and his duty to it, I consider, on the balance of probabilities, that Mr Craig did in fact own the majority of OFSL's share capital on 27 May 2016. The Scheme's bank statements show that payments totalling £1,350,048.75 were made to OFSL from Scheme funds. Mr Craig has submitted that those payments were, "duly authorised commissions, earned by OFSL to pay its ongoing expenses" and that, "The monies were legitimately and contractually owed to OFSL from the fund".

200.3. Loans, repayable with interest, were made to Scheme members by SSL, of which Mr Craig was the sole director and shareholder, and other companies within the Shawhill group, in which Mr Craig also had an interest, as detailed in paragraphs 53 and 116 above. I note that RMJ Solicitors, a firm later shut down by the SRA, were involved in the loan transactions, as explained in paragraph 114 above.

Mr Kelly:

200.4. During his time as a Trustee, Mr Kelly carried out "FCA work" for OFSL, charging OFSL £2,000 to £3,000 per month for that work (see paragraph 52 above).

200.5. Despite having resigned as a director of RAM on 12 January 2017, with the aim of avoiding a conflict of interests, Mr Kelly maintained an interest in RAM,

[62] The last annual return to be filed at Companies House was made up to 12 January 2016.

indirectly via Merydion, until 17 February 2017, as explained in paragraph 136 above. Payments of £200,000 were made from Scheme funds to RAM between 30 January 2017 and 8 February 2017 inclusive, as well as a further two payments of £300,000 each on 15 February 2017 and 16 March 2017, when Mr Kelly was both a Trustee and a person with significant control over a company that was RAM's majority shareholder (see paragraphs 133 to 136 above).

200.6. As I have set out in Appendix 4, despite initially submitting that he had not held shares in EMM while being in office as a Trustee, on questioning at the Oral Hearing, Mr Kelly remembered that he still held shares to the value of approximately £30,000 in EMM, within a SIPP, and had continued to do so after being appointed as a Trustee. As I have explained in Section A.1.3 above, the Scheme had a large shareholding in EMM, which it had held since before Mr Kelly's appointment as a Trustee. Mr Kelly submitted, at the Oral Hearing, that EMM had gone into liquidation before he became a Trustee. However, Companies House's records suggest that the petition for liquidation did not start until 14 February 2017 and its winding up did not begin until 26 June 2017.

Mr Reilly:

200.7. OFSL was a "long-standing client" of Mr Reilly's and had asked him to become a Trustee of the Scheme. However, Mr Reilly submitted at the Oral Hearing that he was not instructed by OFSL during his term as a Trustee and I have seen no evidence to the contrary. On that basis, I do not consider there to have been a conflict of interest in this regard during Mr Reilly's term of office as a Trustee or, in the alternative, to the extent that any conflict or potential conflict existed, Mr Reilly took adequate steps to manage it by refraining from providing advice to OFSL during his time as a Trustee.

201. Clearly, Mr Kelly's and Mr Craig's respective interests in the capacities listed above conflicted with their duties to the Scheme's beneficiaries in their capacity as Trustees of the Scheme.

202. Under Clause 19.2 of the Trust Deed, "No decision of the Trustee and no exercise of the power or discretion by them is invalid on the ground that a Trustee, agent, delegate or nominee has a personal interest in the matter". Under Clause 20.2 (see Appendix 6), a Trustee who has an interest in a company, business or partnership may retain remuneration he receives in respect of it, notwithstanding any interest that the Fund has in it, and the Trustee or any company, in which he has an interest as an officer or shareholder, may retain payments he or it receives in connection with the Scheme.

203. It seems that Clauses 19.2 and 20.2 effectively disapply the Trustees' fiduciary duties not to profit from their positions in relation to their other interests at the expense of that pension scheme's beneficiaries and not to be in a position of conflict of duty or interests, which would otherwise have been imposed on the Trustees.

204. However, as has been established by the case of Armitage v Nurse [1997] EWCA Civ 1279, no provision of the Scheme's governing documents or any other documentation can have negated the Trustees' duty to act honestly and in good faith for the benefit of the beneficiaries. That duty forms the "irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust". This, together with what constitutes "honesty" in this context, is explained more fully in Section D.10.2 below.

205. As liquidator of the principal employers of the Clear Fund and the Ocean Fund, and acting (as it seems from the Merger Deed that Mr Craig did) as trustee of each of those Funds, Mr Craig knew of the loans to RTC (the **RTC Loans**)[63] and must have been aware of the investment in Silex. Dalriada has submitted that Mr Craig had, in fact, been a party to the settlement agreement reached in relation to the RTC Loans, which is detailed in paragraph 118 above. While Mr Craig has submitted that he did not enter into the settlement agreement and that his signature was forged, I have seen no evidence to support that submission. In fact, as Dalriada has pointed out, on the copy of the settlement agreement that TPO has seen, in the second signature box for Mr Craig there is a handwritten addition of the words "(without personal liability)". Dalriada has submitted, and I accept, that it is reasonable to assume that this could only have been intended to protect Mr Craig's personal position, which would have been an unlikely stance to have been taken by anyone forging Mr Craig's signature. Prior to the Merger, Mr Craig had been advised, by Mr Davenport, of the need to satisfy himself "that he is not taking on, as a result of the Merger, unforeseen liabilities to the members of those schemes." (see paragraph 25 above). Mr Davenport specifically referred to the RTC Loans within that advice. Further, Mr Craig has said, in his submissions to TPO, that he held a meeting with Mr Dowd and Mr James in April 2015, in which they discussed "the Ocean Scheme and its members as the only asset that would repay them was a loan to Real Time Claims Limited which was not due until 2018".

206. However, despite knowing that the RTC Loans were likely to represent a loss, potentially of their entire value, and the information concerning Silex's loss-making trading history (see Appendix 4), which would have alerted a reasonable trustee to the high-risk nature of that investment, Mr Craig went ahead with the Merger. Mr Craig has submitted that he had received no warning that the Ocean Scheme was a "dishonest scheme" and that "as at the present date [7 October 2022] nobody connected with that scheme has been charged with any offence of dishonesty. That alone, is a significant factor in pointing to Mr Craig not being dishonest, because those directly involved in the scheme have not been charged with any offence." I do not consider this to be relevant. Regardless of any dishonesty committed by other individuals in connection with the Funds, or absence of such dishonesty, the fact remains that Mr Craig was instrumental in the merger with the Scheme, of those two schemes, which had made such significant losses for their members, resulting in a diminishment of the Scheme's funds overall.

[63] This is confirmed by Mr Craig's submissions, sent to TPO on 7 October 2022.

207. It is apparent, from Mr Davenport's emails before the Merger and from the fact that he was still querying the RTC investment in 2016, when he provided advice in relation to the Scheme's draft accounts (see paragraphs 25 and 139 above), that Mr Craig was less than transparent about the RTC investment, which was likely to make a loss for the Scheme, before and after the Merger. However, Mr Craig proceeded with the Merger despite his conflicting interests and, following the Merger, the Scheme's assets were intermingled with those of Refresh Recovery within the same bank account. In the circumstances set out in paragraphs 205 and 206 above, I cannot see that proceeding with the Merger could be considered to have been done in good faith or in members' financial interests.

208. The Scheme's bank statements show that payments totalling £1,350,048.75 were made to OFSL from Scheme funds. Mr Craig has explained that those payments were commission owed to OFSL (see paragraph 200.2 above). As a 60% shareholder in OFSL, it seems that Mr Craig must have benefited from those payments, at the expense of the Scheme's members. Clearly, in doing so, Mr Craig was putting his own interests before those of the Scheme's members. I cannot see that any reasonable trustee would have considered that depleting the Schemes' funds by an amount equivalent to nearly 10% of the total amount transferred into the Scheme could be in the Scheme's members' financial interests.

209. Mr Craig has submitted that the payments from Scheme funds to OFSL were authorised in a "five-stage authorisation trail", requiring "input from at least three usually four different people including a confirmation letter from OFSL sent to the cashier at Refresh and copied to [Mr Craig]". Mr Craig has submitted further that this process has been reported to "the police", the Official Receiver and TPR and that "All investigations have found nothing wrong". Mr Craig has provided no evidence of any of those organisations having considered that process or of their concluding that there was "nothing wrong" with that process. In using this as part of his defence to the allegations against him, the onus falls on him to provide supporting evidence to demonstrate these assertions to be true, which he has not done. Contrary to Mr Craig's apparent view, I have no automatic access or right to other bodies' non-published criminal or regulatory investigation materials or findings. In any event, I would not be required to agree with any such conclusion, or to base my own conclusions on it. Regardless of any authorisation process, the fact remains that payments of substantial amounts were being made to OFSL, a company in which Mr Craig had a significant shareholding and of which, he has submitted, he was the insolvency practitioner. I do not consider that Mr Craig can have been acting in good faith for the benefit of the Scheme's members in allowing these payments to be made to OFSL.

210. Similarly, by virtue of his ownership and involvement with SSL and other Shawhill companies, Mr Craig must have benefited from the loans made to Scheme members, which were subject to interest, to the cost of those members. Mr Craig has submitted that, in fact, the loans were made from AU Capital PLC and Shawhill Seychelles Limited, companies which had "nothing to [do] with Mr Craig". I have been unable to find any record of any company called AU Capital PLC, although there is a company

listed at Companies House called AU Capital LLP[64]. I have seen no evidence, in support of Mr Craig's submissions, of that company's involvement in the Scheme. I have, however, seen documentation relating to loans made to Scheme members from SSL (not Shawhill Seychelles Limited). I note that RMJ Solicitors, a firm later shut down by the SRA, was involved in the loan transactions, as explained in paragraph 114 above. RMJ Solicitors' involvement is, in my opinion, further evidence that Mr Craig acted dishonestly in allowing companies in which he had an interest to lend money to members of the Scheme.

211. Further, as I have explained in paragraph 113 above, the terms of at least some of those loans were less than favourable to the borrowers, with some members receiving significantly less than the percentage of their fund that they had intended to borrow, due to "charges" being applied. I am informed that some of those loans were of an amount equivalent to as much as 40% of the member's pension fund. Some members who received loans also incurred tax charges as they had not reached age 55 when the loan payments were made to them. It seems that the full effect of the loans on members' funds was not explained to them, with members being told that the loan would not be taken out of their pension fund, but would be paid for by the investments under the Scheme.

212. In allowing Scheme members to take out loans from companies in which Mr Craig had an interest, I cannot see that Mr Craig can be considered to have acted honestly, in good faith or for the benefit of the Scheme's beneficiaries. Being involved as he was in the Shawhill companies and as a trustee of the Scheme, Mr Craig must have been aware of the loans and cannot have been acting in good faith. However, even if he was not aware of the terms or circumstances of the loans, I consider that Mr Craig was recklessly indifferent as to the negative effect of those loans on members' financial interests.

213. As a consequence of the actions detailed in paragraphs 205 to 212 above, Scheme funds have been lost and I find that Mr Craig acted in breach of his duty to act honestly and in good faith for the benefit of the beneficiaries, favouring his own interests over those of the beneficiaries in circumstances in which no reasonable pension scheme trustee could have considered that his actions would benefit the scheme's members.

214. Regarding Mr Kelly and his paid work for OFSL, Mr Kelly submitted that his work for OFSL was "in parallel" with, rather than connected to, the Scheme. While I have not seen evidence that the Scheme's funds suffered any detriment as a consequence of this clear conflict of interests, I am concerned that Mr Kelly does not appear to have considered the management of that conflict.

215. Regarding Mr Kelly's indirect interest in RAM during a period in which £200,000 was paid from the Scheme to RAM (see paragraph 136 above), I cannot accept that Mr Kelly did not stand to benefit from those payments when they were made. Mr Kelly has submitted that he did not have or exert control over RAM; he had no access to its bank

[64] Company number OC343125

accounts or any involvement in running it. Mr Kelly has submitted also that Merydion held the shares in RAM as bare trustee for Mr Hooper, who subsequently became a director of RAM and into whose name the shares were then transferred. TPO has received no evidence of that arrangement other than a statement from Mr Hooper to that effect, which is of limited evidential value without reliable corroborating documentation. TPO has seen evidence[65] that Mr Hooper has been convicted of an indictable offence in relation to RAM and associated companies, and has consequently been disqualified from acting as a director, which further discredits his statement. Given that Mr Kelly was clearly interested in RAM's survival, as evidenced by his loaning money to it at some point in the year ended 31 July 2018 (see paragraph 134 above), I do not accept that he had no interest in RAM or that he did not stand to benefit in any way from the Scheme's investment in it. His prospects of receiving repayment of his own personal loan were enhanced by scheme money being invested to add to RAM's liquidity.

216. Mr Kelly has submitted that the decision to invest in RAM would have been made prior to his becoming a Trustee. However, Mr Kelly was clearly aware that payments were to be made to RAM, as demonstrated by his resignation from his position as a director of RAM on the same date on which he signed the Deed of Appointment. Remaining in a position in which he had ultimate control over a company in which the Scheme had invested shows a reckless disregard for the Scheme's members' interests. I shall explore this further in Section D.10.2 below.

217. Regarding Mr Kelly's shares in EMM, which he held in his SIPP, Mr Kelly clearly knew of the Scheme's large shareholding in EMM before he was appointed as a Trustee, as detailed in Appendix 4 below. I am therefore concerned that he did not ensure that any shares he held in EMM had been relinquished before his appointment as a Trustee. While Mr Kelly has submitted, and I accept, that he did not gain any benefit from holding those shares, I am most concerned by Mr Kelly's failure to consider properly whether a potential conflict of interest existed or to remove that conflict by relinquishing his shares.

Section 249A of the Pensions Act 2004 and TPR's Code of Practice No.13

218. The Trustees were subject to the requirement, under the 2004 Act, section 249A, to have in place "internal controls", which were defined as:

"(a) arrangements and procedures to be followed in the administration and management of the scheme,

(b) systems and arrangements for monitoring that administration and management, and

(c) arrangements and procedures to be followed for the safe custody and security of the assets of the scheme".

[65] Simon Charles HOOPER - Disqualification Details - Find and update company information - GOV.UK) (company-information.service.gov.uk)

219. In addition, the 2013 Code applied to the Trustee until July 2016 when it was replaced by the 2016 Code. The 2016 Code applied to the Trustees from July 2016 (in Mr Craig's case) and, in Mr Reilly's and Mr Kelly's case, from their appointment on 1 January 2017. TPR's codes of practice are not binding in their nature. However, I am required to take them into account, insofar as they are relevant, in determining complaints made to TPO.

220. Paragraph 143 of the 2013 Code stated that the statutory requirement under the 2004 Act, section 249A (**Section 249A**), to have in place an effective system of governance, included a requirement for pension scheme trustees to ensure that they have processes in place to manage their conflicts of interest.

221. The 2016 Code includes a section entitled 'Conflicts of interest'. TPR's expectations regarding the steps that pension scheme trustees should take to manage conflicts of interest are set out in paragraphs 61 and 62 of the 2016 Code:

> "61. Conflicts of interest may arise from time to time in the course of running a pension scheme, either among trustees themselves or with service providers or advisers. Part of the requirement in law to establish and operate adequate internal controls[66] includes having processes in place to identify and manage any conflicts of interest.
>
> 62. We expect these controls to include, as a minimum:
>
> - a written policy setting out the trustee board's approach to dealing with conflicts
> - a register of interests (which should be reviewed at every regular board meeting)
> - declarations of interests and conflicts made at the appointment of all trustees and advisers
> - contracts and terms of appointment to require advisers and service providers to operate their own conflicts policy and disclose all conflicts to the trustee board."

222. Mr Reilly has submitted that an absence of conflict controls did not necessarily amount to a failure to have in place "internal controls" under Section 249A and that whether "internal controls" should include conflict controls would be fact specific to the pension scheme in question. Mr Reilly has stated, in support of that submission, that the Scheme was "not very large". As a pension scheme into which its 288 members had transferred a collective sum of £13.4 million of their savings, I do not accept, as Mr Reilly seems to be inferring, that conflict controls did not constitute part of the "internal controls" required in relation to the Scheme by Section 249A. I find that having in place

[66] i.e. in accordance with the 2004 Act, section 249A.

conflict controls, as described by the 2013 and 2016 Codes, was required in order to fulfil the requirement to have in place “internal controls” under Section 249A.

223. Mr Reilly has pointed out that he had drawn the other Trustees’ attention to the 2016 Code and to TPR’s TKU course in his emails to them of 5 and 10 January 2017, respectively, as well as listing “Register trustees conflicts [*sic*]” as an item in the agenda for the Trustees’ first meeting. Mr Reilly has submitted that it had been agreed at the Trustees’ meeting in February that there would be no new investments made from the Scheme and that, on that basis, “inference might be drawn that a register would be constructed as and when investments were made and subject to that once Mr Reilly had acquainted himself with the assets of the Scheme and reviewing its investments.”

224. While I accept that Mr Reilly had listed the conflicts register as an item for discussion at the Trustees’ meeting, I have seen no evidence that any action was taken to put in place such a register or that any other conflict controls were put into place. I consider that, having discovered that no register of conflicts existed and that there were no conflict controls in place at all in relation to the Scheme, Mr Reilly and Mr Kelly should at least have taken action to document any conflicts that already existed and to consider how any identified conflicts would be managed in the future. They did not do so. I have already found that conflicts existed in Mr Craig’s and Mr Kelly’s case (see paragraphs 205 to 217 above). In Mr Reilly’s case, by 6 April 2017 he was clearly on notice that there were actual or potential conflicts in existence, as is evidenced by the contents of his email to the other Trustees on that date[67]. However, he took no action at that point or thereafter to put in place any conflict controls.

225. Taking into account, as relevant, the 2013 Code and/or the 2016 Code, I find that the Trustees were required, under Section 249A, to have processes in place to manage any conflicts of interest.

226. Under Clause 5.1 of the Trust Deed, the Trustees were required to “administer the Scheme in accordance with any overriding legislation affecting pension schemes”, so a breach of Section 249A will have amounted to a breach of Clause 5.1 of the Trust Deed.

227. Other than Mr Craig’s submission that payments to OFSL from the Scheme’s funds were put through a several-step “authorisation trail”, which I have not accepted, (see paragraph 209 above), none of the Trustees has submitted that any conflict controls were put in place in relation to the Scheme. I find that each of the Trustees acted in breach of Section 249A and Clause 5.1 of the Trust Deed during their respective term of office as a Trustee.

228. In addition, I have seen no evidence that the Trustees acted in accordance with the 2013 and 2016 Codes in relation to managing conflicts of interest among the Trustees, or that they demonstrated that they had taken those Codes into account with regard to

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[67] For example, Mr Reilly was clearly aware that SSL had been sending demands for repayment of loans to Scheme members and that SSL had the same registered office address as Refresh Recovery, as is documented in the 6 April 2017 Email (see paragraph 66 above).

managing the various conflicts of interest outlined in this Section. I find that such failure to have regard to those Codes amounts to maladministration on the Trustees' part.

D.3 Investment of the Scheme's funds

D.3.1 Investment powers and duties

229. The duties imposed on pension scheme trustees in relation to investments are contained in: the pension scheme's documents, such as the scheme's trust deed and rules; Part I of the 1995 Act; and case law, as set out in Sections D.3.2 to D.3.6 below.

230. Mr Craig claimed, early on in this investigation, that the vast majority of investments under the Scheme were made from November 2017 onwards and, as he was "off ill" from that time, he could not have had any involvement in the Scheme's investments. He later provided a different explanation, which I have detailed in Section D.3.4.1 below. As I will explain, in section D.3.4 below, the bank statements and other evidence that I have seen show that most of the Scheme's investments were in fact made prior to 1 January 2017.

D.3.2 Investment powers/duties under the Trust Deed

231. The relevant provisions of the Trust Deed, which govern the Scheme's trustee investment powers, are contained in Clause 10, see Appendix 6 below.

232. Clause 10.2 provided the Trustees with a broad power to invest the Scheme's assets, and to vary any investment made, as if they were absolutely and beneficially entitled to those assets. Clause 10.3 qualified Clause 10.2, as it provided that: "The Trustee may lend money upon security and upon such terms as the Trustee thinks fit.". The effect of Clause 10.3 was that, should the Trustees invest any of the Scheme's assets by making a loan to another party, they could only do so if they took security for that loan.

233. The Trustees were not required to follow any member's directions in investing the Scheme's assets. Clause 10.9 stated that "No day to day decision relating to investments (within the meaning of the Financial Services and Markets Act 2000) shall be taken other than by the Trustee provided that; the member has the same meaning as in the Financial Services and Market Act 2000 (carrying on regulated activities by way of business) Order 2001 (SI 2001 No. 1177); or who has permission to carry on activities of the kind specified by article 37 of the Financial Services and Market [*sic*] Act 2000 (regulated activities) Order 2001 (SI 2001 No. 544)." Clause 10.9 is not clearly drafted, but it appears to me that the draftsman's intention was likely to prevent any member from making any decision concerning the investment of the Scheme's funds unless they had the permission or authorisation under the Financial Services and Market Act 2000 (**FSMA 2000**), referred to in Clause 10.9.

234. Mr Craig has submitted that, from the Scheme's establishment until August 2016, all investments made under the Scheme were chosen by members, who had received advice from their own IFA's as well as from OFSL's compliance manager, Mr Ewing, and had been given "full advice on the ramifications of investing in a scheme using the

loan back 3rd Party scheme". According to Mr Craig, he was "compelled to invest [Scheme members' funds] according to the mandate given by the members.". While Mr Craig has provided various diagrams illustrating the process through which, he has submitted, that members' funds went, Mr Craig has provided no evidence to substantiate that submission (as to compulsion). However, if he did in fact act in accordance with members' investment instructions without further thought, it seems that Mr Craig did so in contravention of Clause 10.9 and therefore in breach of trust. I will consider the suitability of such investments and the matter of payments having allegedly been made to members in Sections D.3.4 and D.4.5 below.

D.3.3 Statutory investment duties under the Pensions Act 1995

235. The 1995 Act, section 34(1), provides the Trustees with a wide-ranging power "to make an investment of any kind as if they were absolutely entitled to the assets of the scheme", subject to: the 1995 Act, section 36(1); and any restrictions imposed by the respective Scheme.

236. The 1995 Act, section 36(1), requires the Trustees to exercise their powers of investment in accordance with: (i) The Occupational Pension Schemes (Investment) Regulations 2005 (the **Investment Regulations**); and (ii) subsections 36(3) and 36(4), to the extent that the Trustees did not delegate the exercise of such powers to a fund manager in accordance with the 1995 Act, section 34 (which I will explain in Section D.3.5 below).

D.3.4.1 The Investment Regulations

237. The Investment Regulations set out specific requirements in relation to pension scheme trustees' exercise of their investment powers under the 1995 Act, section 36(1). Under Regulation 4 of the Investment Regulations (Regulation 4) (which is set out in Appendix 11 below), the Trustees, or any fund manager to whom any investment discretion had been delegated under the 1995 Act, section 34 (see Section D.3.5 below), are required to exercise the discretion in accordance with the provisions listed in Regulation 4.

238. Of particular relevance to the Scheme and its investments were the following provisions listed in Regulation 4:

> "(2) The assets must be invested-
>
> (a) in the best interests of members and beneficiaries; and
>
> (b) in the case of a potential conflict of interest, in the sole interest of members and beneficiaries.
>
> (3) The powers of investment, or the discretion, must be exercised in a manner calculated to ensure the security, quality, liquidity and profitability of the portfolio as a whole.
>
> …

(5) The assets of the scheme must consist predominantly of investments admitted to trading on regulated markets.

(6) Investment in assets which are not admitted to trading on such markets must in any event be kept to a prudent level.

(7) The assets of the scheme must be properly diversified in such a way as to avoid excessive reliance on any particular asset, issuer or group of undertakings and so as to avoid accumulations of risk in the portfolio as a whole. Investments in assets issued by the same issuer or by issuers belonging to the same group must not expose the scheme to excessive risk concentration."

239. The various investments made with Scheme funds, of which I have been made aware, are listed in Appendix 4 below, together with my observations on the various entities in which those investments were made. In general, the companies invested in: had only been incorporated a short while before the investment; were dormant companies; had been trading at a loss (and continued to do so); and/or were companies in which one or more individuals involved in running the Scheme had, in some way, an interest.

240. The investments were all unregulated and illiquid, consisting of shares in, or loans to, the various companies.

241. It is clear, therefore, that none of the investments, of which I have been made aware, complied with the requirements of the Investment Regulations. The investments cannot be considered to have been in the best interests of the Scheme's members or beneficiaries, as required by paragraph (2)(a) of Regulation 4, and, owing to their lack of diversity, cannot be considered to have been made in accordance with paragraphs (3) or (5) to (7) of Regulation 4.

242. I note that, with the exception of those listed in paragraph 125 above, and the transaction or transactions described in paragraphs 126 to 132 above, all of the investments identified as having been made from the Scheme's assets appear to have taken place before 1 January 2017 (**Pre-2017 Investments**), while Mr Craig was the sole Trustee of the Scheme and before Mr Kelly's and Mr Reilly's appointment as Trustees of the Scheme. Regarding the investments made before 1 January 2017, I find that Mr Craig acted in breach of the requirements of Regulation 4.

243. Mr Craig has submitted that, contrary to the investment position set out in Section A.2 above, the investments made under the Scheme prior to August 2016 when a call centre was set up from which new Scheme membership was generated, were loan back arrangements via "AU Capital PLC" (see paragraph 210 above) and, subsequently, Shawhill Seychelles Limited. Mr Craig has submitted that the Scheme was set up not for members to invest and obtain any growth on their investments, but to liberate "frozen pensions", members being granted loans themselves from AU Capital PLC or Shawhill Seychelles Limited, as applicable. According to Mr Craig, pensions were "reinvested by those companies for a commission" and, at any time between the Scheme's establishment and early November 2016, "excluding time differences, there was, in effect, a nil balance in the scheme. The funds invested in

these third-party schemes were in different ways loan backs to the pensioner, without recourse to the fund."

244. This broad position is not substantiated by the evidence that I have received. As I have set out in Section A.2 above, investments in a number of other companies have been made. The information set out in relation to the various identified investments and payments out of the Scheme, at Appendix 3 below, includes some investments made prior to August 2016. This is substantiated by copies of emails that TPO has received, which relate to various investments and which are dated earlier than August 2016. For example, TPO has received a copy of emails[68] between Mr Craig and Mr Dowd and sent on 1 July 2016, concerning a loan from the Scheme to Nail Tech Limited, the first instalment of which was to be paid on 1 July 2016, as detailed in an email from an individual named Emma Barton to Mr Craig on 30 June 2016. Mr Reilly and Dalriada both confirmed, under oath or affirmation at the Oral Hearing, that they had seen evidence of the various investments mentioned in Section A.2 above having been made.

245. Mr Craig has submitted that members accessed their pension funds by way of loans from the companies in which they had instructed him to invest. However, there are inconsistencies within Mr Craig's submissions (which his representative, Mr Young, made on Mr Craig's behalf). For example, he has submitted, on page 9 of his submissions, that initially the Scheme received pension monies from OFSL, to be reinvested in a fund named AU Capital PLC and that, to cut out the "middlemen" and achieve a larger return for OFSL, a Seychelles registered company, Shawhill Seychelles Limited, was set up. Mr Craig stated that "the fund then invested these monies in AU Capital PLC and subsequently Shawhill Seychelles Limited", which then "made a loan back to the pensioner at a commercial interest rate". However, on page 18 of his submissions, in paragraph 23, Mr Craig states that between 1 July 2015 and 4 November 2016, "OFSL exclusively concentrated on investments into the AU Capital plc, Shawhill Seychelles Limited and others" (my emphasis), implying that other companies had been invested in. In a diagram that Mr Craig submitted, entitled 'Gordon Craig Estates Account Number 1', Mr Craig states that Shawhill Seychelles Limited had been an "accounting fiction" and that it had been "nothing to do with Mr Craig", having been formed by Mr Dowd and Mr Haslam.

246. Bearing in mind: the many contradictions within Mr Craig's submissions; and the fact that, on any of the possible readings of his submissions, they are not evidenced by the Scheme's bank statements and contradict evidence received from the other parties (who gave evidence at the Oral Hearing under oath), I do not accept Mr Craig's submission that, prior to November 2016, members accessed their funds almost in their entirety subject only to commission paid to OFSL.

247. Regarding the investments made from August 2016, Mr Craig has submitted that the call centre referred to in paragraph 243 above, was set up by Mr Dowd without Mr Craig's knowledge and that, in late November 2016, during a period in which Mr Craig

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[68] Sent to TPO by Dalriada, following the Oral Hearing.

was “off ill” due to mental health issues, monies began to arrive from the call centre introductions, without Mr Craig being informed of this. Mr Craig has submitted that Mr Kelly and Mr Reilly were subsequently appointed without his knowledge in early December 2016 and that Mr Kelly and Mr Reilly had access to the new Scheme bank account that had been set up with Barclays at around that time. According to Mr Craig, more than £1,000,000 was paid out of that bank account to investments that had not been authorised by him during the week before Christmas 2016.

248. Considering first, Mr Craig’s allegation that he was unaware of the call centre being established and of payments having been made in December 2016, without his knowledge, I do not accept that this was the case. Evidence that TPO has seen, which suggests that Mr Craig was aware, and in control, of the Scheme’s investments, is contained in Dalriada’s attendance note of its visit to OFSL’s offices, in which Dalriada reported that Ms Kelly Grass, a member of staff who was present at OFSL’s offices during Dalriada’s visit, had stated that Mr Craig was the only person who had access to the Scheme’s bank account. Also, at least two payments were made to a ‘Smart Call Centre’ from the Refresh Recovery Limited bank account (see paragraph 104 above) prior to November 2016. So, it appears that Mr Craig was aware of both the call centre and the December 2016 payments. While Mr Kelly and Mr Reilly did attend the December 2016 Meeting (see paragraph 53 above), they confirmed, under oath at the Oral Hearing, that that was not a Trustee meeting, but an introductory meeting prior to their being appointed as Trustees. I have not seen evidence to suggest that any investments were agreed during that meeting, or any other evidence suggesting or confirming that Mr Kelly and/or Mr Reilly authorised any investments or payments out of the Scheme prior to their appointment as Trustees.

249. I find, on the balance of probabilities, that Mr Craig was aware of the investments made from the Scheme’s funds or, alternatively, that he allowed Mr Dowd to handle the Scheme’s investments. As I shall explain in Section D.3.5 below, even if Mr Craig was not actively involved in the investments, leaving that responsibility to Mr Dowd would not have absolved Mr Craig of his responsibilities and duties in relation to the Scheme’s investments.

250. Regarding Mr Craig’s submission that he had been unaware of Mr Kelly’s and Mr Reilly’s appointment, the evidence that TPO has received does not support his submission. The copy of the Deed of Appointment sent to TPO by Dalriada bears Mr Craig’s signature as one of the parties to that deed. Mr Craig was copied into emails dated 5 January 2017, in which the operative provisions of the Deed of Appointment, and the logistics for all parties including Mr Craig to sign it, were covered. I find that Mr Craig was aware of Mr Reilly’s and Mr Kelly’s appointment and was instrumental in giving effect to their appointment.

251. Regarding the investments made on or after 1 January 2017 (the **Post-2017 Investments**), the evidence that TPO has seen suggests that Mr Craig was involved

in those investments[69]. Each of the Post-2017 Investments involved the payment of Scheme funds into companies with either no trading history or accounts that showed net liabilities. The Post-2017 Investments were all high-risk, illiquid and involved no trading on any regulated market. The Post-2017 Investments cannot be considered to have met the requirements of Regulation 4, either in their own right or within the context of the investments that had already been made with Scheme funds. I find that Mr Craig acted in breach of Regulation 4 in respect of the Post-2017 Investments. I shall consider, in Section D.3.6 below, the extent to which Mr Reilly and Mr Kelly breached their investment duties in relation to the Post-2017 Investments.

D.3.4.2 <u>Section 36(3) and (4) (Choosing investments: requirement to obtain and consider proper advice)</u>

252. The relevant parts of the 1995 Act, section 36, subsections (3) and (4), are as follows:

> "(3) Before investing in any manner…the trustees must obtain and consider proper advice on the question whether the investment is satisfactory having regard to the requirements of regulations under subsection (1), so far as relating to the suitability of investments…"
>
> "(4) Trustees retaining any investment must –
>
> determine at what intervals the circumstances, and in particular the nature of the investment, make it desirable to obtain such advice as is mentioned in subsection (3), and
>
> obtain and consider such advice accordingly."

253. Proper advice is defined by the 1995 Act, section 36(6), as advice given by: a person with the appropriate FCA authorisation; or, where FCA authorisation is not required, a person who is "reasonably believed by the trustees to be qualified in his ability in and practical experience of the management of the investments of trust schemes".

254. Under the 1995 Act, section 36, subsection (7), pension scheme trustees will not be regarded as having complied with subsections (3) or (4) unless the advice that they have obtained is in writing.

255. Dalriada has submitted that Logic Investments, named in the SIP as the Scheme Investment Consultant, denied providing any investment advice. In fact, I have seen no evidence to suggest that any of the Trustees took any investment advice in relation to any of the investments.

256. Mr Craig has sought to rely upon members having taken independent financial advice before transferring their pension funds into the Scheme. However, the requirements, imposed on pension scheme trustees by section 36, as set out in paragraphs 252 to 254 above, to take 'proper advice', are direct requirements of the trustees to take

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[69] See, for example, paragraph 128 above, in which details of Mr Craig's emails concerning investments via RAM are set out.

advice on the investments made by the Scheme. Those requirements are independent of any due diligence carried out, or advice taken, by members of the Scheme and cannot be met by a trustee's reliance upon a member having received independent financial advice. Therefore, if and to any extent that members did take independent financial advice before transferring their pension funds into the Scheme, this does not serve to disapply the requirements of section 36, or to assist Mr Craig or the other Trustees in meeting those requirements.

257. Given that the statutory requirements imposed by Regulation 4 were clearly not met, as I have explained in Section D.3.4.1 above, it seems more likely than not, on the balance of probabilities, that, had the Trustees obtained investment advice in accordance with the 1995 Act, section 36, they would have been: advised against investing the Scheme's assets in the manner in which they were invested; and concerning any retained investments, advised of the unsuitability of those investments and the need to take action to bring the Scheme's investment portfolio into line with the requirements of Regulation 4.

258. I consider Mr Craig to have acted in breach of the requirement to obtain written advice under the 1995 Act, section 36, subsections 36(3) and (4), in relation to the Pre-2017 Investments and the Post-2017 Investments. I shall consider the extent to which Mr Reilly and Mr Kelly breached their investment duties in relation to the Post-2017 Investments in Section D.3.6 below.

D.3.5 Delegation of the Trustees' power of investment

259. Noting that, in practice, Mr Dowd appears to have exercised at least some of what should have been Mr Craig's or the Trustees' (as applicable) investment discretions, I have also considered whether any of the Trustees could be said to have delegated their discretion to make investment decisions to Mr Dowd.

260. Under the 1995 Act, section 34(2), trustees are permitted to delegate their discretion to make investment decisions to a fund manager who is authorised by the FCA to carry on regulated activities or is exempt from that authorisation requirement. Checks of the FCA's register carried out by TPO have provided no indication that Mr Dowd ever had the necessary FCA authorisation to enable Mr Craig or the Trustees to have delegated their investment decisions to him in accordance with the 1995 Act, section 34(2), and I have seen nothing to suggest that Mr Dowd was exempt from the authorisation requirement.

261. Even if Mr Dowd had been granted the necessary FCA authorisation, or any exemption from the requirement for FCA authorisation, in order for any of the Trustees to have been exempt from responsibility for Mr Dowd's exercise of the Trustees' discretion to make investment decisions, Mr Craig or the Trustees (as applicable) would have needed to have: carried out sufficient due diligence before appointing Mr Dowd as fund manager, to satisfy himself as to Mr Dowd's knowledge and experience, (the 1995 Act, section 34(4)(a)); continued to monitor Mr Dowd's performance on an ongoing basis following any such appointment.

262. I have seen no evidence that any due diligence in relation to Mr Dowd was carried out before, or during, his involvement with the Scheme in any capacity. In fact, Mr Dowd clearly could not have been considered to have been a suitable fund manager even if due diligence had been carried out, as his "experience" included activities that led to his being ultimately convicted and imprisoned for offences including money laundering (as explained in paragraphs 100 and 102 above).

263. I find that Mr Craig, and (in relation to any Post-2017 Investments) all of the Trustees were and remained responsible for carrying out the investment powers and duties under Clause 10 and under the 1995 Act, section 34.

D.3.6 Duties under case law

264. Case law provides further requirements that trustees must meet in exercising their power of investment, as follows:-

264.1. Pension scheme trustees are required, in investing scheme assets, to take such care as an ordinary prudent person would take if he invested "for the benefit of other people for whom he felt morally bound to provide" (*Re Whiteley* [1886] UKHL).

264.2. Pension scheme trustees must act in members' best financial interests (*Cowan v Scargill* [1984] 2 All ER 750).

264.3. A distinction has been drawn by the House of Lords between investments made by a business person and those made by trustees, the requirement of trustees being that trustees must avoid "all investments attended with hazard" (*Learoyd v Whiteley* [1887] 12 AC 727).

265. Looking further at the case of *Cowan v Scargill*, Megarry V-C said, at paragraph 41, 'that the starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries. This duty of the trustees towards their beneficiaries is paramount. When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally their best financial interests. In the case of a power of investment, the power must be exercised so as to yield the best return for the beneficiaries, judged in relation to the risks of the investments in question; and the prospects of the yield of income and capital appreciation both have to be considered in judging the return from the investment.'

266. Citing the case of Re: *Whiteley*, Megarry V-C said, at paragraphs 49 to 50,

> 'that the standard required of a trustee in exercising his powers of investment is that he must take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide. That duty includes the duty to seek advice on matters which the trustee does not understand, such as the making of investments and, on receiving that advice, to

act with the same degree of prudence. This requirement is not discharged merely by showing that the trustee has acted in good faith and with sincerity. Honesty and sincerity are not the same as prudence and reasonableness. Some of the most sincere people are the most unreasonable. Deliberately not taking advice is a reckless breach of trust.'

267. I find that, in investing the Scheme's assets in the manner in which they have apparently been invested (see Section D.3.4.1 above), without taking investment advice (Section D.3.4.2 above) and, in failing to keep accurate or up to date records of those investments, Mr Craig cannot be considered to have met the above requirements see paragraphs 264 to 266 above. The investments made were high-risk in nature and there was a lack of diversification of investment, showing a disregard for members' financial interests and a failure to avoid hazardous investments, contrary to the requirements imposed on trustees by *Cowan v Scargill* and *Learoyd v Whiteley*. The fact that Mr E's transfer request, and those of other Scheme members, had not been actioned, and that Dalriada has concluded that most of the Scheme's assets have been lost, is clear evidence of Mr Craig's failure to invest the Scheme's assets in accordance with his duties under case law, as detailed in paragraphs 264 to 266 above. I find therefore that Mr Craig failed to meet the minimum standards imposed on him by case law regarding investing the Scheme's funds and has failed to discharge his duty to exercise due skill and care in the performance of his investment functions. This constitutes a breach of trust on Mr Craig's part.

268. As I have explained in Section D.3.4.1 above, I do not accept Mr Craig's account of the manner in which members invested in the Scheme over the evidence that I have received from the other parties, including under oath. However, if I did accept that account, I would have found that Mr Craig had made those loans in breach of the case law outlined above. Making loans to companies, without taking security for those loans and leaving any due diligence to the Scheme's members to conduct themselves, cannot be viewed as having been carried out in accordance with any of the case law outlined in paragraphs 264 to 266 above.

269. Mr Reilly has submitted that, as the Post-2017 Investments were made by Mr Craig and he did not carry out or authorise any investment of the Scheme's assets himself, he cannot be held liable for breach of investment duties unless he acted passively and left the decision to Mr Craig, which he has denied having done, or can be found to be "vicariously liable" for Mr Craig's acts or omissions. Mr Kelly has also queried how action taken by Mr Craig can be deemed to have been the responsibility of his and Mr Reilly's.

270. Mr Reilly has referred to Lewin on Trusts, 20th Edition (**Lewin**), paras 41-094 and 36-074, which states that a trustee is not liable for the acts or defaults of their co-trustees unless the same happened through his own wilful default. Mr Reilly has referred also to commentary in Underhill & Hayton: Law of Trusts, 20th Ed (**Underhill & Hayton**), paragraphs 100.1-3, which cited the case of *Wilkins v Hogg*, in which it was found that:

> "There are three modes in which a trustee would become liable *according to the ordinary rules of law* – first, where, being the recipient, he hands over the money without securing its due application; secondly, where he allows a co-trustee to receive money without making due inquiry as to his dealing with it; and thirdly, where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the needful steps to obtain restitution or redress.".

271. However, Mr Reilly's submissions did not take into account the full commentary on liability for the acts of a co-trustee, as set out in either Lewin or Underhill & Hayton, or give due regard to the legislation specific to investment under pension schemes, in particular the 1995 Act, section 34(5) (**section 34(5)**). I shall consider that in paragraphs 273 to 292 below.

272. Regarding the investments made during Mr Kelly's and Mr Reilly's respective terms of office as Trustees (**Post-2017 Investments**), Mr Kelly and Mr Reilly have each submitted that they were not involved in any investment discussions or decisions and that they were unable to discover necessary details about the Scheme and its investments, despite having attempted to do so. I accept that neither Mr Reilly nor Mr Kelly actively invested Scheme assets themselves.

273. However, the investment duties and requirements set out in this Section D.3 were those of all three Trustees'; it was their duty to exercise their power of investment jointly[70]. Under section 34(5):

> "Subject to any restriction imposed by a trust scheme –
>
> (a) the trustees may authorise two or more of their number to exercise on their behalf any discretion to make any decision about investments…
>
> …
>
> but…the trustees are liable for any acts or defaults in the exercise of the discretion if they would be so liable if they were the acts or defaults of the trustees as a whole."

274. It is clear, from section 34(5), that any delegation of investment decisions and activity must be made to a minimum of two trustees and that, regardless of any such delegation, the responsibility and liability for such decisions and activity remains that of all trustees, whether or not they are actively involved in those decisions and/or activity themselves. Even in case where a trustee board has delegated its investment functions to an investment committee, the board is still required to monitor the activity of that investment committee and to satisfy itself that the scheme's investment functions are being carried out "in accordance with legal obligations, with the best interests of

[70] While, under Clause 14.2 of the Trust Deed, the Trustees were permitted to delegate "any of their duties, discretions or powers (other than the duties imposed on the Trustee regarding the termination of the Scheme and the distributions of assets) to any of their number", this ability to delegate was subject to section 34(5) which, as I have explained in paragraph 274 below, only allowed delegation of any discretion to make investment decisions to two or more trustees and, in any case, did not allow any trustee to abrogate his responsibility for investment decisions to his co-trustees.

beneficiaries in mind, and by people with the right expertise"[71]. I have already concluded, in Sections D.3.4.1 and D.3.4.1 and above in this Section D.6, that the Scheme's assets were not invested in accordance with the relevant legal obligations or in Members' best financial interests.

275. On their appointment as Trustees, Mr Reilly and Mr Kelly had become jointly responsible, together with Mr Craig, for the control of the Scheme's assets. The fact that Mr Kelly and Mr Reilly allowed that control to remain solely in Mr Craig's hands by taking no effective action to obtain access to, or any authority over, the Scheme's bank account, does not alter that responsibility, as is made clear by Section 34(5), as I have explained in paragraph 274 above.

276. Considering trust law more generally, the later part of paragraph 41-094 in Lewin provides that, "The practical importance of the principle that a trustee is not liable for the acts or defaults of a co-trustee is limited by the principle [also considered in paragraphs 13-026 to 13-037 of Lewin] that trusteeship is a joint office and that trustees must act jointly, but it is of substantial importance nonetheless." Lewin goes on to consider the effect of the removal of the statutory protection that, under section 30(1) of the Trustee Act 1925, had previously been afforded to trustees against the defaults of their co-trustees. Lewin notes that, due to case law that had pre-dated the legislation, the removal of the legislation "does not, however, make very much difference.", but it does point out that the absence of the statutory protection "throws back on the trustee the burden of proving that he has acted properly".

277. Lewin states, at 13-033, that "The law knows no such person as a passive trustee. A trustee, upon acceptance of the office, must not "sleep upon it" but must take an active part in the execution of the trusts[72]." Similarly, Underhill and Hayton states, at paragraph 100.4, that "Commonly, a trustee is liable for the acts of a co-trustee where he is a passive trustee who allows his co-trustee to exercise alone discretions which it is their duty to exercise jointly so that he himself is at fault.".

278. As I have outlined in paragraphs 131, 133 and 134 above, Mr Kelly was clearly aware that Mr Craig intended to invest Scheme assets in RAM. While Mr Kelly denies having had any active involvement in RAM, the fact remains that he was a director of RAM until shortly after his appointment as a Trustee, and that he took up that position again on 9 July 2018 (according to records at Companies House). I do not accept that Mr Kelly can have been unaware that investing in RAM constituted a high-risk investment (see Appendix 4 below) or, given his background in pension scheme compliance (see paragraph 50.2 above), that investing the assets of an occupational pension scheme in that manner would likely constitute a breach of trustee investment duties. Despite this, Mr Kelly took no steps whatsoever to prevent the investment from proceeding. In

[71] TPR's guide on 'DC investment governance', published July 2016

[72] Lewin cites the following cases: *Lingard v Bromley* (1812) 1 V. & B. 114; *Booth v Booth* (1838) 1 Beav. 125; *Styles v Guy* (1849) 1 Mac. & G. 422; *Trutch v Lamprell* (1855) 20 Beav. 116; *Belemore v Watson* (1885) 1 T.L.R. 241, CA; *Bahin v Hughes* (1886) 31 Ch.D. 390 at 398, CA' *Bacon v Camphausen* (1888) 58 L.T. 851; *Robinson v Harkin* [1896] 2 Ch. 415; *Goodwin v Duggan* [1996] NSWSC 363; *Selkirk v McIntyre* [2013] NZHC 575

fact, he facilitated the investment by stepping down from his position as a director of RAM. Further, Mr Kelly facilitated the Scheme's later investment in Merydion, by transferring its ownership to Mr McMahon, as explained in paragraphs 135 and 136 above.

279. Mr Kelly's submission that the decision to invest in RAM had been made before he was appointed as a Trustee does not assist him. On his appointment as a Trustee, the investment duties outlined in this Section D.3 were those of the Trustees' and, subject to any delegation (which, as I have explained in paragraph 274 above, would have had to have been made to a minimum of two of the Trustees and, by virtue of Section 34(5), liability for any investment decisions would have remained with all of the Trustees regardless of any such delegation) the investment power under the Trust Deed was that of the Trustees' collectively.

280. As Mr Kelly knowingly allowed Mr Craig to invest in RAM and Merydion, in exercise of the Trustees' joint power of investment under Clause 10 of the Trust Deed, I find that Mr Kelly too acted in breach of trust in allowing those investments to proceed.

281. I have seen no evidence that Mr Kelly was aware of the other Post-2017 Investments until after they had been made[73]. However, as he was clearly aware of the investment in RAM, I consider that Mr Kelly was on notice that further investments might be made with Scheme assets. Despite his professional background in pension scheme investment compliance (see paragraph 50.2 above), from which Mr Kelly must have been aware of the investment duties and obligations on pension scheme trustees outlined in this Section D.3, Mr Kelly took no or, at best, inadequate action to prevent, or to try to prevent, further investments by Mr Craig without his or Mr Reilly's input from happening[74]. Mr Kelly's lack of access to the Scheme's bank accounts is no excuse; Mr Kelly was under a duty to bring the Scheme's property under his control on his appointment[75]. I find that, as a consequence of Mr Kelly's passivity in relation to the Scheme's investments, that is his omission from taking any action to bring the investment decisions under the control of all of the Trustees or to prevent investments that were clearly in breach of the requirements of statute and case law, as explained in Section D.3 and earlier in this Section D.6, Mr Kelly acted in breach of trust in allowing the other Post-2017 Investments to proceed. As I have explained in paragraphs 273 to 280 above, Mr Kelly is also responsible for the breaches of trust that Mr Craig committed in carrying out the Trustees' investment functions.

282. I shall now consider Mr Reilly's position. Mr Reilly has submitted that he did not act passively and did not leave investment decisions to Mr Craig, having agreed with Mr

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[73] At the latest, Mr Kelly became aware of those investments on 6 April 2017, on reading the 6 April 2017 Email.

[74] I note that Mr Kelly submitted at the Oral Hearing that he had sent Mr Jenkins a Deed of Removal in respect of Mr Craig on 24 March 2017 (see paragraph 63 above). However, Mr Kelly submitted that the intention had not been for Mr Craig to be removed, but that Mr Craig would instead engage with him and Mr Reilly in relation to corresponding with the BEIS to achieve the payment of £50,000 of Scheme monies, held by Refresh Recovery, to the Scheme.

[75] Lewin, at 34-015

Craig and Mr Reilly that no investment decisions would be made without unanimous Trustee agreement. As I have explained in paragraph 61 above, that submission conflicts with the evidence that TPO has received from Dalriada. I also note that, in his email to the other Trustees of 6 April 2017 (see paragraph 66 above), while he asked for further information concerning the various investments listed in that email, Mr Reilly did not enquire why those investments had been made without his knowledge or agreement. In fact, Mr Reilly has submitted no evidence that he challenged Mr Craig for having made these investments without his approval. Having seen no written evidence at all that the Trustees agreed that unanimous Trustee approval was required in relation to investment decisions, I do not accept Mr Reilly's submission in that respect.

283. Mr Reilly, although unaware that an investment was to be made in RAM specifically, was aware, as early as 1 February 2017, of a proposal that a significant amount of Scheme funds was to be applied to purchase a hotel (see paragraph 131 above).

284. Since the Oral Hearing, in response to my second Preliminary Decision, Mr Reilly has submitted that his file note of 1 February 2017 had been prepared and used by him from that date, as "an on-going aide memoir, which he added to over time" and that the note cannot therefore be taken as evidence of his knowledge as at 1 February 2017 in respect of "any particular matter now contained on the face of the note."

285. However, the copy of the file note that Mr Reilly sent to TPO on 10 January 2022, shows that it had been emailed by Mr Reilly to himself, from his personal 'gmail' account, on 1 February 2017, at 5:42 PM. At the foot of the file note, Mr Reilly had noted his time engaged as "11 o'clock until 5:45". In the note, Mr Reilly has referred to having arranged to meet with Mr Craig on "Friday" and speculated about dates for potentially flying to Spain, referring to "the week of the 20th" as being unsuitable. If Mr Reilly had indeed added to that note later on, I consider that he would have been more specific in relation to the dates mentioned in the note, and that he would have documented any later additions. Further, the correspondence between Mr Craig, Mr McMahon and Fieldings Porter (see paragraphs 128 and 129 above) was dated 10 February 2017 and 16 February 2017, respectively, which is consistent with the content of the file note concerning the hotel purchase having been dictated on 1 February 2017.

286. Mr Reilly has sent TPO a copy of an email from him to Mr Craig, sent on 18 August 2017, in which Mr Reilly queried whether the Scheme had any interest in a hotel referred to as 'Northrop Hall' and whether any investment needed to be secured "by way of charge", stating that he had not seen any documents. It seems, from the emails between Mr Craig and a representative from a firm of property consultants[76], that Mr Craig had intended that the Scheme would purchase the freehold of Northrop Hall. Mr Reilly has submitted this as evidence to support his submission that he was not aware of any proposed hotel purchase on 1 February 2017. However, Mr Craig's emails with Fieldings Porter and Mr McMahon (see paragraphs 128 to 129 above) refer to "IBIS Coventry and IBIS Birmingham", not to Northrop Hall. 'Northrop Hall' was located in

[76] Colliers International Property Consultants Limited

Wales, so its proposed purchase seems to have been a separate matter from the proposed hotel purchase that was the subject matter of Mr Craig's emails and mentioned in Mr Reilly's file note. Taking all of this into account, I do not accept that the copy of the file note, dated 1 February 2017, was a later version of the original note and I find, on the balance of probabilities, that Mr Reilly was aware, by 1 February 2017 (albeit at a high level) that an investment using Scheme funds was planned.

287. Mr Reilly submitted that, while he had made enquiries into the transaction mentioned in his file note, such as the location of the hotel and whether any due diligence had been conducted, he never received any information and, on questioning at the Oral Hearing, was unable to tell me whether the proposed investment had gone ahead. It seems that, having failed to obtain the information that he had requested, while the fact that he was unable even to ascertain the location of the hotel would have alerted him to the real possibility that an investment was to be made in breach of trust, Mr Reilly took no further action to ensure that the transaction would not proceed, other than to ask that all "deals" were sent to him for legal review before being signed off[77]. Instead, he assumed a passive role, with the consequence that the Scheme's investments in RAM went ahead, by Mr Craig's unchallenged exercise of the Trustees' joint power of investment.

288. I find that, in failing to take any adequate steps to prevent the proposed investment that Mr Reilly had identified on 1 February 2017, which was effected by Scheme monies being paid to RAM, from going ahead, Mr Reilly acted passively in relation to the investment, he omitted to take action and so acted in breach of trust by allowing it to proceed. Similarly, I have seen no evidence that Mr Reilly took any steps, on learning of the Scheme's investment (or proposed investment) in Northrop Hall to prevent it from proceeding or to attempt to minimise any loss to the Scheme, so I find that he also acted in breach of trust in allowing that investment to proceed. As I have explained in paragraphs 273 to 277 above, Mr Reilly is also responsible for the breaches of trust that I have found Mr Craig to have committed in the exercise of the Trustees' investment functions relating to the investment in RAM and the investment in Merydion.

289. Given that the other Trustees were not forthcoming with information concerning the proposed hotel purchase and Mr Reilly had not gained access to or control over the Scheme's bank accounts, it cannot have escaped Mr Reilly's attention that investment activity might be continuing without his knowledge. However, I have seen no evidence that Mr Reilly took any steps to prevent further investment activity from proceeding. As a consequence, I find that Mr Reilly acted in breach of trust in allowing the other Post-2017 Investments to proceed. As I have explained in paragraph 273 to 277 above, Mr Reilly is also responsible for the breaches of trust that Mr Craig committed in carrying out the Trustees' investment functions.

290. Having become aware, or received confirmation, (as the case may be) of the Post-2017 Investments, had they exercised their duty of care properly, Mr Kelly and Mr Reilly

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[77] This is evidenced by an email of 1 March 2017, from Mr Reilly to Mr Dowd and Mr Kelly, which was sent to TPO by Dalriada following the Oral Hearing.

should both have insisted on seeing the relevant paperwork evidencing matters such as security taken for the loans and due diligence having been carried out and, crucially, that “proper advice” had been taken. I note that Mr Reilly asked for paperwork and whether due diligence had been carried out in his 6 April 2017 Email, but I have seen no evidence that he followed those requests up before he took leave of absence. Mr Reilly has submitted that he had thought that an investment consultant had been appointed by the Scheme, as that was stated in the SIP. However, Mr Reilly made no enquiry of that investment consultant, whose name and firm were included in the SIP, with regard to any of the Post-2017 Investments, either to check that he had provided advice or to seek any advice on the retention of the Post-2017 Investments[78].

291. Mr Kelly has submitted that he had relied on the fact that Mr Reilly had taken on the role of investigating the Scheme’s investment position and that he had no involvement in agreeing transactions and had no access to or sight of the Scheme’s bank accounts. However, the exercise of any discretion to make any decision about investments, which I consider should be interpreted broadly so as to include decisions concerning the monitoring of investments already made, could not be delegated to one person (see paragraph 273 above) and, by being entirely passive in that regard, Mr Kelly acted in breach of trust.

292. I consider that, by failing to take adequate steps to ensure that the investments made by their co-Trustee had been carried out in accordance with the legislation and case law outlined in this Section D.3, Mr Reilly and Mr Kelly acted in breach of the 1995 Act, section 36(4) and in breach of their duty of care in relation to an ‘investment function’ under the 1995 Act, section 33.

293. Having found that Mr Reilly and Mr Kelly are jointly liable, with Mr Craig, for the various breaches of trust identified in relation to the Post-2017 Investments in Section D.3.4 and earlier in this Section D.3.6 (see paragraphs 280 to 281, 288 to 289 and 291 above), as well as having committed the breach of trust and equitable duty identified in paragraph 292 above, in order to address Mr Reilly’s submissions concerning wilful default, I shall consider whether, had I not found Mr Reilly and Mr Kelly to be jointly liable for Mr Craig’s acts and omissions in respect of the Post-2017 Investments, I should find Mr Reilly and Mr Kelly liable through wilful default. It should, however, be noted that wilful default is irrelevant for the purpose of investments, given that the 1995 Act, section 33, prevents a trustee from excluding or restricting liability for breach of any obligation under any rule of law to take care or exercise skill in the performance of any investment functions[79], and that I have found Mr Reilly and Mr Kelly to be liable for the various breaches of trust and breach of their equitable duty in relation to the investment of the Post-2017 Investments, as explained above in this Section D.3.6.

[78] The 1995 Act, section 36(4) applies to the retention of investments, requiring trustees to “determine at what intervals the circumstances, and in particular the nature of the investment, make it desirable to obtain [proper advice]”, and to “obtain and consider such advice accordingly”.
[79] I shall explore this more fully in Section D.10 below.

294. Mr Reilly's submissions on this point make only brief reference[80] to paragraph 41-099 of Lewin, which is as follows:

> "If one trustee knows of a breach of trust by another and he either conceals it[81] or takes no active measures for the protection of the beneficiary's interest[82], he is liable for the consequences of the breach. Section 30(1) did not protect him, because he was personally guilty of wilful default.".

Mr Reilly has not mentioned that Lewin expands upon this point, in paragraphs 41-100 to 41-101, as follows:

> "*Where a breach of trust is threatened*
>
> If a trustee threatens a breach of trust, his co-trustee should seek to prevent it, if necessary by obtaining an injunction[83]. (41-100)
>
> *Where the breach of trust has already been committed*
>
> If the breach of trust has already been committed, the co-trustee should bring an action for the restoration of the trust fund to its proper condition[84] or, at least, take such other active measures as in all the circumstances may be most prudent[85]. In any but a very simple case, he would be well advised to seek the directions of the court as to what, if any, steps he should take.[86]" (41-101)

295. In the context of the Scheme's investments, which Mr Reilly had already discovered included (for example) investments in dormant companies, as evidenced by the April 2017 Report, the fact that there was no paperwork, including evidence of any due diligence, available in relation to the Post-2017 Investments would have alerted Mr Kelly and Mr Reilly to the strong possibility that breaches of trust had already been committed. This can only have escaped their notice if they chose to ignore it or closed their eyes and ears to the possibility that breaches of trust had been committed. Given that investments had been carried out since their appointment as Trustees, some of which had occurred after their first Trustee meeting with Mr Craig, I cannot accept that Mr Kelly or Mr Reilly can have been confident that further investments would not be made without their knowledge and authorisation. However, I have seen no evidence that either of them took any action to prevent any further breaches of trust or to protect

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80 See paragraph 271 above, in which I have observed that Mr Reilly has omitted key parts of Lewin's and Underhill & Hayton's commentary in respect of a trustee's liability for a co-trustee's acts.

81 *Boardman v Mosman* (1799) 1 Bro.C.C. 68 is cited.

82 Lewin cites the following cases: "*Brice v Stokes* (1805) 11 Ves.Jr. 319; 2 W. & T.L.C. (9th edn) 581; and see *Walker v Symonds* (1818) 3 SW. 1; *Oliver v Court* (1820) 8 Price 127 at 166; *Booth v Booth* (1838) 1 Beav. 125; *Gough v Smith* [1872] W.N. 18."

83 Lewin cites the case of *Re Chertsey Market* (1818) 6 Price 261 at 279.

84 Lewin cites the case of *Earl Powlett v Herbert* (1791) 1 Ves. Jr. 297.

85 Lewin refers the reader to *Walker v Symonds* (1818) 3 Sw. 1.

86 Lewin refers to CPR, Pt 64, r.64.2(a) and Practice Direction 64B – Applications to the Court for Directions by Trustees in relation to the Administration of the Trusts.

the Scheme's beneficiaries' interests, or took "prudent" measures in accordance with paragraph 41-100 or 41-101 of Lewin.

296. Moreover, the Post-2017 Investments, of which I am aware, have all been made in companies which had no assets or trading history and/or were owned or controlled by persons with whom one or more of the Trustees, or other individuals involved in running the Scheme, had some personal or business connection (see Section A.2 above). While this may not have been apparent to Mr Reilly or Mr Kelly in relation to all of the Post-2017 Investments at that time (with the exception of the investments in RAM), further enquiries using resources readily available to them, such as Companies House, would have revealed this. As he had read the Trust Deed and was familiar with the law governing the investment of pension scheme assets, including Section 34(5), Mr Reilly will have been aware that those investments having been made other than by the Trustees' joint exercise of their investment power in the absence of any delegation constituted a breach of trust on Mr Craig's part. I do not accept that it can have passed either Mr Kelly or Mr Reilly by that breaches of trust had occurred in relation to the Post-2017 Investments.

297. I consider that Mr Reilly's and Mr Kelly's failure to take further action on becoming aware of the Post-2017 Investments amounted to breach of trust and wilful default, meaning that, even if I had not found them liable, together with Mr Craig, for the various breaches of the requirements and duties imposed on them by statute and case law (paragraphs 269 to 292 above) they would still be liable for the loss to the Scheme caused by the Post-2017 Investments, subject to any protection afforded to them by the exoneration clause under the Trust Deed and/or Section 61 of the Trustee Act 1925, both of which I shall consider in Section D.10 below. I shall consider also, in Section D.8 below, the fact that neither Mr Reilly nor Mr Kelly reported matters to TPR when, if exercising their trustee duties properly, they should have done so.

D.3.7 Statement of Investment Principles (**SIP**)

298. As the Scheme had more than 100 members, the Trustees were required, by the 1995 Act, section 35, to secure that a SIP was prepared and maintained for the Scheme and that it was reviewed at least every three years or without delay following any significant change in investment policy[87]. Section 35(3) and (4) requires the SIP to comply with the requirements and cover the matters set out in Regulation 2 of the Investment Regulations (**Regulation 2**). Copies of the relevant parts of section 35 and Regulation 2 are included in Appendix 11.

299. It seems that a SIP was prepared in relation to the Scheme in 2016. However, the SIP does not entirely fulfil the requirements of Regulation 2 and, from the evidence that I have seen and, as commented upon previously, it appears the SIP was largely ignored by the Trustees.

[87] Section 35(1) of the 1995 Act and Regulation 2(1) of the Investment Regulations

300. Paragraph (2) of Regulation 2 requires trustees to:

> "(a) obtain and consider the written advice of a person who is reasonably believed by the trustees to be qualified by his ability in and practical experience of financial matters and to have the appropriate knowledge and experience of the management of the investments of such schemes; and
>
> (b) consult the employer."

301. In the 'Introduction' section on page 3 of the SIP, it is stated:

> "In drawing up this statement, the Trustee has considered advice from his investment consultant, and has consulted with all participating employers. The Scheme's Investment Consultant is Roderic Owen-Thomas who is the Discretionary Fund Manager at Logic Investments".

302. However, TPO has received no evidence that any written advice was obtained or considered by Mr Craig before the SIP was prepared. Dalriada has submitted that a representative of Logic Investments had, during a telephone call on 6 March 2018 with Dalriada's representative, Mr Purvis, denied having provided any investment advice. I consider, on the balance of probabilities, that no written advice was obtained. On that basis, I find that Mr Craig acted in breach of the requirement of paragraph (2) of Regulation 2, in failing to obtain any written advice before the SIP was prepared.

303. Certain statements made in the SIP have either clearly not been followed in practice by the Trustees, or are demonstrably untrue, as I shall explain in paragraphs 304 to 309 below.

304. The Trustee's investment objectives stated in the SIP include the following:

- "To enable members to provide adequately for their retirement via an appropriate investment of their accumulated contributions." and
- "to acquire suitable assets of appropriate liquidity that will generate income and capital growth to meet the cost of both current and future benefits."

305. As I have explained above in sections D.3.4.1 and D.3.6, the Scheme's investments were inappropriate, high-risk and illiquid. It is clear that Mr Craig failed to fulfil the SIP's objectives and I have seen no evidence that he even attempted to do so.

306. Under the heading 'Investment policy', it is stated that there are "currently three investment profiles for members to choose from", those investment profiles being labelled as: "Balanced"; "Cautious"; or "Adventurous". The SIP states that "New members are automatically placed into the balanced profile unless they choose otherwise".

307. I have seen no evidence that members' funds were allocated to any particular investment or investments, or that members were given any choice as to the

investment of their funds[88]. The investments of which I am aware certainly would not have fitted into the "Balanced" or "Cautious" profiles. The "Adventurous" profile was described as moving to "lower risk investments approaching retirement". I have seen no evidence that any "lower risk" investment existed under the Scheme.

308. There is also a statement that "Currently the return-seeking asset portfolio is predominantly asset backed company loans…with a small allocation to illiquid private equity and property assets. The matching asset portfolio is a combination of index-linked and fixed interest gilts". Again, I have seen no evidence that any of this is true; there is no evidence that any loan made by the Scheme was backed by any security, or that any gilts of any type were purchased by the Trustees. The majority of the investments of which I am aware were illiquid.

309. The Trustee's stated policy in the SIP was "that there will be sufficient investments in readily realisable assets to meet cash flow requirements in foreseeable circumstances…The Trustee will hold sufficient cash to meet benefit and other payment obligations.". The fact that the Trustees have failed to fulfil Mr E's transfer request, and those of other members, together with the apparent loss of the Scheme's assets almost in their entirety, is evidence that Mr Craig and (to the extent applicable) the other Trustees have failed to act in accordance with that policy and/or that the SIP did not set out accurately the investment principles that actually governed decisions about the Scheme's investments.

310. As the SIP was clearly not relevant to the manner in which the Scheme's assets were actually invested and no advice was obtained or considered before the SIP was prepared, I find that Mr Craig breached the requirements of section 35(3), and (4) and Regulation 2.

311. Mr Reilly has submitted that he read the SIP when he was first appointed as a Trustee, but that it was only after he had investigated the investments already made that he noted, in his August 2017 Report, that the SIP had not been adhered to. Mr Reilly has submitted that it was too late to do anything about that by then.

312. I do not accept that Mr Reilly could not reasonably have become aware of the failure to invest in accordance with the SIP before August 2017, or that he was in fact unaware of that failure. It is clear, from the April 2017 Report, that Mr Reilly was on notice that at least some of the Scheme's investments had been made other than in accordance with the SIP and that, due to lack of access to the Scheme's accounts and paperwork, the position could not be ascertained fully. As I shall explain in Section D.8 below, Mr Reilly should have taken the lack of adherence to the SIP into account, in the context of his findings in the April 2017 Report and his subsequent email of 6 April 2017, and reported the matter to TPR.

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[88] It seems that shares in Heather Research Limited or Tulip Research Limited may have been purchased with the intention of benefiting a small number of members, who were introduced to the scheme by a Mr Dan Gregory. However, in reality, shares in Tulip were bought in bulk for the Scheme and there is no evidence available at Companies House that shares were ever purchased in Heather Research at all.

313. I note Mr Kelly's submission that he was not aware that a SIP had been produced for the Scheme. I find this concerning. Under the 2004 Act, section 247, Mr Kelly was required to have acquired knowledge and understanding of the law relating to pensions and trusts within six months of becoming a Trustee of the Scheme. Had Mr Kelly fulfilled that requirement, he would have learned that the Scheme was required to have in place a SIP and, with that knowledge, he should have made enquiries as to whether or not the Scheme had one. Further, given Mr Kelly's prior experience, which included supervising occupational pension schemes from an investment management regulation context, I cannot see how the requirement for the Scheme, with significantly more than 100 members, to have had a SIP in place, can have escaped his attention.

314. Further, I note, from Mr Kelly's submissions given at the Oral Hearing, that he had considered the identification of the Scheme's assets to have taken priority over the identification of any SIP. Mr Kelly submitted that having a SIP in place would, itself, have achieved nothing. Mr Kelly had largely relied upon Mr Reilly to conduct enquiries into the Scheme's investments, as he said that Mr Reilly had volunteered to do so and was geographically more proximate to the sources of information. Mr Kelly admitted, at the Oral Hearing, that he had undertaken no research of his own regarding the role and requirements of a pension scheme trustee and he did not complete the TKU Course despite having been made aware of it, relying instead upon Mr Reilly having carried out research into those requirements. While Mr Reilly had arranged for a file to be opened in the office, Mr Kelly remarked that that was "no good" for him, as he was not in the office himself. For Mr Kelly, with his background of experience in FCA compliance, to have turned a blind eye to the requirement to educate himself on the most basic aspects of the requirements of trustees of occupational pension schemes, on the basis that he had delegated that role to another, is astonishing. Mr Kelly's submission that he was unaware of the existence of a SIP does not, therefore, assist him. Mr Kelly was aware that the Scheme was to invest in RAM (see paragraph 131 above). Had Mr Kelly reviewed the SIP, it would have been apparent to him that the investment in RAM was unlikely to have accorded with the SIP. On receiving and reading Mr Reilly's April 2017 Report[89] and the 6 April 2017 Email (which he has not denied having read), Mr Kelly too was on notice that the Scheme's investments were not being made in accordance with the SIP. I shall consider this in the context of reporting matters to TPR, in Section D.8 below.

D.3.8 Fraud on the power of investment

315. I have considered whether the investments made by Mr Craig and, where applicable, the other Trustees, amounted to a fraud on the power of investment. This concept was explained, by Bean J in the case of *Dalriada v Faulds*[90] as follows:

> "66 The final string to Mr Spink's bow, if I am wrong both on s173 and on the meaning of 'investments', is the argument that the MPVA loans constituted a fraud on the power of investment. This time-honoured but (at least to the

[89] Mr Kelly's having read the April 2017 Report is evidenced by the fact that he replied to it on 6 April 2017.

[90] *Dalriada v Faulds* [2011] 104 PBLR - [2011] EWHC 3391 (Ch)

layman) misleading phrase does not connote dishonesty. It was explained by Lord Parker of Waddington in *Vatcher v Paull* [1915] AC 372 at 378:

It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power. Perhaps the most common instance of this is where the exercise is due to some bargain between the appointor and appointee, whereby the appointor, or some other person not an object of the power, is to derive a benefit. But such a bargain is not essential. It is enough that the appointor's purpose and intention is to secure a benefit for himself, or some other person not an object of the power.

67 Thomas on Powers puts it in this way (at paragraph 9-01):

Thus there are two basic elements in a fraudulent exercise of a power first, a disposition beyond the scope of the power by the donee, whose position is referable to the terms, express or implied, of the instrument creating the power; and, secondly, a deliberate breach of the implied obligation not to exercise that power for an ulterior purpose. The first element is common to both a fraudulent and an excessive execution. It is the second element which distinguishes a fraud on a power.

68 Thomas goes on to emphasise (at paragraph 9-04) that the scope and purpose of a power must be determined objectively:

The true intention of the donor of the power as to its scope and purpose must, of course, be ascertained from the instrument creating the power, even where the donor and the donee are the same person."

316. As I have outlined in Appendix 3 below, many of the entities in which Mr Craig invested were linked with acquaintances of Mr Craig's, some of whom were also involved in the running of the Scheme. It is also clear that the investments made were high-risk in nature (see Sections D.3.4 and D.3.6 above).

317. This brings into question whether Mr Craig or, as applicable, the other Trustees could reasonably have considered exercising their investment powers in the manner in which they did to have been a good investment and to have accorded with the Scheme's purpose, stated in Recital (1) of the Trust Deed, of "securing benefits under a pension scheme".

318. The intention behind the power of investment is clear from Recital (1) of the Scheme's Trust Deed. I find that, in investing Scheme assets in the various companies set out in Section A.2 above, to the benefit of various acquaintances of Mr Craig's, Mr Craig committed a fraud on the power of investment and, in doing so, acted in breach of trust. Even if Mr Craig had not been acting in conscious breach of trust, he clearly acted recklessly or indifferently. For the avoidance of doubt, although I have found that the manner in which Mr Craig (or, as applicable, the Trustees) invested Scheme funds

amounted to a fraud on the power of investment, I am satisfied that the Scheme was set up for the purpose stated in Recital (1) of the Trust Deed.

319. I have considered Mr Craig's submission, received after I had issued my second Preliminary Decision, that the Scheme was set up to enable members to access their "frozen pensions", and not to provide any kind of investment growth. While I have seen evidence that some degree of pension liberation occurred in relation to the Scheme, I do not accept that that was the Scheme's sole purpose on establishment. However, if I had accepted that position and had been required to make a finding as to whether such activity constituted a fraud on the power of investment, I would have concluded that it did, as such investment activity would clearly have been contrary to members' interests and for a purpose other than securing benefits under the Scheme in accordance with Recital (1) of the Trust Deed.

320. Mr Reilly and Mr Kelly had both submitted that they were not involved in the Scheme's investments. Any investments that were made after their appointment as Trustees of the Scheme were, they have submitted, made without their knowledge. Although, as I have explained in Section A.2 above, Mr Kelly and Mr Reilly were clearly aware of at least some of the Scheme's investment activity during their time as Trustees and were passive in relation to the investment of Scheme assets during that time (see Section D.3.6 above), I do not consider that their involvement or knowledge provides sufficient grounds on which to make a finding that either of them committed a fraud on the power of investment. While the use of Scheme monies to purchase one or more hotels as part of what seems to have been a venture capital arrangement was clearly a high-risk investment and one that did not accord with the law governing the Trustees' exercise of their investment powers, I have not seen sufficient evidence of Mr Reilly's or Mr Kelly's active involvement in that transaction to allow me to make a finding that either of them committed a fraud on the power of investment.

D.4 Other payments from the Scheme's funds

D.4.1 The Scheme's bank accounts

321. I shall consider first Mr Craig's submissions concerning the bank account used for Scheme funds until December 2016. As I have explained in paragraph 104 above, while Mr Craig has submitted that Scheme funds were not intermingled with those of Refresh Recovery Limited's, the NatWest bank statements that TPO has reviewed evidence that monies were paid in and out of the account regarding at least 25 companies which had Refresh Recovery Limited appointed at the time, either as an Administrator or a Liquidator.

322. Mr Craig has submitted that Scheme funds were never mixed with those of Refresh Recovery Limited's; they were banked in a trust estates account with NatWest. Mr Craig has explained that that account comprised of "hundreds of discrete trust accounts for individual companies mainly in insolvency, held in Mr Craig's own name. Funds are held separately on trust for each company, in this case [the Scheme] had its own account. It was never and never could be mixed with Refresh Recovery Limited. The

account concerned was a separate trust account named Gordon Craig No 3 Estates Account.”. Mr Craig has submitted that: this account was subject to external audit five times every three years; and no irregularities had been found.

323. While I accept that Mr Craig might well have had a trust account open in his own name, as I have observed in paragraph 322 above, it is clear from the bank statements that TPO has seen that Scheme monies were not held separately from those of Refresh Recovery Limited’s[91]. Mr Craig has not submitted any evidence to substantiate his submission that the bank account was audited by various external bodies or provided the results of any such audit. I do not accept Mr Craig’s submission that Scheme funds were not intermingled with those of Refresh Recovery Limited’s.

324. Regarding the Barclays bank account, which appears to have been used exclusively for Scheme funds since December 2016, I have already dealt with Mr Craig’s submission that he had no access to or control of that account, see paragraph 247 above. For the reasons set out paragraph 248 above, I do not accept that submission.

D.4.2 Payments to companies

325. The bank statements of which TPO has received copies, show that payments to various entities, as listed in paragraph 143 above, were made from what seem to have been the Scheme’s funds, to the total value of £3,696,395.64. As is detailed in Appendix 3 below, many of those entities were connected with one or more of the individuals listed in paragraph 98 above, who worked alongside Mr Craig in relation to the Scheme, and/or to one or more relatives of such individuals. Of particular concern are the payments, of a total value of £750,000, which were made to the former law firm RMJ Solicitors (**RMJ**), which was closed down by the SRA in 2017, over concerns about breaches of the solicitor’s accounts rules[92]. The principal of that firm was struck off by the SRA in 2019, for “turning a blind eye” to the fact that some of his clients were subject to pension scams.

326. TPO has received no explanation as to why these payments were made, although it seems that at least part of RMJ’s involvement with the Scheme concerned the loans to members made by the Shawhill companies (see paragraph 114 above).

327. I have seen no evidence to show that the making of any of the payments was a legitimate use of the Scheme’s funds. Many of the payments will have benefited acquaintances of Mr Craig’s due to their interests in the companies that received the payments while, as a consequence, the Scheme’s funds were reduced by nearly 25%, with no prospect of any return.

328. I cannot see that any power given to the Trustees by the Trust Deed, or the purpose of the Scheme as stated in Recital (1) to the Trust Deed, can have authorised the Trustees to make these payments. Further, in the absence of any explanation for these

[91] TPO’s reconciliation of the bank statements of the NatWest account show 2,373 transactions relating to Refresh Recovery, of which £4,518,708.22 was paid out of the account and £4,293,787.94 was paid in.
[92] https://www.solicitorsjournal.com/Sjarticle%2FSRA%20closes%20RMJ%20Solicitors

payments, I cannot see that any reasonable trustee would consider that paying out nearly 15% of the Scheme's assets, with no prospect of any return, could be considered to have been for the benefit of the Scheme's beneficiaries. I consider that, in making those payments, or in allowing them to be made, Mr Craig acted in breach of trust.

329. Mr Reilly and Mr Kelly have both submitted that they were not involved in making payments from the Scheme's funds and that they had no access to the Scheme's accounts. However, given their respective experience prior to becoming Trustees of the Scheme and the fact that they were clearly aware[93] of the requirement, under the 2004 Act, section 247, to be conversant with, among other things, "any document recording policy" and to have an understanding of "the law relating to pensions and trusts", I find it most surprising that Mr Reilly and Mr Kelly remained in office as Trustees for as long as they did without reporting to TPR their lack of access to the Scheme's bank account, as well as other matters of concern, such as those that Mr Reilly outlined in the April 2017 Report (see Section A.1.3 above). I shall explore this further in Section D.8 below.

D.4.3 Payments to individuals associated with the Scheme

D.4.3.1 Payments to the Trustees

330. The Scheme's bank accounts show that Mr Craig received a number of payments between November 2015 and November 2016, of a total value of £489,430. Mr Craig has submitted that the payments recorded in the bank statements, as having been paid to a personal account in his name, were in fact paid to OFSL. According to Mr Craig, OFSL's own bank account had been closed by NatWest in November 2015, as a winding up order had been presented against OFSL. However, OFSL was "entitled to substantial commissions", which were "legitimately and contractually owed to OFSL from the fund banking in a specific trust account" and therefore needed a bank account in order to receive those commissions and so that OFSL could pay its ongoing expenses. Mr Craig has submitted that he allowed OFSL to use his "Chartered Accountants Clients Account" [*sic*], which was named "G Craig No 1 Account" (the **No. 1 Account**) and was held at Barclays Bank and that this was not a personal account.

331. Mr Craig has not provided evidence to substantiate his submission, set out in paragraph 330 above, and TPO's reconciliation of the bank statements shows only one payment, of £5,180, from the NatWest account to the No. 1 Account, made during August 2016. So, I do not accept Mr Craig's explanation for the payments shown by the bank statements to have been made to him. Even if I were to accept that the payments that were apparently made to Mr Craig were in fact made to OFSL, this would have constituted a conflict of interest for the reasons that I have set out in Section D.2 above. As I have already explained in Section D.2 above, if those payments were made to OFSL, Mr Craig would have benefited from them and I would have found that, in

[93] See paragraph 57 above.

allowing payments to OFSL from Scheme funds, Mr Craig failed to act in good faith for the benefit of the Scheme's members.

332. On the basis that the payments were in fact made to Mr Craig himself and that Mr Craig has provided no explanation for those payments, I find that Mr Craig acted in breach of trust in making and/or accepting those payments. Mr Craig cannot be considered to have acted honestly or in good faith in doing so and the fact that he has made submissions regarding those payments, which I can only regard in the face of all the evidence presented as false, is evidence of Mr Craig's lack of honesty in that regard.

333. Further, Mr Reilly and Mr Kelly confirmed, at the Oral Hearing, that they each charged fees of £4,000 per calendar month for their work as Trustees.

334. Clause 20.1 of the Trust Deed permits Scheme trustees to "agree fees with the Administrator which may be paid out of the Fund". Clause 20.3 states that "Any Trustee…may retain any fees, brokerage, commission, remuneration and expenses it receives in connection with the Scheme.". However, I cannot see that any services that Mr Craig provided to the Scheme can have amounted to fees of nearly half a million pounds. I find, therefore, on the balance of probabilities, that Mr Craig acted ultra vires, and therefore in breach of trust, by making these payments to himself out of the Scheme's funds.

335. Regarding Mr Kelly's and Mr Reilly's fees, Mr Reilly has submitted that they were in line with the average pension scheme trustees' fees, as set out in a report prepared by PwC and that, compared with his hourly rate that he charged to clients in his capacity as a Solicitor, he was effectively working at a discount.

336. I have not seen a copy of the report that Mr Reilly has mentioned. In fact, a report published by PwC in July 2017, which is available online in the public domain, shows that pension scheme trustees' fees, even in relation to pension schemes with funds far larger than that of the Scheme, are considerably lower than £4,000 per month[94]. Mr Reilly has submitted that, although a trustee is not necessarily entitled to charge by reference to his normal charging rate, that rate can act as an initial reference point and will be relevant if it had been approved and is "commensurate with the nature of the service provided"[95]. While I have seen no evidence that Mr Reilly's and Mr Kelly's respective rates of remuneration had not been agreed, I do not agree that the rate was "commensurate with the nature of the service provided". Mr Reilly and Mr Kelly were working as trustees, not as solicitors. As I shall explain in paragraphs 337 to 340 below, I cannot see how Mr Reilly or Mr Kelly could have considered that their rate of remuneration, at £4,000 per month for two days' work as pension scheme trustees, to be suitable.

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[94] https://www.pwc.co.uk/pensions/insights/pwc-trustee-survey.pdf Mr Reilly has queried my reference to this report, on the basis that it is dated after his appointment, so cannot have been the report that he had referred to. I accept that this will not have been referred to by Mr Reilly before his appointment. However, I would not expect trustee remuneration rates to have changed significantly between Mr Reilly's appointment and the publishing of this report.

[95] Mr Reilly has cited the case of *Pullan v Wilson* [2014] EWHC 126 in support of this submission.

337. Mr Reilly has submitted, in response to my second Preliminary Decision, that in fact he worked on average around 8 days per month, so was actually paid well below his hourly rate, putting in more work than he invoiced the Scheme for and doing so in the Scheme members' interests. This has no bearing on the fact that Mr Reilly charged £4,000 per month for January, February and March, in which he had worked for two days per month, as the additional hours worked took place after he had returned from sickness absence. I do not accept that Mr Reilly's investigations carried out after his return from sickness absence were in the Scheme members' interests. As I shall explain in Section D.8 below, had Mr Reilly acted in Scheme members' interests, he would have reported matters to TPR before he went on sickness leave, so that TPR could itself investigate the concerning matters that he had identified. Mr Reilly has submitted that the need to report matters to TPR became apparent only because he had undertaken the investigative work following his return from sickness absence, for which he charged the Scheme. I disagree with that submission, for the reasons set out in Section D.8 below.

338. Mr Reilly has provided TPO with copies of two surveys of pension scheme trustees' pay: one entitled '2013 Winmark Pension Chair Remuneration Survey' (the **Winmark Survey**); and another entitled 'The PwC Trustee Pay Survey 2020 Lite Report' (the **PWC Survey**). Both of those surveys covered pension schemes, the majority of which were much larger than the Scheme[96] and each survey showed that Scheme size had a significant bearing on trustee remuneration levels, trustee pay in relation to smaller schemes being lower than in relation to larger schemes.

339. Much of the Winmark Survey concerns trustee Chairs and so is not relevant to Mr Reilly's or Mr Kelly's[97] remuneration level. However, in Section 5 of the Winmark Survey, which concerns trustee board members other than Chairs, only 5% of 'independent trustees'[98] were reported to be paid more than £40,000, with 90% of independent trustees being paid less than £10,000 per annum or nothing at all. Similarly, in the PwC Survey, while the average remuneration of a Chair across schemes with assets of up to £5 billion[99] was around £50,000 per annum in 2017, for a member of a board of trustees who was not a Chair or a committee member, the average remuneration across the same range of pension schemes was less than £10,000 per annum.

340. Mr Reilly has submitted that: he took legal advice to confirm that he could legitimately charge for his extra time spent investigating the Scheme's investments; he capped those fees; and Mr Craig had agreed not to charge some of his own fees, in order to

[96] In the Winmark Survey and the PwC Survey, only 9% and 25% of pension schemes considered had assets of £500 million or less respectively.

[97] I note that the intention had been that Mr Kelly would be the Chair of the Trustees. However, as he submitted in the Oral Hearing, that appointment was never made.

[98] For the purpose of the Winmark Survey, an 'independent trustee' is "a trustee with a wide range of experience, not employed by any of the Employer Group companies, not a member of the scheme and not part of a firm of Professional Trustees". I consider that Mr Reilly and Mr Kelly would have been within this category of trustees for the purpose of the Winmark Survey.

[99] It should be borne in mind that the total value of the Scheme's assets, approximately £13.4 million, was significantly lower than £5 billion.

reduce the expense to the Scheme in funding Mr Reilly's additional work. However, I still do not consider that Mr Reilly's total fees of £27,000, shown by the Scheme's bank statements as having been paid to him during his time as a Trustee, which covered only three complete months of working two days per month, followed by a period of several months of absence before returning to work full time for less than five months, are justified. I accept that Mr Reilly did not charge the Scheme for the months in which he was unable to work due to illness. However, as I shall explain in Section D.8 below, Mr Reilly's work on his return from sickness absence should not have been necessary in the first place, as he should have reported matters to TPR, allowing TPR to investigate matters itself, far earlier than he did.

341. Mr Reilly has submitted that the payment of fees and expenses is the exercise of a right of indemnity and to be remunerated, not an exercise of a power and that, as a consequence, there can be no finding that charging fees at the rate at which Mr Reilly and Mr Kelly did was contrary to members' best interests. However, as stated in Lewin at paragraph 20-035, which Mr Reilly has referred to,

> "In the absence of an express contrary provision in the trust instrument, the beneficiary is entitled, at his own risk as to costs, to have the charges made by a professional trustee under a charging clause investigated, whether or not agreed to by a co-trustee, and the trustee will be liable to account for any charges made insofar as unreasonable or excessive."[100].

342. For the reasons that I have set out in paragraphs 337 to 340 above, I find that the rate of remuneration charged by Mr Reilly and Mr Kelly was unreasonable and excessive and that they are liable to account for the fees that they have received from the Scheme. Based on the Winmark Survey and the PwC Survey, I consider that fees equivalent to around £10,000 per annum, or £830 per month, would have been appropriate (see paragraph 339 above). As I have observed in paragraph 337 above, Mr Reilly should not have carried out the work that he undertook on return from his sickness absence, without at least having consulted TPR. Therefore, I do not consider that he should be awarded any fees for work carried out after 6 April 2017.

D.4.3.2 <u>Payments to other individuals</u>

343. In addition to the payments made to Mr Craig himself, TPO's reconciliation of the Scheme bank accounts shows that, between November 2015 and November 2016, the following payments were made:

    343.1. Mr Dowd received £72,000

    343.2. Mr Jenkins received £74,500; and

    343.3. Mr Ewing received £7,000.

[100] Lewin has referred to the cases of: *Re Fish* [1893] 2 Ch. 413, CA; *Hall v Coulter* [2014] NICh 23; and *Re Wells* [1962] 1 W.L.R. 397.

344. I have also seen a copy of Mr Dowd's contract of employment, dated 1 September 2015, under which he was employed as a Business Development Manager in relation to the Scheme[101] and was entitled to a basic salary of £120,000, plus quarterly bonus payments depending on performance, and use of a company vehicle.

345. While Clause 14 of the Trust Deed gave Mr Craig the power to employ such agents as he thought fit "in the transaction of the Scheme or the Fund including the payment pensions [sic] and other benefits", given that the Scheme is an occupational pension scheme, set up for "securing benefits under a pension scheme"[102], I cannot see why Mr Craig considered it necessary to employ a Business Development Manager. Mr Craig was clearly aware of Mr Dowd's criminal convictions concerning money laundering, but continued to employ him and allow him to make investment decisions concerning the Scheme's funds, which, as I have found in Section D.3.5 above, was contrary to the 1995 Act, section 34. Employing Mr Dowd as Business Manager was clearly not in members' financial interests with regard to the purpose for which the Scheme was created. Therefore, in employing and paying Mr Dowd, Mr Craig acted in breach of trust.

346. Regarding the payments made to Mr Jenkins, in the absence of any explanation as to why those payments were made, I assume that these were made in connection with OFSL's Scheme administrator role (see Section D.6 below). If those payments were made to Mr Jenkins, as remuneration for any administrative role he (or OFSL) may have taken on in respect of the Scheme, the amount of those payments will have been far in excess of any industry norm. I note also that Mr Jenkins was under investigation by the Official Receiver and, ultimately, was disqualified from acting as a director while he was supposedly administering the Scheme. Regarding the payments to Mr Ewing, I have seen no evidence that he carried out any work in his reported role of Compliance Manager. Mr Craig has submitted that Mr Ewing advised members prior to their transferring into the Scheme in relation to their "investing in a scheme using the loan back 3rd Party scheme[103]". I have seen no evidence of that and, in any event, advising prospective members would not have been part of the role of Compliance Manager for the Scheme.

347. Further, the 2016 Code, which was published in July 2016, stated, in the section headed 'Value for members', that "The law requires trustee boards to calculate at least annually the charges…to which members' funds are subject; and to assess the extent to which they represent good value for members" (paragraph 114 of the 2013 Code).

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[101] Mr Craig has submitted that Mr Dowd was an employee of OFSL, not the Scheme. However, in his contract of employment dated 1 September 2015, Mr Dowd's employer is stated to be "Optimum Retirement Benefits Plan". Mr Craig has submitted further that Mr Dowd was paid his salary by OFSL. TPO has seen no evidence of this and, as explained in paragraph 98 above, the Scheme's bank statements show that payments to Mr Dowd of a total of £72,000 were made from the Scheme's bank account between November 2015 and November 2016.

[102] as stated in Recital (1) of the Trust Deed.

[103] As I have explained in paragraph 246 above, I do not accept Mr Craig's explanation of how the Scheme's investments operated prior to November 2016.

The 2016 Code listed four key areas that TPR expected trustee boards to consider as a minimum when they assess value for members:

347.1. scheme administration and governance

347.2. administration

347.3. investment governance; and

347.4. communication.

348. Paragraph 119 of the 2016 Code stated:

> “The standards we expect trustee boards to meet in each of these areas are covered in this code, and we expect trustee boards to use these as a starting point when assessing value for members.”

349. It is clear that the standard of administration, investment governance and communication fell far below that expected by the 2016 Code (see Sections D.2 and D.3 above and D.6 below). Even if the standard of the services supposedly provided by these individuals to the Scheme had been high, payments to those individuals would have been excessive compared with industry norms and represented poor value for members.

350. Therefore, on the basis of the evidence that I have seen and having regard to the 2016 Code, I find that Mr Craig: acted outside his powers under the Trust Deed by making these payments to Mr Jenkins and to Mr Ewing; and it was maladministration on his part in failing to comply with the terms of the 2016 Code, as the payments made to those individuals represented poor value for members. To any extent to which Mr Craig can have been said to have employed these individuals within the scope of his powers under the Trust Deed, given the evidence in relation to Mr Dowd’s and Mr Jenkins’ respective backgrounds and the fact that the amounts paid to these individuals was far in excess of the industry norms, I consider that Mr Craig failed to fulfil his equitable duty to exercise reasonable care in doing so.

351. I also consider that, in making payments of such high amounts, Mr Craig favoured the interests of his acquaintances, who were the recipients of those payments, over those of the beneficiaries. Mr Craig cannot therefore be regarded as having acted in good faith. I find that Mr Craig acted in breach of trust by making these payments.

D.4.4 Payments to Introducers

352. As I have explained in section A.3.3 above, the Trustees had entered into arrangements with several firms of Introducers, in order to increase the Scheme’s membership. I have seen evidence that approximately £684,436 was paid to Introducers from the Scheme’s bank accounts.

353. Fees agreed with the Introducers were, in some cases, far higher than the market rate. For example, under the agreement with EPSH, fees were to be as high as 20% of the value of the member’s transferred-in fund. 16% of those fees were to be paid from a

special purpose vehicle (**an SPV**) rather than from the Scheme's funds so, in reality, the payments to Introducers will likely have been far higher than suggested from TPO's reconciliation of the bank statements. Those payments will have resulted in a corresponding diminishment of the Scheme's funds. Concerningly, some of the Introducers appear to have held interests in some of the companies invested in by the Scheme, or to which the Scheme made payments.

354. Mr Craig has submitted that, prior to November 2015, he was not involved in any decision-making aspect in relation to the Scheme other than to authorise the payment of funds received from members to "their pre-ordained destination as specified by the individual investor". Mr Craig has submitted that the subsequent events in relation to the Scheme, such as the opening of the call centre, were carried out without his involvement or knowledge. As I have explained in paragraphs 248 to 250 above, I do not accept Mr Craig's version of events. In any event, I have seen evidence that Mr Craig was involved in the use of Introducers. For example, an invoice from The LG Group, a firm of Introducers, dated 17 January 2017, refers to the "Final instalment of Alex Hirons [*sic*] shortfall (As agreed with Martin and Gordon)". Further, as it was only Mr Craig who had control of the Scheme's bank account (see paragraph 248 above), only he could have made the payments to the Introducers.

355. While there was a power to employ agents under Clause 14 of the Trust Deed (see Section D.4.2 above), the rates paid to the Introducers were far higher than market rate. Further, there is nothing in the Trust Deed to suggest that the Trustees' powers and duties included actively generating new membership of the Scheme, so I do not consider that the Introducers can be properly regarded as "agents". The Scheme's purpose under Recital (1) of the Trust Deed, is to secure benefits under the Scheme, and so I find that using and paying Introducers fees far in excess of market rate, was outside the scope of Mr Craig's powers under the Trust Deed and constituted a breach of trust.

356. Mr Reilly has submitted that he raised the Introducers' fees as an issue, at the December 2016 Meeting before he and Mr Kelly had been appointed as Trustees, and asked to see copies of the Introducers' contracts and scripts, but that these were not forthcoming. The minutes of the Scheme meeting on 13 December 2016, suggest that Mr Reilly did indeed ask questions of Mr O'Malley concerning the Introducers' "lead generation and scripts" and that Mr O'Malley was to provide Mr Reilly with copies of the Introducers' scripts. Mr Reilly also submitted that, having asked for, but not been given, copies of the scripts, he recommended to Mr Craig, in February 2017, that Mr O'Malley's Manchester operation cease to do business. I have seen no record of that recommendation. It does seem, from the Scheme's bank statements, that transfers into the Scheme ceased after March 2017. However, the Scheme's bank statements show that a payment of £12,500 was made to an Introducer firm on 26 October 2017.

357. At the Oral Hearing, Mr Kelly submitted that he had not been aware that Introducers were being used, despite having been present at the 13 December 2016 meeting in which the work of the Introducers and their terms and conditions were discussed. Mr Kelly explained that the mention of introducers "did not hit me with a great deal of

significance at the time". Mr Kelly has since submitted in writing that the discussions that he can recall having happened at that meeting related to the charges that OFSL was making to "onboard" members, and that the meeting was attended by staff who were presented as the distribution team based in Manchester. Even if I were to accept that statement, given that the purpose of an occupational pension scheme is to provide benefits for its members, with the trustees holding on trust sums of money that will, of course, be significant to those members, many of whom rely upon their pension funds to sustain them in their retirement, I find it astonishing that Mr Kelly was able to have attended the meeting, listen to the discussion about the high rate that members were being charged on transferring into the Scheme, which will have resulted in a corresponding diminishment of members' funds, and not realise that this was significant.

D.4.5 Payments to Scheme members

358. As I have explained in paragraph 246 above, I do not accept Mr Craig's submission that, prior to August 2016, all funds received by the Scheme were liberated. However, I understand that a number of individuals received a percentage of their transferred fund value, some in excess of 40%, in the form of loans from SSL or another Shawhill company, and that not all of these members had reached the minimum pension age of 55 at the time they received the loan (see Section A.1.8 above).

359. I have seen no power, under the Scheme's Trust Deed or Rules, which permits Scheme trustees to make or arrange loans to the Scheme's members. Therefore, I find that, in making those payments, Mr Craig acted in breach of trust.

360. Further, as I mentioned in paragraph 110 above, SSL was incorporated with Mr Craig as sole director and shareholder in October 2014. Based on Companies House's records, it seems that no annual returns or confirmation statements were submitted prior to the company's dissolution in March 2016. So, there is no evidence of the company having any assets and the nature of SSL's business was never provided.

361. Payments seem to have been made to the applicable members from Refresh Recovery Limited's bank account, with the reference of "Optimum/Shawhill"[104]. In an email sent from Mr Reilly to Mr Craig and Mr Kelly on 6 April 2017, under the heading 'Shawhill Securities Limited', Mr Reilly has referred to: Mr Haslam having carried out 'credit control' after the date of SSL's dissolution; a list of people "described on a spreadsheet as bridging loans of £260,750.00'; and a demand having been sent by Mr Haslam to a Scheme member on 22 March 2016, for repayment of £17,600 under the terms of a loan. Taking these circumstances into account, I find it more likely than not that the funds that the members were receiving, in the form of a loan from Shawhill Securities Limited, were in fact a portion of their transferred funds. As a result, it appears that these were unauthorised payments under Section 160(2) of the Finance Act 2004 (**Unauthorised Payment**), and a form of pension liberation.

[104] These payments match those listed in a spreadsheet that TPO has received from Dalriada, listing loans taken by Scheme members from SSL.

362. Mr Craig has submitted that pension liberation is not illegal, and he has not denied that pension liberation occurred under the Scheme. While obtaining pension monies before minimum pension age is not, in itself, illegal, a consequence of the liberation, which constitutes an Unauthorised Payment, for the member who has accessed their fund and, also, potentially, for their pension scheme, will be that they become subject to tax charges. While any tax charges arising from these payments are a matter for HMRC and not for me to investigate further, Mr Craig's acts and omissions in entering into this arrangement, under which Unauthorised Payments were made, fall within my jurisdiction. Given the warning on the Scheme application form, which specifically mentions that releasing pension funds through loans was an illegal activity (although, as I have noted earlier in this paragraph pension liberation it is not, itself, illegal), I am satisfied that Mr Craig knew that the loans from Shawhill Securities Limited to members of the Scheme would be Unauthorised Payments and should, at the very least, have warned members of that.

363. As I have mentioned in Section A.1.8 above, I have seen evidence that some members did not even receive the full percentage of their fund that they wished to ”borrow”, as “fees” had been taken from that amount. While members were told that their investment gains under the Scheme would cover the repayment of their loans, in reality, as I have found in Section D.3 above, the Scheme's investments were high-risk and members would, more likely than not, have ended up losing more of their pension fund on repaying the loans. Mr Craig will have been aware of this. In fact, as I have found in Section D.2 above, Mr Craig stood to benefit, via SSL, from any interest charged in relation to the loans.

364. I consider that allowing loans to be made to members out of Scheme funds was contrary to members' financial interests and cannot have been done honestly or in good faith. I find that Mr Craig acted in breach of trust.

365. Regarding Mr Kelly and Mr Reilly, they have both submitted that they were unsuccessful in their attempts to ascertain the state and condition of the Scheme. At the Oral Hearing, Mr Kelly submitted that he had not been aware that loans were being paid to members from the Scheme's funds. As I shall explain in Section D.8 below, I consider that Mr Kelly's efforts to understand the Scheme in general and to educate himself of his duties and responsibilities of a pension scheme trustee fell far short of any reasonable standard.

366. Mr Reilly has submitted that he was aware that pension liberation and/or unauthorised payments were or might be going on within the Scheme, but that he could not prove this, as he had only anecdotal evidence. He was unable to investigate his concerns regarding pensions liberation, owing to the Shawhill companies being “based in the Seychelles”. As he was unable to prove that pension liberation was or had been occurring, Mr Reilly did not report his concerns to TPR.

367. Mr Reilly has submitted, throughout the course of my investigation, that he was not aware of SSL's involvement. However, as I have explained in paragraph 66.2 above, contrary to those submissions, Mr Reilly had clearly become aware of SSL's

involvement by 6 April 2017 and had ascertained that its registered office was the same as Refresh Recovery's.

368. Even if Mr Reilly had not been aware of SSL's involvement (which he clearly was), the very fact that the Shawhill companies were overseas and that this prevented Mr Reilly from finding out more, as Mr Reilly has submitted it did, should have alerted him to the urgent need to report the matter to TPR or, at least, to seek guidance as to what action he could or should take, for example by taking independent legal advice or by conducting research into the appropriate action. As I shall explain in Section D.8 below, I consider that, in failing to report the matter to TPR, Mr Reilly failed to fulfil his common law duty of skill and care and acted in breach of Clause 5.1 of the Trust Deed.

D.5 Scheme assets not accounted for

369. As I have explained in section A.3, paragraph 142 above, minimal information was kept in relation to the Scheme's assets, investments or payments out of the Scheme. While the investments and payments that I have considered in sections D.3 and D.4 above have been identified, there remains a large part of the Scheme's fund that is unaccounted for. Mr Craig has submitted a document, purporting to be the Scheme accounts to 31 December 2017, which he has said were prepared in June 2018 by "the company's external accountant", at Mr Craig's expense, and were "slightly amended by Mr Craig [in October 2018] to show the true position and sent to both the police and [TPR].". This document contains headings and figures, but no accounting notes explaining those figures. Mr Craig has submitted no evidence to substantiate those figures, or their preparation by an external accountant, and I have seen no evidence that the accounts were audited at any point. Given that TPR had appointed Dalriada as independent trustee of the Scheme with exclusive powers, some four months before the accounts were first prepared, it is unclear to me why Mr Craig would have gone about preparing the Scheme accounts at that time. I do not accept that these documents provide any accurate representation of the Scheme's accounts.

370. Other than Mr Craig, none of the Trustees has offered any explanation as to where the balance of the Scheme's fund has gone. Mr Craig's comments, which he made to TPO in relation to Dalriada's referral[105] and which he expanded upon in his submissions to TPO on 7 October 2022, are essentially that Dalriada's actions regarding one of the Scheme's main investments, and its alleged refusal to engage with Mr Craig after its appointment by TPR, prevented Dalriada from being able to recover Scheme funds.

371. Mr Craig has submitted copies of various communications that he or his representatives sent to Dalriada at various intervals from late 2018 to December 2020. In some of those communications, Mr Craig stated that he wished to assist Dalriada in recovering assets from various Scheme investments, and claiming that various

[105] Mr Craig made these comments on being notified of Dalriada's referral. However, as observed throughout this Preliminary Decision, Mr Craig has not provided any formal response to Dalriada's referral or to Mr E's complaint.

individuals had agreed to pay monies owed to the Scheme. However, at no point did Mr Craig provide any evidence to support those statements.

372. Dalriada has refuted Mr Craig's allegations, set out in paragraph 370 above. Dalriada has pointed out that:

372.1. Dalriada's attempts to organise a meeting with Mr Craig were unsuccessful;

372.2. Mr Craig declined to provide any information to Dalriada, despite Dalriada's having asked Mr Craig to do so. As a consequence, Dalriada has not received material or evidence that may have assisted its investigations;

372.3. a settlement agreement that Mr Craig had accused Dalriada of "blindly" accepting in respect of the RTC loan, which Mr Craig said had caused a significant loss to the Scheme, had actually been entered into by Mr Craig himself (see paragraph 205 above); and

372.4. Mr Craig contacted RTC in October 2018, in breach of the requirements of the February 2018 Letter, to try to arrange for payment of the original RTC loan, plus interest, which Mr Craig had himself settled, as explained in paragraph 205 above, to his own company, Refresh Recovery Limited[106].

373. Leaving aside the lack of any record of where the balance of the fund was paid, if the funds had not been lost, members' transfer and benefit requests would surely have been actioned. Further, if Mr Craig had complied with all of his duties as a pension scheme trustee, I cannot see that he would have had reason to refuse to pass on any information that could have assisted Dalriada in its attempts to recover the lost assets.

374. I therefore consider it more likely than not that the balance of the Scheme's funds were lost due to breaches of trust[107] on Mr Craig's part. However, if and to any extent that any payment, that has led to the loss of the balance of the Scheme's fund, can have been regarded as having been made within the scope of any power under the Trust Deed, I consider, on the balance of probabilities, that Mr Craig failed to fulfil his equitable duty to exercise reasonable care in making those payments.

375. Mr Reilly and Mr Kelly have each submitted that they had no access to the Scheme's bank account, despite Mr Reilly having asked Mr Haslam for access on multiple occasions. While I accept that Mr Reilly and Mr Kelly may not have had direct control over the payments that were made out of the Scheme during their time as Trustees (which, in itself is most concerning), I do consider that they should have taken action to report matters to TPR, in order to prevent further payments from being made. I shall explore this further in Section D.8 below.

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[106] Dalriada has submitted a copy of the letter, dated 11 October 2018, from Mr Craig to RTC, to TPO.

[107] i.e. failure to invest the Scheme's assets in accordance with the investment powers and duties outlined in Section D.3 above, or payments out of the Scheme made outside the Trustees' powers under the Trust Deed.

D.6 Administration of the Scheme and internal controls

D.6.1 Trustees' duties toward Scheme administration

376. The Trustees were required, under the 2004 Act, section 249A, to "establish and operate an effective system of governance including internal controls".

377. "Internal controls" is defined by section 249A(5) as:

"(a) arrangements and procedures to be followed in the administration and management of the scheme,

(b) systems and arrangements for monitoring that administration and management, and

(c) arrangements and procedures to be followed for the safe custody and security of the assets of the scheme."

378. Section 249A(1A) provided that:

"The system of governance must be proportionate to the size, nature, scale and complexity of the activities of the occupational pension scheme".

379. Dalriada submitted, when it made its referral, that the Trustees "failed to maintain standard governance documentation, hold trustee meetings, record trustee meeting minutes, obtain regular administration reports, produce a statutory Chairman's Statement or publish financial statements for the Scheme".

380. Mr Craig has not denied this. Mr Kelly and Mr Reilly have both submitted that they were unable to gain access to key information about the Scheme, such as the Scheme's accounts, during their trusteeship. Mr Reilly has submitted that adequate records were not kept and that, despite his attempts to meet with Mr Craig to discuss his concerns, Mr Craig used illness as an excuse to cancel meetings and provide key information. Mr Reilly has submitted that there were no internal controls, which was why he had attempted to implement them.

381. It seems that any records of the Scheme's investments and payments out of the Scheme's funds were completely inadequate and failed to account for a large proportion of the Scheme's funds. This is further evidenced by the email correspondence between Mr Davenport and Ms Brock, in which Mr Davenport expressed serious concerns about some of the entries in the draft Scheme accounts that had been prepared in 2016 (see paragraph 139 above). I have seen no evidence that any proper arrangements or procedures were in place for the safe custody and security of the Scheme's assets as was required by the 2004 Act, section 249A(5)(c).

382. Regarding paragraphs (a) and (b) of section 249A(5), it seems that OFSL was either appointed as Scheme Administrator or assumed that role. I shall consider in paragraphs 383 and 384 below whether OFSL fulfilled the requirements under paragraphs (a) and (b) of section 249A(5), taking into account the relevant provisions of the 2013 Code, which was in force when the Scheme was established.

383. Paragraph 168 of the 2013 Code contained the following requirement concerning the appointment of service providers:

> "168. Trustees should evaluate the suitability of all advisers and service providers prior to appointment. Trustees need to establish and document controls to manage the appointment of advisers and service providers and the delivery of information, advice and services provided by them. Trustees also need to establish and review what procedures and controls their advisers and providers have in place to ensure the quality and accuracy of the service they provide is suitable. Trustees should find out:
>
> - what professional indemnity cover they have?
> - what qualifications and accreditations they have and how they keep their professional knowledge up to date?
> - whether they have experience of dealing with a scheme of a similar size and type to their scheme".

384. I have seen nothing to suggest that Mr Craig, as the sole Trustee at the time of the Scheme's establishment and seemingly OFSL's appointment as the Scheme Administrator, did any research or reviews of OFSL's procedures and/or controls or of its experience with pensions in general. Based on the FCA Register, OFSL did not have any permissions for pensions-related regulated activities. Further, given the difficulty Mr Reilly, Dalriada and TPO, has faced when reviewing the information available, I cannot see that Mr Craig had put in place, documented, or operated any internal controls in relation to OFSL's appointment whatsoever and I have seen no evidence of any agreement between OFSL and any of the Trustees outlining OFSL's responsibilities and liabilities. Consequently, I consider that Mr Craig's failure to operate the necessary internal controls regarding the Scheme's administration or to have in place any adequate system of governance amounts to breach of trust on his part.

385. I consider that there are clear instances of maladministration, as demonstrated by the lack of Scheme-wide communications and/or individual benefit statements and the member complaints alone, which indicate the following:-

    385.1. A number of transfer requests were not processed, suggesting that members' statutory rights to a transfer were denied.

    385.2. Members did not receive benefit statements despite asking for them.

    385.3. Members have been unable to claim their benefits.

    385.4. Members have been unable to access their 25% tax free lump sum, despite being aged 55 and above.

386. Having seen no evidence to suggest otherwise, I find that Mr Craig acted in breach of the requirements of the 2004 Act, section 249A, by failing to have in place an effective

system of governance for the Scheme. I also find that Mr Craig maladministered the Scheme by failing to have proper regard to the requirements of the 2016 Code. Mr Kelly and Mr Reilly were both appointed as Trustees when the Scheme had already been running for some time with no effective system of governance, with the result that they were unable to act in accordance with the Code. I shall explore in Section D.8 below whether or to what extent Mr Kelly and Mr Reilly fulfilled their duties as Trustees on becoming aware that no effective system of governance was in place.

D.7 Information provided to members

387. I am informed that statements were not sent to members annually. Those members who did receive a statement of their funds in the Scheme had had to request them.

388. It is not clear, from the information that TPO has received, who prepared the benefit statements that were sent out on request. However, on the basis that: members were told that their funds in the Scheme held some value; and those same members found their requests to transfer out or to take their tax-free lump sum on reaching age 55 ignored, it seems more likely than not that the benefit statements had been deliberately falsified or negligently prepared.

389. For example, Mr E was informed that his pension fund was £45,565.10 on 3 November 2017, but his request to transfer was never actioned. Also, as I mentioned in paragraph 174 above, one member reported that they had been offered a “pay-off cheque” by Mr Dowd, for around half of what they had been informed was the value of their fund within the Scheme.

390. Mr Reilly was clearly aware of the unfulfilled transfer and benefit requests, as I have seen correspondence in that regard sent by Scheme members to Mr Reilly. However, Mr Reilly has submitted that he had no access to the Scheme’s records himself and that he had chased Mr Craig to make the payments to members and eventually resigned as his requests were not being actioned. Mr Kelly has also submitted that he was unable to access key Scheme information.

391. I have already found, in Section D.6 above, that Mr Craig failed to put in place an adequate system of governance for the Scheme and that there were no internal controls. On that basis, even if it was not Mr Craig himself who sent out the benefit statements to members (and I note that Mr Dowd seems to have been involved, as evidenced by his attempt to reach a settlement agreement with a member in respect of their transfer request), I consider that Mr Craig should be held responsible for falsified benefit statements having been sent to members, as I consider this to have arisen as a consequence of Mr Craig’s failure to have in place an adequate system of governance and to operate internal controls. Mr Kelly has denied having been aware of this. Mr Reilly was aware of this, but did not report the matter until TPR had already become involved. I shall explore this further in Section D.8 below.

D.8 Reporting to TPR

392. Mr Kelly and Mr Reilly have each made both oral and written submissions concerning their involvement in the Scheme during their time as Trustees. Essentially, both deny having been actively involved in any of the acts and omissions that have led to Scheme funds being lost. I shall consider the circumstances in respect of each of them in turn.

Mr Reilly

393. Mr Reilly had within his first few days as a Trustee, identified the importance of the 2016 Code and has submitted that he was, in fact, aware of requirement to report breaches to TPR, under the 2004 Act, section 70 (**section 70**). The relevant parts of section 70 are set out in Appendix 12.

394. That requirement does not include only established breaches of the law. The 2004 Act, section 70(2), requires trustees to report to TPR in writing, as soon as reasonably practicable, in situations in which they have:

> "reasonable cause to believe that-
>
> (a) a duty which is relevant to the administration of the scheme in question, and is imposed by or by virtue of an enactment or rule of law, has been or is not being complied with, and
>
> (b) the failure to comply is likely to be of material significance to [TPR] in the exercise of any of its functions".

395. Regarding the requirement for the reporter to have reasonable cause to believe that there has been a breach of the law, TPR's Code of Practice 01, 'Reporting Breaches of the Law' (**Code 1**), which contains guidance for reporters in interpreting the requirements of Section 70, states, at paragraph 31 to 32, that:

> "Having a reasonable cause to believe that a breach has occurred means more than merely having a suspicion that cannot be substantiated."

396. Code 1 advises that, while it would usually be appropriate for the reporter to check any unknown facts or events around the suspected breach with those who are in a position to confirm what has happened, it would not be appropriate to do so "in cases of theft, or if the reporter is concerned that a fraud or other serious offence might have been committed and discussion with those persons might alert those implicated or impede the actions of the police or of a regulatory authority."[108].

397. At paragraph 34, TPR advises that "In establishing that there is reasonable cause to believe that a breach has occurred, it is not necessary for a reporter to gather all the evidence which [TPR] would require before taking legal action.".

398. I shall outline, in this paragraph and in paragraphs 399 to 401 below, the context within which Mr Reilly raised the matters that he recorded in the April 2017 Report and the 6

[108] Paragraph 32 of Code 1

April 2017 Email. Mr Reilly has submitted that he had begun the review of the Scheme's investments of his own volition, as it was his duty to do so and was in the Scheme members' interests, and that this had nothing to do with the BEIS' investigation, which was being conducted at that time. However, Mr Reilly was clearly aware of the BEIS' investigation as early as 1 February 2017 (see paragraph 64 above). Mr Kelly's response to the April 2017 Report (see paragraph 64 above), confirms that the preparation of the April 2017 Report was undertaken with the BEIS' investigation in mind. Regardless of whether its preparation was also in line with Mr Reilly's duty to do so and in the Scheme members' interests, given this evidence of his awareness of the investigation, I do not accept, on the balance of probability, that Mr Reilly did not have that investigation in mind when he prepared the April 2017 Report.

399. Mr Reilly had to prepare the report without access to the Scheme's bank accounts, as these had not been forthcoming despite his having requested them from the Scheme's accountant. Mr Reilly has submitted that, when he wrote the April 2017 Report, he had only requested the Scheme's annual accounts so that he could complete a chairman's report[109]. However, his complete lack of access to or control over the bank account would have been serious cause for concern, as it will have prevented Mr Reilly from taking control over the Scheme's property on his appointment (see paragraph 275 above).

400. Further, it had clearly been acknowledged, in the December 2016 Meeting, that Introducers were being paid fees in excess of the market rate. Mr Reilly had not received copies of the Introducers' contracts or scripts more than three months after having requested them. Mr Reilly had also requested details of a proposed hotel investment (see paragraph 131 above), such as the proposed security to be taken, but had not received any such information.

401. As well as the breaches of trust that I shall consider in paragraphs 402 to 404 below, the April 2017 Report and the 6 April 2016 Email contained mention of other matters that were most concerning:

401.1. Mr Haslam was demanding repayment of loans made to members by SSL, despite SSL's having been dissolved some months previously. I note that Mr Reilly's clear awareness of SSL's existence and connection with loans made to Scheme members contradicts his statements, provided in his written submissions prior to the Oral Hearing and during the Oral Hearing itself, that he had not been aware of SSL, so could not have made any connection between the loans to members and Mr Craig. I shall consider that further in Section D.10 below.

401.2. Invoices concerning automatic enrolment were mentioned. As Mr Reilly had read the Scheme documentation on appointment as a Trustee and was therefore aware of the nature of the Scheme, invoices concerning automatic

[109] I note that none of the Trustees had been appointed as Chair. As explained in paragraph 162 above, while the intention had been for Mr Kelly to be appointed to that position, that was never achieved.

enrolment should have been cause for serious concern. In fact, Mr Reilly stated, during the Oral Hearing, that he had found this very concerning.

401.3. Scheme monies were being held by Refresh Recovery Limited.

402. In respect of the written evidence and evidence given at the Oral Hearing, I shall consider, whether I should find that Mr Reilly was aware of various breaches of trust that had been committed and of his duty under Section 70 to report them to TPR. Looking first at the lack of any effective system of governance:

402.1. Key information and documentation regarding the Scheme's investments was missing when Mr Reilly compiled the April 2017 Report.

402.2. Despite the intention having been that Mr Kelly would be appointed as Chairman of the Board of Trustees, as demonstrated by the minutes of the December 2016 Meeting, no such appointment had taken place, as Mr Kelly and Mr Reilly did not know how to do so or what the requirements were, concerning a quorum.

402.3. If the items listed in Mr Reilly's agenda for the first Trustees' meeting (see paragraph 57 above) were actually discussed at that meeting, then he will have been aware, early on in his appointment as Trustee, that no effective system of governance was in place in relation to the Scheme. Mr Reilly had had to bring Code 13 to his co-Trustees' attention and he was aware that neither of them had undertaken TPR's TKU courses.

403. Taking into account the matters set out in paragraph 384 above, I do not accept that Mr Reilly was unaware. Mr Craig and the other Trustees had failed, and they all continued to fail to fulfil the requirements of the 2004 Act, section 249A.

404. Considering next the matters that Mr Reilly raised in the April 2017 Report, these were most concerning. Key information and documents in relation to Scheme investments were not available; sizeable investments had been made into companies that were shown on Companies House records to have been dormant; and there was a lack of evidence of due diligence having been carried out. I consider that the contents of the April 2017 Report and the 6 April 2017 Email, together with the lack of access to key documentation of the Scheme's payments and investments, and that Mr Reilly and Mr Kelly had not been granted access to, or control over, the Scheme's bank account more than three months after their appointment as Trustees, showed that, it was more likely than not, breaches of trust had occurred in relation to the Scheme's investments, both prior to, and after Mr Reilly's appointment as a Trustee.

405. While Mr Reilly has submitted that he had thought an investment manager was in place, he took no steps to confirm that the individual named in the SIP had provided any advice in relation to any of the investments. At the very least, even applying only common sense, it will have been apparent to Mr Reilly that these investments had not been made prudently and that Scheme assets were at risk.

406. As I have explained in Section D.3 above, multiple breaches of law had occurred in relation to the Scheme's investments. I find, on the balance of probabilities, that Mr Reilly, with his experience and background, and given the context that I have set out in paragraphs 398 to 401 above, was aware that the matters he had identified in the April 2017 Report, were breaches of the law. At the very least, I consider, on the balance of probabilities, that he was aware of the very strong possibility that Mr Craig had committed multiple breaches of his investment duties.

407. With no control over the Scheme's bank account, Mr Reilly had minimal or no control over further expenditure, so Mr Reilly must have known that action needed to be taken urgently to minimise the loss of Scheme assets and any further payments out of the Scheme.

408. Mr Reilly has submitted that he had felt assured by Mr Craig's professional qualifications and experience, Mr Craig being a Chartered Accountant with, according to Mr Reilly, "an ostensible clean professional record", and so he saw no reason to suspect any wrongdoing, or action as trustee other than in good faith, on Mr Craig's part. Mr Reilly has submitted, in response to my second Preliminary Decision, that he made "discrete inquiries through professional contacts of Mr Craig", although he has provided no evidence of that and did not mention it at the Oral Hearing.

409. However, as Mr Reilly was aware, Mr Craig had been the sole Trustee when the various investments that he had identified in the April 2017 Report had been made. Mr Reilly was also aware, no later than 6 April 2017, that Mr Craig had been investing Scheme assets without consulting him, as is demonstrated by the 6 April 2017 Email. Taking this into account in the circumstances set out in paragraphs 398 to 401 above, I consider that Mr Reilly would have had strong cause for concern that fraud had been committed and that Mr Craig was likely to have been involved. I consider that Mr Reilly could only have believed otherwise by ignoring the obvious facts outlined above in Section D.8. I consider that it was inappropriate for Mr Reilly to have raised these matters with Mr Craig himself rather than consulting TPR's guidance on reporting breaches of the law.

410. Mr Reilly's submission that he trusted Mr Craig as a fellow professional does not help him given the circumstances outlined above in paragraphs 398 to 401. There have been plenty of instances in which governing bodies such as the SRA or the ICAEW have taken disciplinary action against their members for fraudulent behaviour, and individuals with professional membership have been convicted of offences in the criminal courts. While Mr Reilly has submitted that he had made discreet enquiries about Mr Craig before being appointed as a Trustee (see paragraph 408 above), Mr Reilly says he did not know Mr Craig at all well and had not even met him until several weeks after his appointment as a Trustee.

411. Having established that Mr Reilly was aware of the breaches of trust set out in paragraphs 402 to 404 above, I shall consider whether these breaches were likely to be of material significance to TPR. Code 1, paragraph 36, sets out various causes of the breach that would render it likely to be of material significance. Those causes

include: dishonesty; and "poor governance, inadequate controls resulting in deficient administration, or slow or inappropriate decision-making practices".

412. The effect of the breach must also be considered. TPR considers certain elements to be likely to be of material significance to TPR, including doubt as to whether: assets are appropriately safeguarded; payments out of the scheme are legitimate and timely; trustees of occupational pension schemes are properly considering their investment policy and investing in accordance with it; schemes are administered properly and appropriate records maintained; and members receive accurate, clear and impartial information without delay[110].

413. With the guidance outlined in paragraph 394 above in mind, I consider that the breaches of trust that I have outlined in paragraph 402 above, by their very nature, were of material significance to TPR. The matters set out in the April 2017 Report and the 6 April 2016 Email, were clearly not isolated incidents, showing a strong likelihood that further payments and investments would be made if no action was taken.

414. Taking into account the matters set out in paragraph 396 above, I consider that the breaches of trust fell squarely within the category of "red breach situations", as set out in TPR's guidance that accompanies Code 1, which Mr Reilly has referred to in his submissions. I do not accept that Mr Reilly, who has stated that he was aware of the reporting requirements, can have failed to realise this other than by deliberately ignoring the facts, or deliberately refraining from asking questions in case he learned something that he would rather not have known.

415. The requirement under Section 70 was for matters to be reported "as soon as reasonably practicable". Code 1 advises that this phrase "depends on the circumstances and should reflect the seriousness of the suspected breach.". TPR advises that:

> "In case of immediate risk to scheme assets, the payment of members' benefits, or where there is any indication of dishonesty, [TPR] does not expect reporters to seek an explanation or to assess the effectiveness of proposed remedies but only to make such immediate checks as are necessary… In cases of potential dishonesty, the reporter should avoid, where possible, checks which might alert those implicated. In serious cases reporters should consider contacting [TPR] by the quickest means possible to alert [TPR] to the breach.".

416. As I have explained in paragraph 409 above, I consider that Mr Reilly must at least have had some suspicion of dishonesty in the running of the Scheme. Given the nature of the investments, the lack of important documentation, and that Mr Craig had invested Scheme assets since Mr Reilly's and Mr Kelly's appointment as Trustees without consulting them, indicated that Scheme assets were at immediate risk. I consider that Mr Reilly could only have sustained any belief that this was not the case, and that the

[110] Paragraph 40 of Code 01

duty to report matters to TPR under Section 70 had not arisen, by choosing to ignore those clear facts.

417. Putting together the information that TPR required, which is listed in paragraph 63 of Code 1, together with details of how to report it, would not have been an onerous task. Mr Reilly had already drawn together the information contained in the April 2017 Report and the 6 April 2017 Email, so it would not have taken a significant amount of further work to have reported matters to TPR at that point.

418. Mr Reilly has submitted that there is, in effect, a fourth limb to the question of liability; that a failure to report was "without reasonable excuse". Mr Reilly has referred to the test applied by TPR in considering whether to impose a civil penalty under the 1995 Act, section 10, as it would do under section 70(4). Mr Reilly has submitted that "reasonable excuse" is to be "determined by reference to what a reasonable reporter in the position of Mr Reilly (having his attributes) would have done, such that the fact that a report could have been given does not mean that failure to do so was unreasonable.". Matters that TPR will consider when deciding whether a reporter has a reasonable excuse for not reporting under Section 70 are listed in paragraph 68 of Code 1. Those matters are:

> "the legislation, case law [Code 1] and any guidance issued by [TPR];
>
> the role of the reporter in relation to the scheme;
>
> the training provided to the individual or staff, and the level of knowledge it would be reasonable to expect the individual or those staff to have;
>
> the procedures put in place to identify and evaluate breaches and whether these procedures had been followed;
>
> the seriousness of the breach and therefore how important it was to report this to [TPR] without delay;
>
> any reasons for the delay in reporting;
>
> any other relevant considerations relating to the case in question."

419. Mr Reilly has also submitted that reliance on a professional adviser can amount to a reasonable excuse in the tax field. Mr Reilly did not refer to any professional adviser between sending the April 2017 Report and going on sickness absence, so that submission is not relevant to his failure to report matters at that time. I have established in paragraph 414 above that the breaches identified amounted to "red flag breaches" under TPR's guidance. I do not find that, taking into account any of the matters listed by TPR in paragraph 68 of Code 1, Mr Reilly had a reasonable excuse not to have reported matters to TPR at that time.

420. Mr Reilly has submitted that he became seriously ill in March 2017 and was unable to work as a Trustee for several months. However, I do not find that assists him. While Mr Reilly has submitted, since the Oral Hearing, that he had anticipated only being off work

for four weeks, Mr Reilly would not have known, at the time, how long he would be unable to work as a Trustee or, indeed, if he would be able to return to work at all. During the Oral Hearing, Mr Reilly's submissions under oath implied that his illness had been very serious (see paragraph 68 above). Owing to the serious nature of the issues that he had identified and the clear risk to Scheme assets, it would have been apparent to Mr Reilly, unless he ignored the obvious state of affairs that I have outlined in paragraphs 398 to 404 above, that action needed to be taken to protect the Scheme's assets. The possibility that Mr Reilly might not have been able to resume his work as a Trustee meant that he needed to take urgent action in reporting matters to TPR and I do not accept that Mr Reilly can have been unaware of this urgency unless he deliberately closed his eyes to it.

421. Taking into account all of the circumstances set out in paragraphs 413 to 420 above, I find that a duty under Section 70(2), for Mr Reilly to report the matters outlined in those paragraphs to TPR, had arisen no later than 6 April 2017 and that Mr Reilly acted in breach of that duty in failing to do so. By failing to comply with that duty, Mr Reilly was also in breach of the requirement, under Clause 5 of the Trust Deed to "administer the Scheme in accordance with any overriding legislation affecting pension schemes" and was therefore acting in breach of trust, by failing to report matters to TPR, from 7 April 2017. I find also that Mr Reilly failed to fulfil his duty of care to Scheme members, in failing to report to TPR.

422. As a consequence of the failure to report to TPR, action that TPR could and would, in my view, have taken to protect the Scheme, such as preventing further payments out of the Scheme by freezing the Scheme's bank account with immediate effect and/or appointing an independent trustee, was not taken until much later on, when Dalriada was appointed, by which time further payments had been made from the Scheme's assets. Notably, Dalriada took immediate action to freeze the Scheme's bank account the day after it was appointed by TPR (see paragraph 89 above). I find that those losses after 6 April 2017 would in all likelihood have been avoided had the matter been reported to TPR at that time.

423. Mr Reilly has submitted that he resumed his investigations immediately on returning to work as a Trustee and that he was subsequently delayed in reporting to TPR by the events set out in Section A.1.3 above.

424. Mr Reilly said that: his investigations into the Scheme were hindered by his lack of access to key documents and to the Scheme's bank account; and his illness and Mr Craig's failure to pay Mr Davenport's legal fees, resulted in his being unable to report matters to TPR earlier than he eventually did.

425. As I have explained in paragraph 408 above, Mr Reilly failed to act prudently in relying upon Mr Craig's professional status and experience as proof of his honesty, rather than considering the obvious possibility that Mr Craig had been involved in the various matters of concern that Mr Reilly had already identified. However, it is all the more disturbing that Mr Reilly shared his further report with Mr Craig in August 2017, when

he had by then, as he submitted himself in writing, ceased to trust Mr Craig (see paragraph 72 above).

426. Having finally realised the need to report matters to TPR, Mr Reilly consulted Mr Davenport, who was the Scheme's legal adviser, rather than engaging an independent legal adviser. It is evident from the correspondence TPO received that, rather than preparing a report to TPR using its standard format for reporting breaches of the law, Mr Reilly had prepared a 'Triggering Event Notification form', "proposing option 1 as envisaged by section 24 Pension Schemes Act 2017". That legislation and the triggering event notification regime relates to schemes that are master trusts. The Scheme was not and is not a master trust and Mr Reilly's apparent view or acceptance that it was shows a serious lack of competence in his role as a Trustee. Mr Reilly has submitted that he relied upon Mr Davenport's legal advice in that regard. However, as a solicitor himself, who was aware of the nature of the Scheme, including that the Scheme was not a master trust, I consider that Mr Reilly should have questioned this approach with Mr Davenport, and so acted without due care in failing to do so.

427. Mr Reilly allowed matters to be delayed further by waiting for Mr Craig, who, as must have been clear to Mr Reilly, (see, for example, paragraph 401 above), had been heavily involved in the matters of concern, to pay Mr Davenport's outstanding fees. Mr Reilly submitted that further periods of illness had delayed his reporting to TPR. However, he had already put together his report and, as I have explained in paragraph 417 above, putting together the information that TPR required would not have been an onerous task. If in doubt, the obvious approach would have been to file a report as best as was possible in the circumstances, with the aim of being able to deal with further requests for information from TPR, as and when he was able to do so, rather than doing nothing to secure the remaining Scheme funds and allowing the members' positions to worsen with the same Trustee(s) in control.

428. When Mr Reilly resigned as a Trustee on 15 November 2017, he still had not reported matters to TPR. Mr Kelly had already resigned so, by resigning himself, Mr Reilly left the Scheme in the hands of Mr Craig as sole Trustee. Given the serious matters that Mr Reilly had identified in relation to the Scheme and the strong indications that Mr Craig was involved in those matters, including his physical threats to Mr Reilly during their meeting in August 2017, I cannot see how Mr Reilly, whose responsibility at that stage was to minimise further loss of Scheme funds, can reasonably have considered that resigning without reporting matters to TPR immediately could have been in members' interests. Mr Reilly has, in his recent submissions, accepted my conclusion, as set out in my second Preliminary Decision, that it was not in members' interests to have resigned leaving the Scheme in Mr Craig's hands, albeit he maintains that no liability attaches to him for this.

429. Mr Reilly's purported attempt to report to TPR on 10 January 2018, seems to have involved the use of an incorrect email address. The copy of that email that Mr Reilly has submitted to TPO does not include any proof that the attempt was actually made on 10 January; only the content of the email and the address to which Mr Reilly had apparently attempted to send it are included.

430. Mr Reilly has asked me to observe that he had: written to members on 25 October 2017 (see paragraph 79 above); reported matters to the SRA (paragraph 86 above); and reported matters to the police. As I have explained in paragraph 61 above, the unsigned and undated witness statement to an unnamed police force with no explanation as to the context in which the statement was given is of no or very limited evidential value. The correspondence with the SRA that Mr Reilly forwarded contains references to an individual who was apparently a Scheme member unable to access her fund under the Scheme, and enquiries from the Investigation Officer as to where that member's money had gone. This suggests to me that the SRA may have contacted Mr Reilly in the first instance in relation to that member. In any event, I do not consider that reporting matters to the SRA and not reporting to TPR was a reasonable course of action to have taken given the immediate and ongoing threat to members' pension funds. Writing to Scheme members to inform them of the loss of some or all of their pension funds and of Mr Reilly's proposed course of action was of no practical benefit to them and, again, I consider doing so before reporting to TPR was unreasonable. Therefore, Mr Reilly's submission that he took all of those steps does not assist him.

431. I consider that Mr Reilly's acts and omissions committed since his return to work from sickness absence, in June or July 2017, amount to a breach of: his common law duty as a Trustee to exercise care and skill in managing the Scheme's affairs; and his duty under Clause 5 of the Trust Deed (see paragraph 421 above).

Mr Kelly

432. Mr Kelly has submitted that Mr Reilly had taken on the role of investigating the Scheme's investments and payments out of the Scheme and that, in any event, he could not do anything to change what had already happened prior to his appointment as a Trustee. Mr Kelly said, at the Oral Hearing, that he undertook no research of his own regarding the role and requirements of a pension scheme trustee, having effectively left that to Mr Reilly. Mr Kelly did not complete the TKU Course. Mr Kelly had understood that the Manchester office's operation had halted on his and Mr Reilly's appointment as Trustees, so no new members would be joining the Scheme until the office began to operate again.

433. Despite having attended the December 2016 Meeting, at which Mr Reilly had asked for copies of the Introducers' scripts and contracts and at which it was acknowledged that the Introducers were being paid fees at a level higher than market rate, Mr Kelly said that he had not been aware that Introducers were being used to generate new Scheme membership. I consider that this indicates a serious level of disinterest, on Mr Kelly's part, in his duties and responsibilities as a Trustee and is evidence that Mr Kelly acted passively during his time as a Trustee.

434. Mr Kelly said, at the Oral Hearing, that he had known that trustees were the legal owners of the beneficiaries' assets, and were therefore responsible for those assets. However, Mr Kelly also said that he had understood that members of the Scheme's administrative staff were being paid out of members' funds as the members were

transferred into the Scheme. As far as Mr Kelly could see, there was no income coming from any of the Scheme's investments.

435. By March 2017, before he had even received Mr Reilly's report on 5 April 2017, Mr Kelly had become frustrated with Mr Craig's lack of engagement, to such an extent that he felt it necessary to threaten Mr Craig with removal from office as a Trustee, see paragraph 63 above.

436. It is clear, from his email exchange with Mr Reilly on 5 April 2017, which included the April 2017 Report, that Mr Kelly was aware of the BEIS' investigation into OFSL. It is also obvious that he had read the April 2017 Report. In his response to Mr Reilly's email of 5 April 2017, Mr Kelly acknowledged that Mr Reilly had identified matters in relation to EMM and RAM and that Mr Reilly was seeking Mr Kelly's input regarding those matters. Mr Kelly has not denied having read the 6 April 2017 Email, which listed the various investments that had been made during his time as a Trustee.

437. While Mr Kelly has explained that Mr Reilly had taken on the task of researching the Trustees' role and requirements, Mr Reilly could not have fulfilled the requirements of the 2004 Act, section 247 on Mr Kelly's behalf. I note that Mr Kelly did not take the TKU Course, despite Mr Reilly's advice that this would be useful. It seems that Mr Kelly showed very little interest in his role as a Trustee and, as I have found in Section D.3.6 above, was passive in relation to the Trustees' shared investment duties.

438. Mr Kelly had agreed with Mr Reilly that Mr Reilly would take forward the task of ascertaining the state and condition of the Scheme. While Mr Kelly has submitted that he was unaware of the severity of Mr Reilly's illness, or for how long he would be unable to fulfil his role as a Trustee, given that Mr Reilly had lung cancer and was taking leave for surgery in relation to that cancer, I do not accept that Mr Kelly did not anticipate that Mr Reilly might not return for some time. Despite this, Mr Kelly did not take forward Mr Reilly's questions or concerns which were set out in his report. While it may be appropriate to allow a fellow trustee to take the lead in such matters, his role required the monitoring of its progress and personally ensuring that whatever action needed to be taken under the law or TPR's Codes, was carried out.

439. Mr Kelly has submitted that, knowing of BEIS' and HMRC's concerns about OFSL and the Scheme respectively, it seemed inconceivable that neither of those organisations would have notified TPR of their concerns. However, Mr Kelly took no action to satisfy himself that that was indeed the case.

440. As I have explained in paragraph 406 above, it must have been clear, in the context that existed, that there had been breaches of the law in relation to the Scheme and that Scheme assets were at risk or, at the very least, that there was cause to suspect that this was the case. Mr Kelly has submitted that, while it was clear that there was "some explaining to do", he was certain that Mr Reilly, being a lawyer, would have alerted him if he had thought that any breach of trust had occurred. I do not accept that submission. Mr Kelly had an extensive background in pension scheme compliance and it would have been obvious to him that the matters set out in the April 2017 Report were cause

for serious concern and that breaches of trust had occurred. However, Mr Kelly took no action to prevent or minimise the risk of further loss of Scheme assets, or to try to recover any of the Scheme assets that had been invested or paid away in breach of trust which, as I have explained in paragraph 294 above, was a requirement under case law. A trustee acting in accordance with his common law duty of care would not have simply accepted matters as Mr Kelly did, but would at least have considered what action he ought to take in order to minimise the loss of Scheme assets, including whether he was under a duty to report matters to TPR. This would have led to him consulting TPR's guidance. As I have explained in paragraphs 413 to 421 above, given the circumstances that existed as set out in paragraphs 398 to 402 above, a prudent trustee who had familiarised himself with Code 1 would have reported the matters, set out in Mr Reilly's report to TPR, as soon as reasonably practicable.

441. Regarding Mr Kelly's submission that he saw no point in taking action in relation to past events, as that would not change the past, I do not consider that that assists him. Mr Kelly had believed that the Manchester office had ceased to do business, so that no new members were transferring funds into the Scheme. However, Mr Kelly did not check that this was the case. In fact, nearly £2 million of funds were transferred into the Scheme within the first three months of Mr Kelly's term of office as a Trustee. During 2017, payments continued to be made from the Scheme's bank account, including some payments that appear to have been in relation to loans to members. Eventually, having concluded that there was no "way forward" for anyone in relation to the Scheme, rather than seeking to prevent any further loss of Scheme funds by reporting matters to TPR, as was his responsibility, or by taking any other prudent action, Mr Kelly took no such action. Instead, he simply resigned. This single action taken reveals a focus on removing himself from the arena, and perhaps blame, rather than trying to put right what had happened, protect members and dealing appropriately with the consequences of his own inactions.

442. I find that Mr Kelly's conduct fell far short of that required; his inaction, having been on notice that breaches of trust had occurred in relation to the Scheme by 6 April 2017, amounts to a clear breach of: his duty to take care and skill in conducting the business of the Scheme's trust; and, owing to his failure to report matters to TPR, the requirement under Clause 5 of the Trust Deed (see paragraph 421 above). As with Mr Reilly, I find that this failure meant losses occurred to the scheme after 6 April 2017 which in all likelihood would have been prevented had Mr Kelly carried out his trustee duty and reported to TPR.

D.9 Member consent/Contributory negligence

D.9.1 <u>Member consent</u>

443. It is an established principle of trust law that where a beneficiary, who is of full age and capacity, freely consents to the act in question, or afterwards waives the right to sue the trustees in respect of it, he may not later sue for that breach of trust, whether or not he knew that what he was consenting to would amount to a breach of trust (*Re Paulings' Settlement Trusts* [1962] 1 WLR).

444. Regarding the relevance of the question whether it might be fair for the beneficiary to sue the trustees for breach of trust, the following passage from the judgment of Wilberforce J in *Re Pauling's Settlement Trusts* (at paragraph 108) was cited by Harman LJ in *Holder v Holder* [1968] Ch 353 at 394:

> *"The result of these authorities appears to me to be that the court has to consider all the circumstances in which the concurrence of the cestui que trust was given with a view to seeing whether it is fair and equitable that having given his concurrence, he should afterwards turn round and sue the trustees: that, subject to this, it is not necessary that he should know that what he is concurring in is a breach of trust, provided that he fully understands what he is concurring in, and that it is not necessary that he should himself have directly benefited by the breach of trust."*

445. Harman LJ went on to say, at 394G, that:

> *"...the whole of the circumstances must be looked at to see whether it is just that the complaining beneficiary should succeed against the trustee."*

446. Underhill and Hayton: Law of Trusts and Trustees[111] [112]advises that, for this principle to apply: the beneficiary must have: been "of full age and capacity at the date of such assent or release[113]"; "had full knowledge of the facts and knew what he was doing[114] and the legal effect thereof[115], though, if in all the circumstances it is not fair and equitable that, having given his concurrence or acquiescence, he should then sue the trustees, it is not necessary that he should know that what he is concurring or acquiescing in is a breach of trust (provided he fully understands what he is concurring or acquiescing in) and it is not necessary (though it is significant[116]) that he should himself have directly benefited by the breach of trust[117]"; and "no undue influence was brought to bear upon him to extort the assent or release[118]."

447. Regarding the requirement for the beneficiary to have been subject to no undue influence, Underhill and Hayton refers to Re Pauling's Settlement Trusts [1964] Ch 303, in which:

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[111] Paragraph 1 of Article 95 of the 19th edition.

[112] The same paragraph of the 1960 edition of Underhill and Hayton was referred to by Wilberforce J in *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 (on appeal [1964] Ch 303).

[113] *Lord Montford v Lord Cadogan (1816) 19 Ves 635; Overton v Banister (1844) 3 Hare 503 at 506.*

[114] *Re Garnett* (1885) 31 Ch D 1; Buckeridge v Glasse (1841) Cr & Ph 126; *Hughes v Wells* (1852) 9 Hare 749; *Cockerell v Cholmeley* (1830) 1 Russ & M 418; *Strange v Fooks* (1863) 4 Giff 408; *March v Russell* (1837) 3 My & Cr 31; *Aveline v Melhuish* (1864) 2 De GJ & Sm 288; *Walker v Symonds* (1818) 3 Swan 1

[115] *Re Garnett* (1885) 31 Ch D 1; Cockerell v Cholmeley (1830) 1 Russ & M 418; *Marker v Marker* (1851) 9 Hare 1; *Burrows v Walls* (1855) 5 De GM & G 233; *Stafford v Stafford* (1857) 1 De G & J 193; *Strange v Fooks* (1863) 4 Giff 408; *Re Howlett* [1949] Ch 767 at 775.

[116] *Stafford v Stafford* (1857) 1 De G & J 193 (benefits from breach of trust accepted for 15 years); *Roeder v Blues* [2004] BCCA 649, (2004) 248 DLR (4th) 210 at [33].

[117] *Holder v Holder* [1968] Ch 353 at 369, 394, 399 (CA) approving *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 at 108. Also *Re Freeston's Charity* [1979] 1 All ER 51 at 62, CA.

[118] See paragraph 447 below.

> "the Court of Appeal expressed the view that a trustee who carried out a transaction with the beneficiary's apparent consent might still be liable if the trustee knew or ought to have known that the beneficiary was acting under the undue influence of another, or might be presumed to have so acted, but that the trustee would not be liable if it could not be established that he knew or ought to have known."

448. I note that there was a statement, in Mr E's signed Scheme membership application form, confirming to the Trustees that the member had been advised by the Trustees to take "independent financial, legal and taxation advice on the proposed transfer to the plan" and that the member had "made such enquiries" and taken such advice as they considered necessary "concerning all possible implications concerning the proposed transfer and your trusteeship of the Optimum Retirement Benefits Plan". This was followed by a statement, acknowledging that the Trustees had not given the member "any tax advice concerning the proposed transfer or the implications of the proposed transfer on my circumstances or on the circumstances of any other person likely to be affiliated with or benefiting from the plan".

449. If those statements were to be taken at face value, it might suggest that Mr E was informed of the facts and the risks when he transferred into the Scheme. However, there is no evidence to suggest that members had any influence over the Trustees' acts or omissions concerning the investment of the Scheme's funds. As I observed in paragraph 233 above, the investment power under the Trust Deed did not enable the Trustees to allow members to influence their investment decisions unless (broadly) the members had the appropriate FCA authorisation. Members' funds were pooled in the Scheme, so any influence a member might have had on the Trustees' investment decisions with regard to their fund (and I do not consider that members had any influence) would have had very little effect on the pooled fund overall.

450. Also, as I have explained in Section A.1.2 above, Mr E was visited at his home by Mr Croston, an Introducer, who was incentivised to persuade members to join the Scheme. Mrs E's account of the meeting with Mr Croston shows that he presented an inaccurate representation of any potential benefits to Mr E of transferring his pension funds into the Scheme. For example, he informed Mr E, incorrectly, that he would gain nothing by continuing to make payments into a pension scheme at his age. Additionally, Mr Croston failed to set out any potential risks of transferring into the Scheme such as poor investment performance. It seems that Mr E may have been under pressure from Mr Croston to sign the documentation; Mrs E recalled that Mr Croston had encouraged Mr E to sign the forms during the meeting at his home, rather than allowing him time to consider and reflect on his options or even to read the brochure that he had handed to Mr E at that meeting.

451. The fact that, a couple of days after that meeting, Mr E was then asked by Mr Croston to sign additional paperwork presented to him by a man in a car outside of his home, with no explanation other than that this was paperwork that Mr Croston had forgotten to get signed, is most concerning. It does not seem that Mr E was in any way encouraged to read the paperwork before signing it and, according to Mrs E's account,

Mr E was not even allowed to retain a copy of the paperwork himself, other than a copy of the brochure, which contained inaccurate statements as to the safety of the Scheme's investment strategy and the level of engagement that members would have with the Scheme's representatives.

452. There would have been no reason for Scheme members to meet face to face with Introducers if the purpose of those meetings had been solely to share information to enable members to make an informed decision on whether to transfer their pension funds into the Scheme. The use of a face to face meeting, with no written record, allowed the Introducers to present the Scheme as they wished. If Mr Croston had merely wanted to provide documentation to Mr E as a potential Scheme member for his consideration, he could have done that by correspondence.

453. Mrs E does not recall ever having seen the Pension Summaries and I note Dalriada's submission that other members of the Scheme had reported that their signatures on Scheme paperwork had seemingly been forged. Even if Mr E had seen the Pension Summaries, he would not have received an accurate representation of the Scheme from them. For example, the Pension Summaries that apparently bear Mr E's signature include a clear recommendation that Mr E would benefit from transferring his pension funds into the Scheme, setting out reasons why this was the case and referring to the "more active management and the potential for a greater fund at retirement".

454. When Mr E joined the Scheme he also received assurances from Mr Craig himself, in the form of a 'welcome letter', setting out Mr Craig's qualifications and regulation by the ICEAW, as well as stating that he had "an adequate indemnity policy in place with Lloyds of London".

455. As I have observed already, while it is clear that the Scheme's funds have been lost almost in their entirety and, although, some of the missing Scheme investments and payments have been traced, it has not been possible to ascertain where a large proportion of the funds have gone. Dalriada, as a professional trustee, has had difficulty in piecing together the events that led to the loss of the Scheme's funds. Therefore, I cannot see how the members could or should have known how their funds would be invested or applied and I would consider it understandable that Mr E had felt assured by Mr Croston's advice during their meeting at Mr E's home before agreeing to transfer his pension funds into the Scheme.

456. I note that in Re Pauling's Settlement Trusts it was found that, due to the complicated action in question, even one of the claimants who was an experienced lawyer could not be expected to appreciate his rights as a beneficiary until they had been drawn to his attention. Looking at the present case, investments and other payments made by a pension scheme; the raft of legislation which governs those investments; and the Trustees who possessed the power to make them, are a complicated matter. Mr E had no investment experience and was not a pensions professional himself. Instead, Mr E placed his trust in Mr Craig, as Trustee, (and in any Scheme trustee from time to time, including, subsequently, the Trustees) to invest his funds on his behalf and to do so safely, within the requirements imposed on pension scheme trustees, which I have set

out in Section D.3 above. I therefore question how Mr E could have been expected to understand: that his pension fund would be invested in unregulated, high-risk investments; that the trustees of the Scheme from time to time would do so without carrying out due diligence or taking investment advice; or that his pension funds would be used in part to make payments to parties beyond and in excess of any that could have been justified.

457. The Trustees' credibility is further eroded by their association with individuals who were or had been under investigation by various authorities for offences such as money laundering, and (at least in Mr Craig's case) a law firm that had been closed down by the SRA for its failure to comply with the solicitors' accounts rules.

458. Mr Craig has commented that he had never met Mr E. That is irrelevant, however. Mr Craig had himself employed Mr Dowd as Business Development Manager and given him the mandate to generate new membership of the Scheme. Therefore, regardless of whether Mr Craig had met Mr E himself, I am satisfied that he was fully aware that new members were joining the Scheme having been persuaded to do so by Introducers.

D.9.2 Contributory Negligence

459. I have found the Trustees to have committed multiple breaches of trust, including the breach of their fiduciary duty to act honestly and in good faith, as set out in Sections D.2 to D.7 above.

460. In Underhill and Hayton: Law of Trusts and Trustees (19th edition), at paragraph 2 of Article 87, it is explained that, in cases such as this one, where a trustee has lost or misapplied the trust's assets, "contributory negligence [as a defence against the requirement that the trustee restores those assets to the trust fund or pays the amount due to make the accounts balance] is inapt because of 'the basic principle that a fiduciary's liability to a beneficiary for breach of trust is one of restoration'"[119] .

461. It is further explained, in Underhill and Hayton, that "Where the trustee has acted fraudulently, a further reason for denying him the defence would be the rule that 'it is no excuse for someone guilty of fraud to say that the victim should have been more careful and should not have been deceived'"[120].

462. As I have explained above in section D.3.6, duties imposed on the Trustees by case law required them to invest members' funds prudently and with regard to members' best interests. The Trustees also had a fiduciary duty to act honestly and in good faith when dealing with members' funds. As I have already found, the Trustees have

[119] The following cases are cited: *Alexander v Perpetual Trustees (WA) Ltd [2004] HCA 7*, *(2004) 216 CLR 109 at [44]* and esp [104] and *Bristol & West Building Society v A Kramer and Co (a firm) [1995] NPC 14*, *(1995) Times, 6 February*; *Nationwide Building Society v Balmer Radmore (a firm) [1999] Lloyd's Rep PN 241*; *De Beer v Kanaar & Co (a firm) [2002] EWHC 688 (Ch) at [92]*.
[120] *Maruha Corpn v Amaltal Corpn Ltd [2007] NZSC 40*, *[2007] 3 NZLR 192 at [23]*, citing *Standard Chartered Bank v Pakistan National Shipping Corpn [2002] UKHL 43*, *[2003] 1 AC 959*.

breached all of those duties and those breaches have caused the members to lose their pension funds.

463. For the reasons that I have given in paragraphs 459 to 462 above, I find that the Trustees are not entitled to rely upon any defence of contributory negligence against their personal liability for the consequences of their many breaches of trust.

D.10 The Trustees' liability

464. I have found that the Trustees have committed various breaches of trust by:

464.1. failing to take steps to manage the various conflicts of interest that existed, in breach of the 2004 Act, section 249A, and Clause 5.1 of the Trust Deed (Section D.2); and

464.2. failing to act in accordance with the investment requirements and duties imposed on them by Part 1 of the Pensions Act 1995, the Investment Regulations and case law[121] or, in Mr Kelly's and Mr Reilly's case, by acting passively in that regard and/or allowing, by their own wilful default, Mr Craig to commit breaches of his investment duty (Section D.3).

465. In addition, I have found that Mr Craig has committed the following breaches of trust:

465.1. committing a fraud on the power of investment (Section D.3.8);

465.2. paying Scheme funds to companies outside the scope of his powers under the Trust Deed (Section D.4.1);

465.3. making payments out of the Scheme's funds to himself outside the scope of his power to do so under Clause 20 of the Trust Deed (Section D.4.2.1);

465.4. acting outside the scope of his powers under the Trust Deed in making payments to Mr Dowd, Mr Jenkins and Mr Ewing and/or by failing to exercise due skill and care in employing those individuals (Section D.4.2.2);

465.5. acting outside the scope of his powers under the Trust Deed in using Introducers and paying them fees so far in excess of the market rate (Section D.4.3);

465.6. acting outside the scope of his powers under the Trust Deed in making or arranging loans to the Scheme's members (Section D.4.4);

465.7. applying the balance of the Scheme's fund other than in a legitimate manner and/or without fulfilling his equitable duty to act with care and skill (Section D.5); and

[121] In Mr Kelly's and Mr Reilly's case, these breaches of trust apply only to any extent that Post-2017 Investments were made.

465.8. failing to comply with the requirements of the 2004 Act, section 249A (Sections D.6 and D.7).

466. I have found that Mr Kelly and Mr Reilly have acted in breach of trust by:

466.1. charging and accepting an unreasonable and excessive rate of remuneration for their services as Trustees (Section D.4.3.1); and

466.2. breaching their duties of skill and care and the requirement of Clause 5 of the Trust Deed by failing to report matters to TPR when they should have done so, or, in Mr Kelly's case, to take any action at all in relation to the clear breaches of trust of which he was aware. I am satisfied the further losses to the Scheme would have been prevented by TPR/Dalriada had reports been made as I have identified above. (Section D.8).

467. I have also found that there was maladministration on the part of the Trustees, in failing to have due regard for the 2013 Code and the 2016 Code as applicable (Sections D.2, D.4, D.6 and D.8).

468. I shall now consider the effect of the statutory provisions under the 1995 Act, section 33 (**Section 33**).

D.10.1 Section 33 of the Pensions Act 1995

469. Section 33 prevents trustees of an occupational pension scheme from excluding or restricting their liability for breach of any duty imposed on them to take care and exercise skill in the performance of any investment functions:

"(1) Liability for breach of an obligation under any rule of law to take care or exercise skill in the performance of any investment functions, where the function is exercisable:

(a) By a trustee of a trust scheme, or

(b) By a person to whom the function has been delegated under section 34,

cannot be excluded or restricted by any instrument or agreement.

(2) In this section, references to excluding or restricting liability include:

(a) making the liability or its enforcement subject to restrictive or onerous conditions,

(b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy".

470. The Trust Deed contained an indemnity and exoneration clause for the Trustees, which I have set out at Appendix 6 below. On joining the Scheme, members signed an application form which contained the indemnity set out at paragraph 157 above.

471. Section 33 prevents trustees of a pension scheme from excluding or restricting liability to take care or exercise skill in the performance of their investment functions by any instrument. It has been confirmed that section 33 applies both to breaches of statutory investment duties and breach of the equitable duty to exercise due skill and care in the performance of the investment functions (*Dalriada Trustees v McCauley*).

472. The wording of section 33 also does not confine its effect to exclusion clauses within a pension scheme's trust deed and rules; liability "cannot be excluded or restricted by any instrument or agreement". So, the scope of section 33 extends to any attempt, made outside a pension scheme's trust deed and rules, to exclude or restrict the pension scheme's trustees' liability to take care or exercise skill in the performance of their investment functions.

473. A purposive interpretation of Section 33 requires indemnities (particularly a member indemnity) to be included. The impact of any indemnity would prejudice the member in consequence of his pursuing his right or remedy (section 33(2)(b)). To allow an indemnity under Section 33, especially where I have found dishonesty on any of the Trustees' part (see Section D.10.2 below), would render Section 33 open to circumvention and ineffective in practice. As a matter of public law policy where there has been dishonesty it cannot be correct to give effect to any indemnity.

474. I consider that the application form that was provided to join the pension scheme containing the indemnity, can properly be regarded as forming part of the documents comprising the Scheme. "Pension scheme" for the purposes of section 1(5) of the 1993 Act is defined as a "…scheme or other arrangements, *comprised in one or more instruments or agreements* (my emphasis) having or capable of having effect so as to provide benefits".

475. So, I consider that Section 33 applies to both the exoneration and indemnity clause under the Trust Deed and the indemnity given by members on joining the Scheme[122].

476. This renders both the exoneration and indemnity clause and the indemnity given by members ineffective in preventing the Trustees from being held personally liable for any loss suffered by members in relation to the Trustees' breach of their investment duties, imposed by statute (see Sections D.3.3 to D.3.5), and/or common law (see Section D.3.6 above) by having committed the various breaches of trust that I have found the Trustees to have committed.

[122] It has also been acknowledged, in the Court of Appeal judgment of Robert Sofer v Swiss Independent Trustees SA [2020] EWCA Civ 699, that it is arguable that an indemnity must be subject to an implied term that it does not apply to any underlying transaction where the defendant has acted dishonestly (paragraph 52 of the judgment).

D.10.2 Exoneration provisions under the Trust Deed

477. The exoneration clause in the Trust Deed is as follows:

> "18.5 Subject to the 1995 Act, sections 33 and 34, no Trustee or previous Trustee will be liable for;
>
> 18.5.1 any mistake or forgetfulness of law or fact of the Trustees or any previous Trustees, their agents, delegates or advisors; or
>
> 18.5.2 any breech [sic] of duty or trust whether by commission or omission."

478. The scope of this exoneration clause is limited however by the case of *Armitage*, which established that "The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries, is the minimum necessary to give substance to the trusts" (para 29 of *Armitage*). A trustee's duty to act honestly and in good faith are part of the "irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust".

479. In *Armitage*, Millet J accepted, at paragraph 18, that dishonesty:

> "connotes at the minimum an intention on the part of the trustee to pursue a particular course of action, either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interests or not."

480. Millet J explained (at paragraph 19) that:

> "It is the duty of a trustee to manage the trust property and deal with it in the interests of the beneficiaries. If he acts in a way which he does not honestly believe is in their interests then he is acting dishonestly.".

481. However, in considering the test of honesty in *Armitage*, which appears to be subjective, Millet LJ did not consider the House of Lords decision in *Royal Brunei Airlines v Tan* [1995] 2 AC 378. Lord Nicholls said (in the context of knowing assistance and constructive trusts) in *Royal Brunei Airlines* that an objective test of [dis]honesty is to be applied:

> "… in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sights this may seem surprising. Honesty has a connotation of subjectivity as distinct from objectivity of negligence. Honesty, indeed does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated…However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale with higher or lower values according to the moral standards of each individual.

> If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour."

482. Under the heading "Taking Risks" Lord Nicholls said:

> "All investment involves risk. Imprudence is not dishonesty, although imprudence may be carried recklessly to lengths which call into question the honesty of the person making the decision. This is especially so where the transaction services another purpose in which that person has an interest of his own. This type of risk is to be sharply distinguished from the case where a trustee, with or without the benefit of advice, is aware that a particular investment or application of trust property is outside his powers, but nevertheless he decides to proceed in the belief or hope that this will be beneficial to beneficiaries or, at least, not prejudicial to them. He takes a risk that a clearly unauthorised transaction will not cause loss. A risk of this nature is for the account of those who take it. If the risk materialises and causes loss, those who knowingly took the risk will be accountable accordingly."

483. In *Walker v Stones* [2001] 2 WLR 623, Sir Christopher Slade, giving the only full judgment said that, while there is a difference of emphasis between the judgments in *Royal Brunei Airlines* and *Armitage*, as far as they relate to the concept of dishonesty they were not irreconcilable and that he could see no grounds for applying a different test of honesty in the context of a trustee exemption clause from that applicable to the liability of an accessory in breach of trust. With regard to Millett LJ's dictum on a trustee's honest belief he said:

> "I think it most unlikely that he would have intended this dictum to apply in a case where a solicitor-trustee's perception of the interests of the beneficiaries was so unreasonable that no reasonable solicitor-trustee could have held such a belief".

484. Sir Christopher Slade restated the proposition - "at least in the case of a solicitor-trustee" - that honest belief would not be found where a trustee's perception of the interest of the beneficiaries was so unreasonable that, by an objective standard, no reasonable trustee-solicitor could have thought that what he did or agreed to do was for the benefit of the beneficiaries. He explained that he limited the proposition to trustee-solicitors because on the facts he was only concerned with a trustee-solicitor and because he accepted that the test for honesty may vary from case to case depending on the role and calling of the trustee. Lord Justice Nourse and Lord Justice Mantell agreed with his judgment without adding anything of their own.

485. In *Mortgage Express Limited v S Newman & Co* (a firm) (The Solicitors Indemnity Fund limited, Pt 20 defendant) [2001] All ER (D) 08 (Mar), Etherton J said:

> "It is now well established that dishonesty, in the context of civil liability, embraces both a subjective and an objective element. The well known statement on this issue is that of Lord Nicholls in Royal Brunei Airlines v Tan … The inter-relationship between the objective and subjective standards can

produce both conceptual and practical difficulties. I was referred, for example, to … Walker v Stones…".

486. Etherton J considered Sir Christopher Slade's dictum, and said that he did not consider that Sir Christopher Slade could have been intending to abolish the critical distinction between incompetence and dishonesty – that incompetence, even if gross, does not amount to dishonesty without more.

487. In the later case of *Fattal v Walbrook Trustees (Jersey) Limited* [2010] EWHC 2767 (Ch)[123], it was accepted, at para 81, that the law concerning the interpretation of exoneration clauses, as set out in *Walker v Stones*, was not confined to applying to solicitor-trustees. In *Fattal v Walbrook*[124] the test for dishonesty, at least in the case of a professional trustee, seems to be that the trustee has committed a deliberate breach of trust and either: (a) knew, or was recklessly indifferent as to whether, it was contrary to the interests of the beneficiaries; or (b) believed it to be in the interests of the beneficiaries, but so unreasonably that no reasonable professional trustee could have thought that what he did was for the benefit of the beneficiaries.

488. In the case of *Ivey v Genting Casinos Ltd t/a Crockfords* [2017] UKSC 67, it was confirmed that there should be a common standard of dishonesty in both civil and criminal cases and that the civil standard, as considered in the cases of *Royal Brunei* and *Twinsectra* should be applied in the criminal, as well as in the civil, context (paragraph 62 of *Ivey v Genting*). *Ivey v Genting* emphasised, in line with *Twinsectra*, that, in considering whether an individual had acted dishonestly, it was necessary to make that judgment on the basis of the standards of ordinary common people, not of those of that individual.

489. I consider each of the Trustees to be, or to have been, a quasi-professional trustee, for the following reasons:

489.1. Mr Craig received payments from the Scheme, which could be regarded as remuneration in respect of his office as a trustee of the Scheme. None of the Trustees has denied that the Scheme was promoted to members as an opportunity to invest and Mr Craig benefited in many ways, including from: the large amount of payments he received from the Scheme; payments made from the Scheme to OFSL in his capacity as majority shareholder; and proceeds of the loan transactions in which the Shawhill companies were involved, in his capacity as director and owner of SSL and via his relationship with the other Shawhill companies. On that basis, Mr Craig could be considered a professional trustee or, at the very least, a quasi-professional trustee, so the partly objective test for dishonesty, set out in *Fattal v Walbrook*, applies.

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[123] which acknowledged, at para 81, that there had been "twists and turns in the legal definition of dishonesty", referring to the cases of Twinsectra Ltd v Yardley [2002] AC 164 (**Twinsectra**), Barlow Clowes v Eurotrust International Ltd [2006] 1 WLR 1476 and Abou-Rahmah v Abacha [2006] EWCA Civ 1492.

[124] and confirmed in the case of Sofer v Swiss Independent Trustees SA [2019] 2071 (Ch) and subsequently in Robert Sofer v Swiss Independent Trustees SA [2020] EWCA Civ 699.

489.2. Both Mr Kelly and Mr Reilly appear to have been ‘recruited’ as trustees with services to offer the Scheme on account of their respective backgrounds and experience, as they highlighted themselves (see paragraphs 46 and 50 above). Both Mr Kelly and Mr Reilly charged, and were paid, fees for their services as Trustees. Therefore, the same, partly objective, test concerning honesty applies to Mr Kelly and Mr Reilly as applies to Mr Craig.

490. As I have explained in paragraph 204 above, it is also established, in *Armitage*, that a trustee’s duty to act honestly and in good faith are part of the “irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust”.

Mr Craig

491. The subject of scrutiny is, essentially, the loss of the Scheme’s assets through: multiple unregulated, high-risk investments, made without due diligence having been conducted or investment advice having been taken; and: the paying out of Scheme assets with no proper explanation; and the transferring in of the Funds’ members’ assets, which included pooling investments made under those Funds (which had incurred a huge loss) with the assets of the Scheme, thus depleting the existing members’ funds.

492. I have already found that Mr Craig acted in breach of trust and committed maladministration, as set out in paragraphs 464, 465 and 467 above. All of these breaches of trust and findings of maladministration are intertwined and have led, directly or indirectly, to the loss of Scheme funds. Therefore, I have considered together, Mr Craig’s liability in relation to all of these breaches of trust and findings of maladministration, and the extent to which Mr Craig should benefit from any relief under section 61.

493. As I have explained, the applicable test, which has been developed by case law since *Armitage*, is partly objective. Here the circumstances call into question Mr Craig’s honesty on the basis that he had interests of his own. For example, by employing Mr Dowd to promote the Scheme to prospective members, many of whom were persuaded by Introducers to take out loans via the Shawhill companies in which Mr Craig had an interest, Mr Craig was bound to benefit.

494. Mr Craig’s honesty may be questioned further because: he, and OFSL, in which Mr Craig held the majority of the shares, received payments of an unjustifiably high level; he failed to ask questions concerning his duties and necessary level of knowledge as a trustee of the Scheme, and take advice before investing a large amount of the Scheme’s funds in thoroughly unsuitable investments; and he paid out large sums from the Scheme’s assets, many of which were entirely undocumented, or were clearly paid to people with whom Mr Craig was acquainted with no explanation for such payments. Mr Craig’s attempt to direct ‘repayment’ of the RTC loan to his own company, which had been due to the [Ocean] Fund before Mr Craig had settled it, in flagrant breach of the terms set out in the February 2018 Letter, is further reason to doubt Mr Craig’s honesty.

495. Although the nature of the objective test in *Walker v Stones*, which was accepted in *Fattal v Walbrook Trustees*, is in some respects unclear, I consider that there is a distinction between a trustee's conduct constituting a breach of trust and the belief he held at the time of the breach. Mr Craig has responded to Mr E's complaint and to Dalriada's referral with submissions that are full of inconsistencies and has provided no evidence to support those submissions. Mr Craig has made no submissions as to his perception of the interests of the Scheme's beneficiaries.

496. As the insolvency practitioner for the principal employers of the Funds and in his position as trustee or acting trustee of those Funds, Mr Craig will have known how unsuitable the Merger was for members of the Scheme. Given Mr Craig's professional background as a Chartered Accountant regulated by the ICAEW, Mr Craig will have known that the nature of the investments made with the Scheme's funds was unsuitable and he will have been well aware of the need to conduct due diligence and to keep proper records of all Scheme transactions. Even if Mr Craig had not been an experienced pension scheme trustee, I cannot see how the existence, or at least the possibility of the existence, of a duty of care in relation to his handling of members' funds can have escaped his notice.

497. For the avoidance of doubt, even if Mr Craig believed that his investment, paying out Scheme assets, and the Merger, were in the Scheme's beneficiaries' interests, such a belief would have been so unjustifiable, that no reasonable trustee could have held such a belief.

498. As explained, in sections D2 and D5 above, Mr Craig was aware that the Funds investments had made a loss and that transferring those into the Scheme would result in each member's share of the pooled assets being diminished. Mr Craig, as a Chartered Accountant and licensed Insolvency Practitioner, must have known that companies which were brand new, dormant and/or had a loss-making trading history were unsuitable investment vehicles in which to invest members' pension funds, especially without diversification. Mr Craig was aware of Mr Dowd's convictions for money laundering offences, and yet allowed him to make investment decisions and to be actively involved in running the Scheme. Mr Craig should have questioned seriously any perception he might have had that Mr Dowd was trustworthy.

499. If Mr Craig was unaware of the requirement for him, as trustee of the Scheme, to act in members' best financial interests, in investing their funds and in handling the Scheme's assets more generally, I consider that he would only have been able to sustain such a belief by turning a blind eye and refraining from asking obvious questions.

500. A reasonable and honest trustee in Mr Craig's position would have raised questions to assure himself that: the investments made under the Scheme; the payment of Scheme funds to companies and individuals including himself; the Merger; and the loans to members, via a group of companies in which he had a clear interest, were proper transactions in the members' interests and that his actions accorded with his duties and obligations as a pension scheme trustee. Any failure to ask those questions would

have been dishonest, not because it was negligent not to ask, but because any honest reasonable trustee would have asked them.

501. Regarding the Scheme's investments, it is not disputed that Mr Craig took no proper investment advice when he made those investments. Without any proper professional advice, I cannot see how Mr Craig could reasonably have believed that these transactions were in the Scheme members' financial interests. I do not consider that any reasonable trustee would have been happy to make decisions on that basis. A reasonable trustee would have taken steps to satisfy himself that investing as he did was in the members' financial interest. No such steps were taken. Also, I cannot see how any reasonable trustee could have considered that the payment of such high levels of commission, as appear to have been paid to the Introducers, could possibly have been in the members' financial interest.

502. The fact that Mr Craig was willing to pay such a large proportion of members' funds to OFSL, in which he had an interest, and to acquaintances of his and their companies, as payments out of the Scheme rather than investments, and so with no prospect of recovery, suggests that he deliberately pursued a policy of favouring himself and his acquaintances at the expense of the members, which arguably is dishonest under the *Armitage* approach, in addition to being so under the subjective and objective approach accepted in *Fattal*. The conflict of interest between Mr Craig's fiduciary duty to the Scheme's beneficiaries, and the interests of OFSL and the Shawhill companies, which received payments of Scheme assets or profited from loans made from Scheme assets respectively, are obvious and yet these payments and transactions continued. These, and other, transactions conflicted, in the most obvious way, with Mr Craig's fiduciary duty to keep the Schemes' beneficiaries' interests paramount. I do not accept that a reasonable trustee could have believed that making these payments, entering into the loan transactions and investing Scheme assets, as he did, would be in the members' financial interests. In doing so, Mr Craig specifically intended benefiting persons and entities who were not the object of the trust, knowing that this would be at the expense of the beneficiaries' financial interests. No reasonable trustee would regard this course of action as honest.

503. Mr Craig benefited personally, and benefited others who were not Scheme beneficiaries, by decisions taken with those others in mind outside of his capacity as a trustee of the Scheme, and not by the exercise of his own, independent judgment as a trustee of the Scheme.

504. In my judgment, it is this general blunting of his moral antennae which explains why Mr Craig had a lower standard of honesty, as well as his recklessness for others' rights. He was reckless of the members' right that they could expect him, as a trustee, to: take and heed advice in proposing to invest their pension funds as he did; and to refrain from paying out significant proportions of their fund.

505. An honest and reasonable person would have had regard to the circumstances known to him, including the nature and purpose of the proposed transactions, the nature and

importance of his roles and any conflicts of interests and the seriousness of the adverse consequences to the beneficiaries.

506. As my primary finding I conclude, on the balance of probabilities, having regard to the evidence and submissions received, that Mr Craig knew that his actions were not in the Scheme's members' financial interests. Alternatively, any belief Mr Craig may have had that his actions were in the Scheme's members' financial interests would have been so unreasonable that no reasonable trustee could have held such a belief. Alternatively, looking at the first limb of the test set out in *Fattal*, I find that Mr Craig was recklessly indifferent as to whether his various breaches of trust and his maladministration were contrary to the interests of the beneficiaries.

507. I have also considered the subjective test set out in *Armitage*, which would apply if Mr Craig were not to be regarded as a quasi-professional trustee. As I have explained, even if Mr Craig was unaware of the requirements imposed on him as a pension scheme trustee, such an unawareness could only have existed as a consequence of failing to make even basic enquiries as to the existence of any duties or obligations imposed on him as Trustee. This would clearly amount to reckless indifference regarding his duties and obligations as Trustee, such that Mr Craig is unable to rely on the exemption clause under the Trust Deed in respect of any of my findings of breach of trust or maladministration.

Mr Kelly and Mr Reilly

508. In Mr Kelly's and Mr Reilly's case, the subject of scrutiny in considering whether either of them should benefit from any exoneration from liability is, essentially, the payment of Scheme assets to them at an unreasonable and excessive rate (Section D.4.2.1 above); and failure to take any action, in Mr Kelly's case, or to take proper action as required by statute, in Mr Reilly's case, to secure, or prevent any further loss of, members' funds within the Scheme, resulting in a loss of Scheme members' funds, some of which could have been avoided had either Mr Kelly or Mr Reilly taken the appropriate action (Section D.8 above).

509. I have found, in Section D.4.3.1 above, that Mr Kelly and Mr Reilly acted in breach of trust by charging fees at an unreasonable and excessive rate. I have found also in Section D.8 above, that both Mr Kelly and Mr Reilly breached their duty of skill and care and the requirements of Clause 5 of the Trust Deed in failing to: report to TPR the matters set out in the April 2017 Report; or (in Mr Kelly's case) to take any action at all despite being aware that serious breaches of trust had been committed. I have also found that the Trustees, as a whole, acted in breach of trust and in maladministration by failing to take steps to manage Mr Reilly's and Mr Craig's various conflicts of interest (Section D.2 above).

510. I have found, in Section D.3.6 above, that Mr Kelly and Mr Reilly have breached their investment duties by passively allowing Mr Craig to carry out the Post-2017 Investments. The liability for those breaches cannot be excluded by the Scheme's exoneration or indemnity clauses (as explained in Section D.10.1 above). However, as

I have made a finding in the alternative, that Mr Kelly and Mr Reilly acted in wilful default in relation to Mr Craig's breaches of trust concerning the Trustees' investment duties regarding the Post-2017 Investments, I will consider the extent, if any, to which the exoneration clause might afford Mr Kelly and/or Mr Reilly with any protection from liability.

511. When Mr Reilly sent the April 2017 Report and the 6 April 2017 Email, both Mr Kelly and Mr Reilly were aware that: the Scheme was not being governed properly; access to the Scheme's bank accounts was being denied from both of them; Mr Craig was refusing to engage with his fellow Trustees; and the Scheme's sponsoring employer was under investigation by BEIS. I have also found, in Section D.8 above, that given the contents of Mr Reilly's report in the circumstances that prevailed, Mr Kelly and Mr Reilly must have been aware that Mr Craig had very likely committed multiple breaches of his investment duties and was likely to commit further breaches, and that urgent action to minimise the loss of Scheme assets was required.

512. Mr Kelly's honesty is drawn into question by his following acts and omissions:

512.1. His failure to relinquish his shares in EMM (Section D.2 above), or to surrender control of RAM until several weeks after he had been appointed as a Trustee, during which time Scheme assets had been paid to RAM (Section D.2 above).

512.2. Mr Kelly's denial that investments had been made with Scheme funds during his office as a Trustee, despite clearly having known, at the time of his appointment or shortly afterwards, that the Scheme would be investing in RAM and in Merydion, and that the Scheme had invested in those companies (Section D.2 above).

512.3. Mr Kelly's failure to take any action to protect the Scheme's remaining assets, despite knowing of the matters, as set out in paragraph 404 above.

512.4. Mr Kelly's failure to have questioned the legitimacy of the use of transferred-in funds to pay the Scheme's staff, which was clearly apparent to Mr Kelly (see paragraph 74 above), which should have served as a clear red flag to Mr Kelly that TPR's involvement was necessary, especially given Mr Kelly's professional experience, see Section A.1.3 above.

513. Mr Reilly's honesty is drawn into question by the following:

513.1. Mr Reilly's blinkered belief that Mr Craig should have been trusted, in the face of strong evidence to the contrary, which Mr Reilly maintained, was on the basis of Mr Craig's professional qualifications and experience.

513.2. Mr Reilly's failure to report the matters, set out in paragraph 404 above to TPR, when he first discovered them or subsequently, during which time Mr Reilly was charging fees at an excessive and unreasonable rate, until TPR appointed Dalriada.

513.3. Mr Reilly's insistence, throughout the course of this investigation, that he had never heard of SSL which, as is shown by the 6 April 2017 Email, was not the case (see paragraph 126 above).

514. As I have explained in paragraph 495 above, although the nature of the objective test in *Walker v Stones*, which was accepted in *Fattal v Walbrook Trustees* and *Sofer v Swiss Independent Trustees SA*, is in some respects unclear, I consider that there is a distinction between a trustee's conduct constituting a breach of trust and the belief he held at the time of the breach.

515. Mr Kelly clearly knew that, as a Trustee, he was responsible for members' assets within the Scheme, see paragraph 434 above. Given his extensive background in pension scheme compliance, which included work in relation to occupational pension schemes, Mr Kelly must have known that, by taking no action in his role as a Trustee, even in familiarising himself with the duties and responsibilities imposed on him by law in that role, he would be at serious risk of breaching one or more duties as a Trustee. Mr Kelly has submitted that he saw no reason to take any action on becoming aware of the various issues that affected the Scheme and its fund, as he said he could not change the past.

516. However, it cannot have escaped Mr Kelly's notice that, on discovering serious breaches of trust concerning the investment or paying away of Scheme assets, some action was necessary. Without access to the Scheme's accounts or other key information and documentation concerning the Scheme, Mr Kelly cannot have been certain that further payments would not continue to be made from the Scheme's fund (as they subsequently were). Mr Kelly made no attempt to ascertain that this was the case and had assumed, without checking, that TPR had been informed of the Scheme's predicament by BEIS and/or HMRC. This assumption, without further enquiry or action, was entirely inappropriate in the circumstances, given the role Mr Kelly had and his duty in that role to the scheme members. Further, Mr Kelly appears to have completely failed to acknowledge any need for those who were responsible for the loss of the Scheme's assets before his appointment as a Trustee to be brought to justice for their actions, or the potential for any such individuals to continue to act as they had been, at a cost to further innocent individuals.

517. I have already found that Mr Kelly acted in wilful default in failing to take any action to prevent investments being made with Scheme funds in breach of trust or to recover assets invested in breach of trust (Section D.3.6 above), or to secure members' funds to prevent further loss (Section D.8 above). I have also found that Mr Kelly showed a reckless disregard for whether he was fulfilling his duties as a Trustee, in relying entirely on Mr Reilly to carry out any such action.

518. An honest and reasonable person would have had regard to: the circumstances known to him, including the matters outlined in paragraphs 398 to 404 above; the nature and importance of his role; any conflicts of interests; and the seriousness of the adverse consequences to the beneficiaries of his failure to fulfil his duties and responsibilities

as a Trustee. I have seen no evidence that Mr Kelly had any regard to whether his inaction could have been in the Scheme's beneficiaries' interests.

519. I consider that Mr Kelly would only have been able to sustain any belief that his failure to take action was in the interests of the Scheme's beneficiaries by turning a blind eye to the fact that he might have been under any duty to take action and by unreasonably assuming, without asking what should have been obvious further questions, that Mr Reilly would act on his behalf in that regard.

520. Mr Kelly's role as a Trustee appears to have involved very little work on his part as, by his own admission, he did not research the duties and requirements imposed on him by law as a Trustee, he made no attempt to ensure that the Trustees were complying with their investment duties, leaving that instead to Mr Reilly despite those duties being imposed on all of the Trustees collectively, and he did not assist Mr Reilly in carrying out investigations in order to try to ascertain the status of the Scheme's investments, or even ask Mr Reilly for updates on his progress during those investigations. Despite this, Mr Kelly saw fit to charge fees of £4,000 per month, at a cost to the Scheme's members. Mr Kelly seems to have adopted a policy of favouring his own interests (in his position as a handsomely-paid Trustee) and the interests of Mr Craig and any others involved in the matters identified in the April 2017 Report and the 6 April 2017 Email, including associates of his involved in RAM, over those of the Scheme's beneficiaries. I cannot see that any reasonable trustee could have considered this to be in the Scheme's beneficiaries' financial interests.

521. Further, to have "forgotten" that he owned shares in a company in which the Scheme was the majority shareholder, or even that investments had been made with Scheme assets during his time as a Trustee shows, at best, a reckless disregard for his duties as a Trustee and for the Scheme's beneficiaries' financial interests.

522. Regarding my finding that Mr Kelly and Mr Reilly breached the requirements of the 2004 Act, section 129A, and therefore acted in breach of trust under Clause 5.1 (Section D.2 above), if the matter of conflicts was discussed in the first Trustee meeting, as Mr Reilly has submitted it was, I do not understand why no conflicts register was put in place, to document Mr Kelly's association with RAM and the Scheme's proposed investment in it. I find that omission to have been a deliberate breach of trust on Mr Kelly's part at that time. Mr Reilly had clearly become aware of Mr Kelly's involvement in or association with RAM by the time he sent the 5 April 2017 Report, but did not take any action to document that in any conflicts register. I consider this to have been a deliberate breach on the part of both Mr Kelly and Mr Reilly and I consider that they demonstrated a reckless indifference to whether this was contrary to members' interests. In the alternative, if they did consider not documenting conflicts to be in members' interests, that belief was so unreasonable that, by any objective standard, no reasonable professional trustee could have held that view.

523. Mr Reilly, being an experienced Solicitor, was aware of the need to ensure that members' pension funds were protected, see paragraph 46 above, and paragraph 594.9 in Appendix 8 below and was aware of the investment duties that applied to the

Trustees collectively. However, despite his clear understanding of this fundamental aspect of his role as a Trustee, having discovered the matters set out in the April 2017 Report and the 6 April 2017 Email, in the circumstances that existed at the time, which indicated clearly that breaches of trust had occurred in relation to the Scheme's investments, and the fact that investments had been made since Mr Reilly's appointment as a Trustee (see Sections D.3 and D.8 above), Mr Reilly took no action at the time other than alerting Mr Craig of those matters. I do not accept that Mr Reilly can have been unaware that the investments listed in the 5 April 2017 Report and the 6 April 2017 Email had been made in breach of trust and that he needed to take immediate action to attempt to restore the Scheme's fund to its proper position (see Section D.3.6 above).

524. I consider that Mr Reilly can only have believed that this was in the Scheme's beneficiaries' best interests by ignoring what should have been the obvious possibility or likelihood that Mr Craig was in some way responsible for the situation and less than trustworthy. As I have explained in Section D.8 above, Mr Reilly's strong reliance upon Mr Craig's professional qualifications and experience was unreasonable, especially given the numerous occasions on which individuals with professional qualifications have been found to have acted dishonestly. I consider that an honest and reasonable person in Mr Reilly's position would have had regard to what should have been an obvious reality, that action was required to protect the Scheme's assets and that TPR's involvement was necessary on discovering the matters set out in his report on 5 April 2017. I find that it would have been apparent to Mr Reilly, knowing what he clearly knew about the Scheme, as evidenced by the 5 April 2017 Report and the 6 April 2017 Email, and being aware of the reporting requirements, that a duty had arisen for him to report matters to TPR.

525. This is compounded by the fact that it became necessary around that time for Mr Reilly to go on sickness absence in relation to serious illness. While I sympathise with someone suffering serious illness, Mr Reilly's submissions on that point have been inconsistent, and I do not accept that Mr Reilly can have been confident that he would be able to return to his role as a Trustee within four weeks. In event, having seen the investment activity that took place during the few weeks between Mr Reilly's appointment and his sending the 6 April 2017 Email, Mr Reilly cannot have ruled out the possibility that further investment activity might occur while he was away. However, despite having no certainty that he would be able to take action himself, either imminently or at all, Mr Reilly took no action to ensure that TPR was aware of the serious matters that he had identified. I cannot see that Mr Reilly can have thought that it was in the Scheme's beneficiaries' financial interests for him to allow matters to continue as they had, or that asking questions of Mr Craig and Mr Kelly in relation to payments and investments that had already occurred would in any way secure members' funds. Alternatively, if Mr Reilly did indeed consider that it was in the beneficiaries' financial interests to: refrain from reporting to TPR, who could have immediately frozen the Scheme' bank account and taken the investigation forward themselves; and/or take other prudent active measures; and/or consult an independent legal advisor for advice on how to handle the matter, then I consider that that view

would have been so unreasonable that no reasonable trustee with Mr Reilly's background and in his position could have held that view.

526. I consider that Mr Reilly favoured Mr Craig's interests over those of the Scheme's beneficiaries and acted in a way in which no honest or reasonable trustee would have acted. Additionally, while I accept that Mr Reilly may not have received all of the fee payments, that he considered were due to him for his additional work in investigating the Scheme's assets and investments, it cannot have escaped Mr Reilly's notice that continuing to act as a paid Trustee at an excessive rate was to his financial benefit.

527. I conclude, on the balance of probabilities, having regard to the evidence and submissions received, that any belief that Mr Kelly or Mr Reilly may have had that any of their respective actions or inactions were in the Scheme's members' interests, or that they were fulfilling their duty of care owed as Trustees, would have been so unreasonable that no reasonable trustee could have held such a belief. Alternatively, looking at the first limb of the test set out in *Fattal*, I find that Mr Kelly and Mr Reilly were each recklessly indifferent as to whether their respective action or inaction and maladministration were contrary to the financial interests of the beneficiaries.

528. I have also considered the subjective test set out in *Armitage*, which would apply if Mr Kelly and Mr Reilly were not to be regarded as quasi-professional trustees.

529. Even if Mr Kelly was unaware of the requirements imposed on him as a pension scheme trustee and the potential further loss of Scheme funds that could have occurred and did in fact occur, such an unawareness could only have existed as a consequence of failing to make even basic enquiries as to the existence of any duties or obligations imposed on him as Trustee. This would clearly amount to reckless indifference regarding his duties and obligations as a Trustee, such that Mr Kelly is unable to rely on the exemption clause under the Trust Deed in respect of my findings of breach of trust, as set out in Section D.3 and Section D.8 above.

530. In Mr Reilly's case, I consider that his failure to: take immediate action, on becoming aware of the threatened breaches of investment duties and on subsequently learning that breaches of investment duties had occurred, to prevent the breaches from occurring or to attempt to restore the fund or other such prudent action; and report to TPR despite knowing of the requirement to do so, amounted to reckless indifference regarding the clear, immediate threat to members' funds. I find, therefore, that Mr Reilly too is unable to rely on the exemption clause under the Trust Deed in respect of my findings of breach of trust, as set out in Sections D.3 and D.8.

D.10.3 Section 61 of the Trustee Act 1925

531. If and to any extent that the Trustees are unable to rely on the exoneration provisions under the Trust Deed and Rules, there remains for consideration section 61, under which I may direct relief to the Trustees wholly or partly of their personal liability if it appears to me that: 1) the Trustees acted honestly and reasonably; and 2) it would be fair to excuse the Trustees from personal liability, having regard to all the circumstances of the case.

532. Regarding Mr Craig, as I explained in paragraph 492 above, I have already considered his liability for all of his breaches of trust together, as they were all intertwined and have led, directly or indirectly, to the loss of members' funds. I have already found, in Section D.10.2 above, in relation to those breaches of trust, that Mr Craig failed to act honestly or reasonably, so I cannot see that the criteria set out in section 61 can apply to any of his acts or omissions.

533. Regarding Mr Kelly and Mr Reilly, my consideration of their honesty in Section D.10.2 above related only to: their acts of wilful default in failing to take action to prevent the investments made during their term of office in breach of trust (Section D.3.6), their failure to take action to prevent further breaches of trust and loss of Scheme funds (Section D.8); their failure to take proper action in relation to Mr Craig's and Mr Kelly's conflicts of interest (Section D.2); and their various acts of maladministration. As I have found that they failed to act honestly or reasonably in committing those breaches of trust and acts of maladministration, I cannot see that the criteria set out in section 61 can apply to their acts or omissions which led to those breaches of trust or acts of maladministration.

534. However, I do need to consider separately whether either Mr Kelly or Mr Reilly should benefit from any relief under section 61 regarding my findings that they committed various breaches of their investment duties in relation to the Post-2017 Investments by their passivity and/or by breaching their duty to take care in the exercise of their investment functions by failing to take adequate steps to ensure that the investments made by Mr Craig had been made in accordance with their investment duties, as trustees (Section D.3.6 above).

535. The Post-2017 Investments, of which I am aware, are listed in paragraph 125 above.

536. Considering first the payments to RAM and Merydion, Mr Kelly was clearly aware of those payments. As I have explained in paragraph 278 above, I have found Mr Kelly to have been aware of the high-risk nature of the investments in those companies and I have not accepted Mr Kelly's submissions that he was in no way involved in RAM or Merydion, or that he had no interest in RAM (see paragraph 215 above). Mr Kelly has not even attempted to argue that he considered these investments to have been in Scheme beneficiaries' financial interests, relying instead on submissions that the investments were not of his doing, even though they were actioned during his joint trusteeship. It seems that Mr Kelly gave no thought to the Scheme's beneficiaries' interests at all. On that basis, I do not find that Mr Kelly acted reasonably in allowing those investments to proceed, so I find that he is unable to rely upon any relief, under section 61, from liability for the loss of Scheme funds that flowed from the payments to RAM and to Merydion.

537. Regarding Mr Reilly, as I have found in Section D.3 6 above, despite being aware of the planned purchase of a hotel for £1.9 million (as documented in his file note of 1 February 2017) and having been provided with no information in response to his enquiries into that matter, he took no further action. Mr Reilly did not receive any reassurance that the purchase would not go ahead. Similarly, on becoming aware of

the proposed investment in Northrop Hall, Mr Reilly took no action to prevent the transaction from proceeding. Mr Reilly did not even seek legal advice as to how he might prevent those transactions from proceeding, or request confirmation that either transaction had been abandoned. Knowing, as he did, that a significant amount of Scheme funds was potentially at risk and given the circumstances, which included Mr Reilly's lack of any access to or control over the Scheme's bank accounts, I do not consider that Mr Reilly acted reasonably in not taking any action to prevent those transactions from going ahead. Therefore, I find that Mr Reilly cannot be granted any relief under section 61 in respect of his liability for those investments and the resulting breaches of trust (see Section D.3 above).

538. I shall now consider whether Mr Kelly or Mr Reilly should be granted relief under section 61 in respect of any other investments made since their appointment as Trustees on 1 January 2017 but before 6 April 2017. From 6 April 2017 onwards, as I have explained in Section D.8 above, Mr Kelly and Mr Reilly were in breach of their duty of care and of their duty under Clause 5 of the Trust Deed in failing to report matters to TPR and, as I have found in Section D.10.2 and paragraph 533 above, are unable to rely upon any exoneration or relief from liability in respect of losses incurred by the Scheme after that point under section 61, so I need only consider any other investments made during their tenure up until 6 April 2017.

539. The extent to which investments, other than payments to RAM or Merydion, were made during the period from 1 January 2017 to 5 April 2017 is unclear, due to the serious lack of proper record keeping and governance within the Scheme. However, the 6 April 2017 Email shows that Mr Reilly and Mr Kelly were aware of the investments listed in that email, which are set out in paragraph 126 above. I have found, in Section D.3.6, that Mr Reilly and Mr Kelly, who acted passively in relation to further investments by taking no steps to prevent further investments from being made despite their awareness of the investment in RAM or the proposed investment in the hotel, as the case may be, are liable for the various breaches of the Trustees' investment duties (paragraphs 289 to 291 above). Additionally, on becoming aware of the Post-2017 Investments, as documented by the 6 April 2017 Email, both Mr Kelly and Mr Reilly acted in further breach of trust in relation to their investment functions by making no, or inadequate, enquiries in order to monitor those investments or take any necessary action for recovery of monies (paragraphs 290 to 291 above). I do not consider that the absence of any action on Mr Kelly's part, or the minimal enquiries made on Mr Reilly's part, can be considered to be reasonable. Therefore, I find that Mr Reilly and Mr Kelly are unable to benefit from any relief under section 61 from the consequences of their breaches of trust set out in this paragraph.

Decision

540. The Trustees have committed multiple breaches of trust and acts of maladministration, as summarised in paragraphs 464 to 467 above, which have caused the loss of Scheme funds and will have impacted severely on Scheme members' pensions.

541. The Trustees are not entitled to rely upon any defence of member consent or contributory negligence (see Section D.9 above).

542. Mr Craig cannot rely upon any exoneration provision or indemnity, as explained in Section D.10.1 and 10.2 above, and is afforded no relief from personal liability by virtue of section 61, for the consequences of his many breaches of trust and acts of maladministration, as explained in Section D.10.3 above. Mr Craig is responsible, therefore, for reimbursement to the Scheme of all payments and investments made from the Scheme's funds except for: any (that is, scheme legal costs, or valid transfers out to members) to which he was entitled, as Trustee, to have made[125]; any amount recovered by Dalriada in relation to Mr Craig's investments and payment made in breach of trust; and payments for which Mr Kelly and/or Mr Reilly are each personally liable (on an individual, rather than a joint and several, basis)[126].

543. Mr Kelly and Mr Reilly are not entitled to rely upon any exoneration provision or indemnity, as explained in Section D.10.1 and 10.2 above. They are not afforded relief from personal liability, by virtue of section 61, in respect of the Post-2017 Investments as explained in Section D.10.3. Accordingly, Mr Kelly and Mr Reilly are jointly and severally liable with Mr Craig for investments made during their term of office as Trustees, from 1 January 2017 to 13 July 2017[127] inclusive, of a total amount of £1,233,000[128].

544. Additionally, as a consequence of their breach of trust in failing to report matters to TPR as soon as reasonably practicable after 6 April 2017 (see Section D.8), further payments and/or investments were made out of Scheme funds, during the period between 7 April 2017 and 31 October 2017 inclusive[129], of a total value of £531,014.95[130] which I have found, on balance, would have been prevented had Mr Reilly and/or Mr Kelly reported the matter to TPR. Mr Reilly and Mr Kelly are liable (jointly and severally with Mr Craig) for any payments out of the Scheme and/or investments made after 6 April 2017, except for any payments of their own fees which were made after that date, as I shall explain in paragraph 545 below.

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125 Refresh Recovery's bank accounts show that payments of a net total of £78,020.36 were made to Turner Parkinson LLP. As Trustee, Mr Craig was entitled to seek legal advice, so I find that those payments to Turner Parkinson were valid as I have explained in paragraph 146 above. TPO has also seen evidence that transfers out of Scheme members' funds to other pension schemes, of a total value of £639,753.52, were made. As Mr Reilly and Mr Kelly are each liable to account for their own fees received as Trustees, the total amount of those fees (£59,000) has been excluded from Mr Craig's liability.

126 See paragraph 547 below.

127 This is when the last investment of which TPO has seen evidence, the second of two payments of £50,000 to Merydion, was made.

128 This is the total amount of investments that Mr Reilly identified, in the 6 April 2017 Email, as having been made between 1 January 2017 and 6 April 2017, plus a further £200,000 paid to RAM and £100,000 paid to Merydion, as identified from the Scheme's bank statements (see paragraphs 125 and 126 above).

129 This is the last date on which the Scheme's bank statements show payments having been made from the Scheme's bank account prior to Dalriada's appointment by TPR.

130 This is the total amount of payments made from the Scheme's funds, during that period, which are documented in the Scheme's bank statements, less Mr Reilly's and Mr Kelly's fees paid during that time, each of them being liable to account for any part of those fees in excess of the maximum reasonable level of fees that I have determined (see paragraph 545 above).

545. Regarding Mr Reilly's and Mr Kelly's fees in respect of their time as Trustees, I have found, in Section D.4.3.1, that those fees were excessive and unreasonable insofar as they related to the period from the date of their appointment as Trustees (1 January 2017) to the date on which they ought to have reported matters to TPR (7 April 2017). As I have stated in paragraph 342 above, a reasonable rate of trustee fees for that period would have been no more than £830 per month. As I have found in Section D.8 above, had Mr Reilly and Mr Kelly reported matters to TPR on 7 April 2017, Mr Reilly's further work in relation to the Scheme, for which he charged £15,000, would not have been necessary and further payments out of the Scheme's funds, including Mr Reilly's and Mr Kelly's fees paid after that date, would not have been made.

546. Dalriada has succeeded in recovering only £122,400 of the Scheme's funds that were invested or paid out and £1,319.68 remains in the Scheme's bank account.

547. I find that the full value of funds transferred into the Scheme, £13.4 million, less: Dalriada's recovery (£122,400); net payments in relation to legal advice sought with regard to the Scheme (£78,020.36); any transfers out of Scheme members' funds of which TPO has seen evidence (£639,753.52); Mr Kelly's and Mr Reilly's fees, for which they are each liable to account for (£54,020 in total); and the remaining balance in the Scheme's bank account (£1,319.68), is the starting point for redress in respect of Mr Craig in my directions below. Mr Craig is therefore liable to repay to the Scheme a total of £12,504,486.44.

548. Mr Kelly and Mr Reilly are jointly liable, together with Mr Craig, for £1,764,014.95 of the total amount, £12,504,486.44, stated in paragraph 547 above. This amount consists of:

548.1. the investments made during their term of office as identified in the 6 April 2017 Email together with the payments of: £200,000 to RAM; and £100,000 (in total) to Merydion, as shown by the Scheme's bank statements; and

548.2. payments out of the Scheme's bank account after 6 April 2017, less £44,510 (the latter amount being the total amount of their fees in excess of any reasonable amount charged for their period of office from 1 January 2017 to 31 March 2017, and paid out of the Scheme on or after 7 April 2017[131]).

549. Additionally, as explained in paragraph 545 above:

549.1. Mr Reilly is personally liable to repay to the Scheme £24,510[132]; and

[131] Mr Reilly and Mr Kelly each being liable to account for their own fees, as stated in paragraph 547 above

[132] This figure represents the total amount of £27,000 that Mr Reilly received in fees, which related to his period as a Trustee for January 2017 to March 2017 inclusive and his work carried out on his return from sickness absence from July 2017 onwards, all of which was paid to him after 6 April 2017, less £2,490 (being the maximum reasonable amount of £830 per month for the three full months from 1 January 2017 to the end of March 2017, in which Mr Reilly was in office as a trustee, before the requirement to report matters to TPR arose.

549.2. Mr Kelly is personally liable to repay to the Scheme £29,510[133],

in respect of: their excessive and unreasonable fees charged in relation to their period in office as trustees from 1 January 2017 to 31 March 2017 inclusive; and fees charged and paid to them in relation to their respective terms of office from 7 April 2017.

550. Mr Reilly has submitted that, should I find (as I have done) that all three Trustees are jointly and severally liable to pay compensation to the Scheme, he is entitled to a contribution from Mr Kelly and Mr Craig under the Civil Liability (Contribution) Act 1978 (the **1978 Act**), so that between them they should be ordered to pay Mr Reilly 100% of the liability having regard to their contribution towards the losses. Bearing in mind that I have found that Mr Reilly is personally liable, I do not agree, and Mr Reilly is bound by my Determination and the directions in respect of him. It is up to Mr Reilly to commence separate proceedings against Mr Craig and Mr Kelly if he considers that they can indemnify him (but that is outside the scope of this Determination).

551. Dalriada has incurred costs in relation to bringing its referral to TPO. These costs have been incurred by Dalriada, as it has had to make a referral to TPO in order to recover the Scheme funds that have been lost as a consequence of the breaches of trust and maladministration for which I have found the Trustees responsible. I find the Trustees are liable, jointly and severally, for Dalriada's costs. TPO has shared Dalriada's schedule of costs, of a total amount of £19,545, with the Trustees and has given them the opportunity to comment on them. Mr Reilly and Mr Craig have both queried the blended hourly rate that Dalriada has used in calculating its costs; Mr Reilly having queried whether some of the work carried out by Dalriada could have been undertaken by more junior members of staff. Mr Craig has submitted that a more detailed breakdown of costs should have been requested. I have reviewed Dalriada's costs schedule carefully, in the context of the work carried out, and I consider the costs to be reasonable and appropriate.

552. I acknowledge that, given my findings of dishonesty against the Trustees, the Scheme might be eligible to receive compensation via the Fraud Compensation Fund (**FCF**), to the extent that such money is not recovered from the Trustees as a result of my directions. I have taken this into account in my directions below.

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[133] This figure represents the total amount of £32,000, paid to Mr Kelly for his time as a Trustee from 1 January 2017 to 30 August 2017 (the date on which he resigned from his position as a trustee), less £830 per month for his first full three months as a trustee, from 1 January 2017 to the end of March 2017. This is on the basis that Mr Kelly has confirmed that he charged and received fees of £4,000 per month and, in the absence of documentation showing when the payments were made, I have assumed that Mr Kelly's fees were paid in arrears at the end of each month during which he was in office as a Trustee.

Putting things right

553. Within 28 days of the date of the Determination:

553.1. the Trustees (jointly and severally liable) shall pay:

553.1.1. £1,764,014.95, plus interest at the rate of 8% per annum simple to the date of payment, into the Scheme; and

553.1.2. £19,545 to reimburse Dalriada for its reasonable costs.

553.2. In addition, Mr Craig shall pay £10,740,471.49, plus interest at the rate of 8% per annum simple to the date of payment, into the Scheme.

553.3. In addition, Mr Reilly shall pay £24,510, plus interest at the rate of 8% per annum simple to the date of payment into the Scheme.

553.4. In addition, Mr Kelly shall pay £29,510, plus interest at the rate of 8% per annum simple to the date of payment into the Scheme.

554. The aim of these directions is to require the Trustees to put Scheme members back in the position they would have been but for the Trustees' breaches. Any payment of monies concerning the recovery of the losses in paragraph 553 above will be paid to the Scheme for the benefit of all the members.

555. It is not intended that members or Dalriada should benefit from double recovery, should a Scheme member or Dalriada recover twice for the same loss through some alternative action or process. For example, if applicable, Dalriada will be accountable to report to the FCF for (a) all monies it receives in consequence of this Determination; and (b) any payment of benefits it makes to Scheme members so that this may be taken into account by the FCF. Additionally, where it thinks appropriate, Dalriada should inform any pension scheme known to have made a transfer into the Scheme, of this Determination, and provide information to any transferring scheme if it becomes aware that an action is being brought against that transferring scheme for the loss of a member's Scheme benefits. I expect Members to co-operate with Dalriada to ensure that they do not unlawfully obtain a windfall.

Reporting to TPR and the SRA

556. On issuing this Determination, I intend to pass a copy of it to TPR.

557. With regard to Mr Reilly's conduct, I intend to pass a copy of this Determination to the SRA once issued.

Anthony Arter

Pensions Ombudsman
20 December 2022

Appendix 1

Main terms of the Merger Deed

“**2. Transfer**

2.1 The Clear Trustee shall transfer and the Optimum Trustee shall accept the Assets of the Clear Scheme on the Effective Date or as soon thereafter as the Clear Trustee and the Optimum Trustee agree to be practicable.

2.2 The Ocean Trustee shall transfer and the Optimum Trustee shall accept the Assets of the Ocean Scheme on the Effective Date or as soon thereafter as the Ocean Trustee and the Optimum Trustee agree to be practicable.

2.3 The Clear Trustee and the Ocean Trustee will account to the Optimum Trustee as an accretion to and as part of the Transfer for any assets which later come under their control as trustees or former trustees of the Clear Scheme and the Ocean Scheme respectively which are or ought in law to have been held on the trusts of the Clear Scheme and the Ocean Scheme.

2.4 The Employer the Clear Trustee and the Ocean Trustee and the Optimum Trustee shall each do all such things and execute all such deed (of assignment amendment or otherwise) as are necessary to effect the Transfer and implement the provisions of this Agreement.

2.5 Subject to the terms of this Agreement, the Clear Trustee and the Ocean Trustee transfer and the Optimum Trustee accepts and assumes responsibility for all liabilities of the Clear Scheme and the Ocean Scheme as described in clause 5 below.

2.6 After the transfer referred to in this Agreement, no Transferring Beneficiary nor any person claiming through or in respect of any of them will be entitled to any pension or other benefit under the Clear Scheme or the Ocean Scheme.

3. Declaration of Trust

The Optimum Trustee declares that he will hold the Assets of the Clear Scheme and Assets of the Ocean Scheme upon the trusts of the Optimum Scheme in the manner provided by the Optimum Trust Deed and the Optimum Rules to the exclusion of all the trusts powers and provisions of the Clear Scheme and the Ocean Scheme.

5. Benefits Granted

5.1 The Optimum Trustee agrees that from the Effective Date and subject to the receipt by the Optimum Trustee of the Assets of the Clear Scheme and the Ocean Scheme:

(i) each Transferring Beneficiary shall become a beneficiary of the Optimum Scheme and be entitled to benefits under the Optimum Scheme before and after the Effective Date as applicable to each Transferring Beneficiary under the Optimum Scheme; and

(ii) any sum held by the Clear Trustee and the Ocean Trustee on discretionary trusts under the rules of the Clear Scheme and the Ocean Scheme shall continue to be held by the Optimum Trustee on the same trusts.

5.2 The benefits terms and entitlements granted by the Optimum Trustee under clause 5.1 shall be subject to relevant legislation.

[…]

9. Indemnities and Warranties

9.1 The Optimum Trustee hereby indemnifies the Clear Trustee and the Ocean Trustee out of the assets of the Optimum Scheme from time to time from and against any Relevant Liability of the Clear Trustee and the Ocean Trustee. A Relevant Liability for this purpose means any liability of the Clear Trustee and the Ocean Trustee incurred to a Transferring Beneficiary whose pension rights are the subject of transfer to the Optimum Scheme under this Agreement in the administration in good faith of the Clear Scheme and the Ocean Scheme or otherwise in the exercise or performance in good faith of the powers and duties of the Clear Trustee and the Ocean Trustee in relation to the Clear Scheme and the Ocean Scheme. A Relevant Liability for this purpose shall exclude any liability of the Clear Trustee and the Ocean Trustee incurred by reasons of that trustee’s fraud breach of any law which constitutes a criminal offence deliberate or culpable disregard of the interests of the members of that scheme (or former members of it) or culpable negligence relating thereto.

9.2 If any of the Clear Trustee the Ocean Trustee or the Optimum Trustee become aware of any matter which may result in a claim under this Clause 9 they will:

a) notify the Employer in writing at its registered office of the relevant matter as soon as reasonably practicable after becoming aware of the same;

b) refrain from making any admission of liability without the prior written consent of the Employer (such consent not to be unreasonably withheld or delayed);

c) provide the Employer with such information which is within their powers regarding the matter as the Employer may reasonably require; and

d) take such other steps at the Employer’s expense as the Employer may reasonably require.

9.3 To the extent that any party entitled to indemnify under this Clause 9 is entitled to and received indemnity under any policy of insurance for any liability envisaged in this Clause 9, then any indemnity under this Clause 9 shall be proportionately reduced. For the avoidance of doubt no party shall be entitled to indemnity either under this Agreement or otherwise more than once in relation to the same matter.

10. Member Data

Each of the Clear Trustee and the Ocean Trustee undertake to and covenant with the Optimum Trustee:

(i) To provide full details of the Transferring Beneficiaries and the benefits under the Clear Scheme and the Ocean Scheme to which they are entitled to the Optimum Trustee on the Effective Date or as soon as is practicable after the Effective Date; and

(ii) To procure that all data and records which are held for the purposes of the Clear Scheme and the Ocean Scheme in respect of all and any of the Transferring Beneficiaries immediately before the date of the Transfer are so far as possible complete accurate and up-to-date; and

(iii) To transfer all such data and records to the Optimum Trustee forthwith prior to the date of the Transfer or as soon as practicable after the date of the Transfer to be held by the Optimum Trustee for the purposes of the Optimum Scheme."

Appendix 2

Summary of Dalriada's findings in its announcement dated 2 June 2020

It had obtained control of the Scheme's bank account, but upon appointment, it noted that the account held limited funds.

It had attempted to make contact with all of the investments made and was actively in correspondence with a number of entities with the aim of, where possible, returning funds to the Scheme.

It became clear that the Trustees entered into a number of purported investments on behalf of the Scheme (and its collective membership), which were now valueless, as the entities had already been dissolved or ceased trading. None of the purported investments made by the Scheme were regulated and provided little to no protection for the capital invested.

Real Time Claims Limited (**RTC**)

The Scheme made payments of approximately £850,000 to RTC, which allegedly related to an investment in a claims management company.

Following this, for reasons that are not clear, the Trustees entered into a settlement agreement, which resulted in the investment being redeemed by ownership of a PPI debt book with a value of approximately £122,000.

A sum of £25,000 was received by the Scheme in September 2019. The remaining £97,000 was recovered in February 2020, but is subject to a potential claim from a third party.

Tulip Research Limited/Heather Research Limited

The Scheme invested in these companies via a company called Digital Media Limited, and made payments totalling approximately £1,008,000 to Tulip for a shareholding of the same.

Tulip was an active company but it was unclear whether it was trading. No returns had been paid into the Scheme from this investment.

The Scheme made payments totalling approximately £240,000 for a share of 240,000 shares to Heather Research Limited. This was also listed as an active company but the Scheme had yet to receive any returns.

Malta Boxing Commission Limited (**MBC**)

Documents suggest that the Scheme made payments totalling approximately £99,000 to MBC. Dalriada received no paperwork relating to the nature of this investment from the Trustees, other than an indication that the payments were for a shareholding in MBC.

The company was dissolved on 17 October 2017, prior to Dalriada's appointment as Trustee. No funds had been returned to the Scheme from the investment and it was unlikely any value would be recovered.

Rationale Asset Management Plc (**RAM**)

Dalriada had been provided with limited paperwork in respect of this investment and to date, the Scheme has received no return on this investment. Dalriada had received information that suggested the Scheme had made payments totalling approximately £698,000 to RAM for a purported shareholding in the company. However, it was unclear what value, if any, could be recovered.

It understood that this investment was linked to a further investment by the Scheme into Merydion Corporation Limited, totalling approximately £300,000.

No paperwork or information had been received by Dalriada in relation to this investment and so it is unaware what this payment was in relation to.

Civilised Investments Ltd. (**CIL**)

The Scheme made payments totalling approximately £50,000 to CIL to purportedly purchase 4,484 shares in the company, which was now known as Allica Bank Limited.

Dalriada received no documentation in relation to this. To date, no funds had been returned to the Scheme from CIL and it was unclear what value, if any, could be recovered.

Emerging Markets Minerals plc (**EMM**)

The Scheme appeared to have made payments totalling approximately £220,000 to two companies (Cornhill Capital Limited and Jarvis Investments Limited) to purportedly purchase shared in EMM, which was based in Madagascar.

No funds had been returned to the Scheme and it is unlikely any value will be recovered.

Platinum Credit Services Limited (**PCS**)

It appeared that the Scheme made payments totalling approximately £530,000 to PCS but it was unclear from the paperwork what the investment the payments related to. Dalriada believed that these may have been loans, but no loan paperwork has been provided to Dalriada from the Trustees.

This company had been dissolved and had returned no money to the Scheme. It is understood that this was an unregulated, unsecured investment and so was highly unlikely that any redress will be available to the Scheme by way of compensation.

Regal Coins Limited (**RCL**)

The Scheme's accounts indicated that £30,000 was paid to RCL in March 2016. This company was dissolved on 28 May 2019 with no viable avenues to make recoveries on behalf of the Scheme.

No funds were returned to the Scheme from this purported investment and it is likely no value will be recovered.

Nail Tech Limited

It appeared that the Scheme made loans of approximately £25,000 to this company, which was dissolved on 27 February 2018.

No funds were returned to the Scheme and it is highly likely that no value will be recovered.

General

It is highly likely that many of the investments, if not all, will return little to no value to the Scheme.

The vast majority of the Scheme's funds were transferred to a number of unregulated parties and to date, little to no funds have been returned to the Scheme. As a direct result, it was therefore not currently possible to provide transfer values or indeed provide any benefit payments from the Scheme.

If any funds are returned to the Scheme, Dalriada will update the membership accordingly.

Appendix 3

Table of companies in receipt of payments relating to the Scheme

Company/Individual	Incorporation	Dissolution	Total number of shares (based on last Annual Return/Confirmation Statement)[134]	Date of first payment/share information	Payment Total[135]	Information to note[136]
Companies in receipt of payments from the Scheme						
Alldone Trading Limited	20 March 2013		100	12 July 2017	£15,000	Glyn Torr, Andrew Haslam, Christopher Haslam, Emma Haslam have all been directors.
Malta Boxing Commission Limited	28 August 2012	17 October 2017	100	13 November 2015	£39,000	Stephen Vaughan was a director. Mr Reilly has said that there is an invoice for 25% of the shares, but no share certificate.
Platinum Credit Services Limited	26 March 2015	02 July 2019	100	10 December 2015	£724,430.00	Deborah and Emma Haslam were directors. On 1 January 2016, all shares were transferred to Shaw Hill Holdings Ltd. Mr Reilly has said that there is no paperwork relating to these payments.
Emerging Market Minerals Plc	27 October 2006		211,221,403	22 February 2016	£418,153.75	Mr Kelly held a personal investment in this company. While there is no information on Companies House, there is evidence to suggest that the Scheme held 5,154,000 shares.
Routeright Limited	02 July 2015	17 September 2019	1	07 September 2016	£48,522.14	The company's address was in the same business park as the Scheme.

[134] Based on Companies House's records

[135] That has been evidenced.

[136] Unless stated otherwise, neither Mr Craig nor the Scheme hold shares in these companies.

Templeton Chase	12 May 2015	17 July 2018	1	29 July 2016	£287,486.09	James Lees was a director. It is not clear whether this was paid for introducer services.
Vaughan Sports Management Ltd	29 January 2016		100	20 June 2016	£77,000	
Reid-Fotheringham Investment Strategies Limited	13 April 2010	24 July 2018	647668	20 October 2016	£415,890	William Brian Murphy was a director.
Mistco (UK) Ltd	16 December 2014		1,100,100	08 January 2016	£102,546	Michael Corey is a director.
C.H. Vision Limited	14 August 2007	06 April 2021	100	10 February 2016	£5,750	
Osiron Services Limited	23 April 2015	28 November 2017	1	09 September 2016	£7,385	James Murray was a director.
Micore Leafield Ltd	07 October 2015		1	14 April 2016	£131,710	Michael Corey is a director.
Viceroy Securities Ltd	13 November 2013	28 November 2017	1	29 January 2016	£92,615.49	
UKCC Marketing Ltd	17 June 2014	17 November 2020	1	25 May 2016	£2,712.99	James Murray was a director.
Regal Coins Limited	21 March 2012	28 May 2019	1	18 March 2016	£30,000	Mr Reilly has said that a payment of £70,000 was made, but there is no documentation.
Silex (UK) Plc	17 September 2014		120,000,010			Investment from the Ocean Fund - Ocean Equities Financial Limited holds 2,100,058 ordinary shares.
Tulip Research Limited	12 February 2015		5,879,001	19 November 2015	£1,008,000	Mr Keith Evans is a director who appears to have a link with Mr Craig through 'The Take 5 Film Limited Liability Partnership'. Mr Reilly has said that the Scheme invested £1,008,000 by purchasing shares.
Heather Research Limited	07 July 2015		2,077,861	1 December 2016	£240,000	Mr Keith Evans is a director. The Scheme holds 240,000 ordinary shares.
Nail Tech Ltd.	02 November 2015	27 February 2018	100			See the entry for Kenni James below.

Civilised Investments Limited	15 July 2011		141,653,711	15 July 2016		Gordon Craig holds 4,484 shares.
Rationale Asset Management Plc	14 July 2016		25,000,000	30 January 2017	£800,000	Optimum Trustees hold 800,000 shares. Mr Kelly was a director from 14 July 2016 to 12 January 2017 and 9 July 2018 to 12 March 2020. Jarvis Investments Limited also hold shares. Mr Reilly suggests that £998,000 was paid to this company with no explanation for it.
Real Time Claims Limited	19 February 2007		3			Mr Reilly suggests that there is an unsigned loan.
Volopa Capital Limited	02 September 2010		788,191			
Merydion Corporation Limited	01 September 2015		2	30 June 2017	£50,000	Martin Kelly was a director between 4 January 2016 and 5 April 2017 and the current director is Michael McMahon. Mr Reilly believes a further £50,000 was paid on 13 July 2017, but there is no paperwork to support this.
R2R Management Services Limited	12 August 2014		1000			Michael McMahon was a director. Mr Reilly suggests that this company received £116,000 from the Scheme.
Sandymoor Consultancy Limited	23 October 2013	30 June 2015		04 October 2016	£172,000	William Brian Murphy was a director.
PHI Consulting Limited	14 October 2015			02 December 2016	£3,000	Mr Kelly is a director.
St James QROPS/Evoconcept Ltd.				20 February 2017	£86,052	St James QROPS appears to be owned by OFSL and has Mr Craig as its sole trustee.
Administration						
Companies House				15 August 2016	£750	
C&H Pensions				18 November 2016	£3,550	
FCA Collection				16 August 2016	£3,472.88	
HMRC				21 January 2016	£5,240	
Onvestor Advisory				25 October 2016	£5,700	

Pension Reports				23 November 2016	£26,000	
Pension Review Services				30 September 2016	£6,000	
PS Administration				4 October 2016	£300	
Procentia				20 October 2016	£996	
UK Pension Review				28 October 2016	£3,000	
West Lancs BC				1 February 2016	£9,057.58	
Introducers						
European Product Sourcing House Limited	23 November 2015			19 July 2016	£114,754.43	Based in Gibraltar. James Lees appears to be involved with this company.
Spector & Scott LLP	11 February 2015			22 August 2016	£27,129.75	
Michael Tyler Associates Ltd	28 November 2014	08 May 2018				No evidence of money being paid directly to this company, but it appears that Chris Hoole was somehow linked.
LG Group Ltd	15 January 2016	23 October 2018		25 November 2016	£45,039	Alex Hirons was the director.
Sail Financial	08 May 2015	16 July 2019		26 August 2016	£76,972.99	
James Lee				24 March 2016	£106,200	
Chris Hoole				5 September 2016	£180,000	
Alex Hirons				16 September 2016	£108,025.09	
Barry Hampton				13 May 2016	£5,000	
Martin O Malley				5 September 2016	£10,857.05	
Andy Croston				3 June 2016	£910.11	
John McIver				3 June 2016	£1,066.28	
A Dickie				3 June 2016	£402.30	
S T Erhardt				18 March 2016	£1,500	
Airivo				3 November 2016	£500	
Kenni James				25 November 2016	£6,079.00	Mr Reilly has suggested that a payment of £25,000 was made to Mr James for a loan to Nail Tech Ltd. but with no documentation.

Michael Corey						There is no evidence of money being paid directly to Mr Corey, but payments were made to companies of which he was a director.
Marketing						
James Murray				22 June 2016	£103,800	
Engage Marketing Group				10 May 2016	£11,000	
Smart Call Centre				21 October 2016	£5,583	
Insurance companies						
AIG				5 October 2016	£8,481.75	
Legal and General				5 October 2016	£3,610.28	
Zurich				7 April 2016	£20,000	
Unexplained multiple payments						
'Johnston'				3 February 2016	£34,674.87	
P M Vaughan				26 February 2016	£34,000	
Bizspace				8 September 2016	£3,456	
CBSWM/CBS Astor Buller				4 November 2015	£53,576	One payment reference is 'Optimum – M Corey'.
Dofas Limited				23 February 2016	£3,136.50	
Letts Rents Ltd				14 July 2016	£13,936.12	
Mailboxes Etc				25 July 2016	£185.50	
Red Office				28 June 2016	£267.61	
Refresh Recovery Limited				19 November 2015	£67,360.59	
Refresh Debt Solutions				12 July 2016	£55,551.96	
"Optimum"				25 May 2016	£277,729.59	
OFSL				1 September 2016	£100,753.56	

Employees						
Mr Craig				8 December 2015	£489,430	
"Trustee"				16 December 2016	£1,249,295	
Martin Dowd				16 November 2015	£72,000	
Ivor Jenkins				13 November 2015	£74,500	
Lindsey Brock				28 January 2016	£5,470	
Kelly Grass				24 March 2016	£1,293.60	
Mr Reilly				1 August 2017	£27,000	
Andrew Ewing				5 February 2016	£7,000	
Solicitors						
RMJ Solicitors				30 November 2016	£750,000	Mr Reilly has suggested that there is no paperwork evidencing what this payment was for. The SRA shut this firm down.
BMD Law				7 April 2016	£6,076	Law firm for which Mr Reilly works. Each payment had the reference: “Optimum/Shawhill”
Eversheds LLP				5 September 2016	£2,555.01	
Millars Solicitors				13 July 2016	£1,200	
Turner Parkinson LLP	18 April 2005		N/A	07 January 2016	£78,020.36	
Other						
Shaw Hill Holdings Ltd.	22 May 2015					Company directors are Mr Craig, Mr Torr and Mr Christopher Haslam. This company is based in Malta and received all of Platinum Credit Services Ltd.'s shares.
ABC International				4 November 2015	£2,000	
Bos HQ Ltd				16 August 2016	£632.22	
Bristow & Sutor				29 November 2016	£1,728	A debt collecting agency.

Design & Print Co				08 September 2016	£720	
Funeral Services L				16 November 2016	£4,238	
“Interaction Recrui”				24 November 2016	£2,880	
JAJ Trading Limited				19 November 2015	£2,000	
Simplybiz				28 June 2016	£971.37	
Squeni				18 November 2016	£800	
TUGL Towergate Insurance				19 May 2016	£697	
Unicom				19 May 2016	£315.88	
Transfers to linked accounts				14 December 2016	£130,086.14	
Cheque payments				21 December 2016	£354,734.76	
				Total:	£8,430,416.45	

Appendix 4

Investment company status at time of receiving payments from the Scheme

The information outlined below is the result of additional research and/or information received from Mr Reilly and Dalriada, to outline the general status of each company, that the Scheme appears to have invested in, at the time it did so.

Emerging Market Minerals PLC

Emerging Market Minerals PLC is a mineral exploration and production company. The Company is currently developing assets in Africa. EMM's current operations include the uranium and thorium exploration project, located in southern Madagascar[137].

It was reported[138], in March 2016, that: EMM had made a £100,000 loss in the first half of that financial year; the project in Madagascar was effectively on hold, pending the requisite environmental clearances from the relevant Madagascan government authorities in respect of the "potential Phase 2 exploration work programme for the project"; market conditions had proved to be "extremely challenging for companies operating in the mining and natural resources sectors, such that the board has yet to secure a suitably compelling proposition, at a sensible valuation, to present to shareholders and potential investors to raise the requisite funding to pursue such an opportunity."

EMM was reported[139], on 30 March 2016, to have needed to raise further funds in order to continue as a going concern:

Martin Dowd expressed an interest in purchasing c. £1m shares on behalf of the Scheme in January 2016 (Simon Hooper's email to various recipients, including Martin Kelly). It is not clear what Mr Kelly's role in relation to EMM was, prior to his appointment as a Trustee. However, Mr Kelly has only denied having had a personal interest in EMM while he was a Trustee, implying that he did have a personal interest before then, when shares in EMM were purchased with Scheme funds.

An extract from a bank statement suggests that the Scheme purchased shares in EMM as follows:

- 03 March 2016: £30,536.00
- 22 March 2016: £30,000.00 ("2nd installment [sic] for 100,000 shares in [EMM]")
- 22 August 2016: £60,067.75 ("Investment – [EMM] 454,000 shares at 13p
- 16 September 2016: -£69,550.00 ("Investment – [EMM] 535,000 shares at 13p")
- 21 December 2016: £198,000 ("Investment – purchase 1,320,000 [EMM] shares at 15p (Rationale)").

137 https://www.bloomberg.com/profile/company/EMM:LN

138 https://www.lse.co.uk/news/EMM/emerging-market-minerals-records-first-half-loss-isxaeu5xiaa4gvw.html

139 https://www.lse.co.uk/news/EMM/emerging-market-minerals-needs-funds-to-avoid-insolvency-risk-lp21te3texq63ey.html

On 24 October 2016, Simon Hooper emailed Martin Dowd, informing him that EMM had entered into a further working capital loan facility for £250,000 with a company wholly beneficially owned by Martin Nicholls, who was also the Executive Chairman and a director of EMM. The email stated that EMM was still looking for a suitable project and that it would need further funding to pursue such an opportunity. EMM's ability to continue as a going concern would be dependent on raising further funds to meet its ongoing operational and capital commitments.

On 28 November 2016, Martin Kelly emailed Martin Dowd saying, "Optimum are now officially on the radar with a registered holding of over 5m shares", so disclosure was now a matter of urgency. It seems that, as of 23 November 2016, the Scheme owned more than 13% of the shares and was therefore obliged to file with the FCA a 'notification of major interest in shares'.

Share certificates were only sent on 1 December 2016, although it seems that the Scheme may have been purchasing shares for some time prior to that.

On 7 March 2017, Martin Kelly (on behalf of all of the Scheme's Trustees) signed paperwork in order to exercise the Trustees' right under section 303 of the Companies Act 2006, to require EMM's directors to convene a general meeting to consider and, if thought fit, pass resolutions replacing Mr Nicholls as EMM's director with new directors; Mr Simon Charles and Mr Nigel Brent Fitzpatrick. The reasons given for this proposal were broadly that, under Mr Nicholls' directorship, EMM had a number of outstanding creditors and that the Trustees would be able to:

- assist in securing further third party funding and the sourcing of investment opportunities;
- attract to EMM necessary talent, skills and experience "to maximise commercial exploitation"; and
- secure quickly the readmission of EMM's shares to trading on AIM, or other suitable investment exchange.

The resolution was signed on 28 March 2017, by all three Trustees. However, Mr Reilly and Mr Kelly confirmed at the Oral Hearing that they never proceeded with replacing Mr Nicholls, as they had been advised, by their lawyer, Marriott Harrison, that doing so would involve spending more than they would get back.

Mr Kelly submitted, at the Oral Hearing, that EMM had gone into liquidation before he had become a Trustee, so any shares that he held in EMM would have been in a delisted company in administration. In fact, it appears from Companies House records that the petition for EMM's wind up was not made until 14 February 2017 and winding up did not commence until June 2017. Mr Kelly submitted that the aim of instructing lawyers was simply an attempt by the Trustees to extract any value from EMM. He did not believe that he had any shares in his personal account when he was a Trustee, although he thought that he may have held some in a SIPP, from which he had invested £30,000 in EMM. He had invested at the top of the market, the highest price, and the shares dropped to nothing. He had forgotten to mention this when he had responded to my earlier question concerning whether he had any personal holdings.

Silex (UK) Plc

This company was incorporated on 17 September 2014, as a limited company (and re-registered as a plc on 10 December 2015). It merged with its 100% Spanish subsidiary, Silex Administrations 2013 S.L. on 7 April 2015 and acquired 100% interest in Silex Administration S.L.U. during the year.

The company operated an olive oil refinery with a bottling plant and bulk storage facility included.

Group accounts for the period ended 31 December 2015, show that the group operated at a loss before tax of £139,000 during that period. The company's olive oil refinery was not yet operational and, while revenue had increased as a result of product and market research services being provided, it was a small amount of revenue relative to the size of the company. The company loaned approximately £350,000 to its subsidiary during that year and, after the period end, issued EUR 6,991,000 of bonds on the Cyprus stock exchange. The basic and diluted loss per share was 0.16p.

The group accounts for the period ended 31 December 2016 showed a group loss before tax of £1,935,000 and the parent company's loss for the year was £3,508,893. The basic and diluted loss per share was 1.61p.

Silex (UK) Plc was subject to a court order for winding up, dated 11 September 2019, which had been petitioned for by some of its creditors. The company is now in liquidation.

Tulip Research Limited

The company had only been incorporated on 12 February 2015, and was a dormant company when the shares were purchased, as shown by the company's accounts for the period from 12 February 2015 to 5 April 2016. Its nature was described as "other research and experimental development on natural sciences and engineering". It has remained a dormant company to date.

Based on Companies House's records, the Scheme purchased 1,008,000 ordinary shares (at £1 per share) in this company in November 2015. It seems that these shares, and those of Heather Research Limited (below), were purchased at the request of various Scheme members.

Heather Research Limited

The company was incorporated on 7 July 2015, and has, at all times, been a dormant company. It has the same listing for its 'nature of business' and it appears that 10 other companies of a similar nature[140] were set up by the same director (Keith Evans).

[140] Fleur Research Limited, Lily Research Limited, Crocus Research Limited, Geranium Research Limited, Buttercup Research Limited, Daisy Research Limited, Lavender Research Limited, Rose Research Limited, Bluebell Research Limited, Snowdrop Research Limited.

According to its accounts on Companies House, Heather Research Limited had a called up share capital of £1 as at 5 April 2016, which increased to £5,754,941 as at 5 April 2017.

Mr Reilly's report on the Scheme's investments stated that the Trustees had received a share certificate for 240,000 £1 shares, which reflects the Confirmation Statement dated 14 January 2019.

Nail Tech Ltd

The company was incorporated on 2 November 2015, but there is no evidence that it ever traded, as no accounts appear to have been filed at Companies House. A notice for compulsory strike off was issued on 3 October 2017 and the company was eventually dissolved via compulsory strike off on 27 February 2018.

Dalriada has submitted that it has seen evidence that the Scheme made loans to this company of approximately £25,000.

Civilised Investments Limited

The company was incorporated on 15 July 2011, and its company accounts for the period to 31 July 2015 showed that it had traded at a loss of £551,691 over that period and that it had net liabilities of £147,191. The company had not traded in the year prior to that year. In the following year, to 31 July 2016, the company traded at a loss of £1,705,958 and had net liabilities of £1,142,457.

Mr Reilly's report stated that the Scheme had paid £50,000 for 4,484 ordinary shares in this company, which is now known as Allica Bank Limited. Records at Companies House show that Mr Craig purchased those shares on 19 November 2015.

Rationale Asset Management Plc (RAM)

The company was incorporated on 14 July 2016. It is described, in its annual report and accounts to 31 July 2017, as an "International Asset management company specialising in developing and generating opportunities from value events", its principal activity being that of property development.

Mr Kelly was a director for a couple of periods (14 July 2016 to 12 January 2017; and 9 July 2018 to 12 March 2020).

Dalriada and Mr Reilly have both reported that shares were bought with Scheme funds for £998,000 (£300,000 of which was in respect of a linked investment by the Scheme into Merydion Corporation Limited). However, no list of shareholders is available on the Companies House website.

At least £200,000 of the £998,000 were paid to RAM in January and February 2017. However, the accounts for the financial period to 31 July 2017 showed a loss of £155,193.

Further, the accounts for the year ended 31 July 2018 purported to be accounts of a dormant company, with no turnover showing. However, the 31 July 2018 accounts referred to management charges of £120,000 from Mr Kelly himself. Mr Kelly confirmed at the Oral

Hearing that the reference to management charges from Mr Kelly was actually a reference to a payment by him to RAM, not the other way around. Mr Kelly said that he had made a loan to RAM in order to support the company, as he had “wanted the company to survive”.

On 12 January 2021, a winding-up order was made against the company, which is now in liquidation. At the Oral Hearing, when I asked Mr Kelly why such an order had been made, Mr Kelly replied that I would have to ask the Insolvency Service about that, adding that it was not because RAM was insolvent; it followed a police investigation and was deemed to be in the public interest, based on the police’s suspicion that RAM had been involved in the matters that were being investigated by the police. While there had been charges brought against Mr Hooper, which did not specifically relate to the Scheme, no charges had been brought against RAM.

Real Time Claims Limited (RTC)

The company accounts for the years ended 31 August 2015 and 31 August 2016, showed that the company’s net assets had been in decline over those accounting periods, falling from £938,378 at 31 August 2014 to £457,643 at 31 August 2015, and then to £144,238 at 31 August 2016. The company’s creditors increased over those periods, the company owing £4,320,574 due within one year as at 31 August 2016.

The accounts also show that the company advanced loans of a considerable amount to its director, Mr Stuart Bell, with Mr Bell owing £563,091 at 31 August 2016.

It seems, from Mr Reilly’s and Dalriada’s reports, that Mr Craig entered into a settlement agreement with RTC of approximately £122,000.

Volopa Capital Limited

This company was incorporated on 2 September 2010.

The annual report and accounts to 31 December 2015 explain that the company “provides execution and trading solutions to Institutional and Professional traders in Financial, Energy and Commodity Futures and Options, Institutional CFDs and Spot FX”. All of those types of investment are high-risk by nature.

The company traded at a loss before taxation of £830,906 during the year to 31 December 2015, although the report stated that the loss had been anticipated by the Directors and represents the “investment required to build foundations for future business growth”.

The accounts for the period to 31 December 2017 suggest that the company continued to trade at a loss, with a loss of £340,142 shown over the two year period until that date.

It is not clear that any investments have been made, although we are informed that a corporate account had been opened with this company.

Malta Boxing Commission Limited (MBC)

The company was incorporated on 28 August 2012 and dissolved on 17 October 2017, with Mr Stephen James Vaughan having been a director since 2015. The accounts to 31 August

2015 show a trading loss of £14,221 (the previous year's loss having been £12,544) and total net liabilities of £14,121 (the previous year's net liabilities having been £12,444).

Mr Reilly reported that an invoice for 25% shares existed, but that there was no share certificate. Dalriada reported, in its announcement to members dated June 2020, that payments totalling approximately £99,000 had been made to MBC and Mr Reilly has quoted a figure of £119,000. However, Companies House records do not show the Trustees or the Scheme as shareholders of MBC.

Platinum Credit Services Limited

The company was incorporated on 26 March 2015 and dissolved on 2 July 2019, having had Emma Haslam and Deborah Haslam as directors. I understand this couple to be Mr Andrew Haslam's daughter and wife, respectively. The company's accounts to 31 July 2016 show a loss of £27 over that period and net assets of £73.

Bank statements show that payments totalling £733,430 were made to this company, but it is unclear what investment the payments related to.

All shares were transferred to Shaw Hill Holdings Limited on 1 January 2016, which appears to be a business set up in Malta by Mr Torr, with himself, Mr Craig and Christopher Haslam as company directors.

Regal Coins Limited

The company was incorporated 21 March 2012, originally as Widnes Football Club Limited (until 18 June 2013) and dissolved on 28 May 2019.

The Scheme accounts show that £30,000 was paid from the Scheme in March 2016. However, the accounts filed at Companies House were those of a dormant company, which has only ever had one ordinary share and net assets valued at £1.

R2R Management Services Limited

This company was incorporated on 12 August 2014. Its annual return dated 12 August 2015 indicated that it had one share, which was in the initial director's name. On 24 November 2016, Mr Michael McMahon became a director until 16 June 2021.

The company's abbreviated accounts dated 31 August 2016 listed shareholders' funds as £12,210 for 2015 and £112,637 for 2016 and as at 5 April 2017, Mr McMahon was the only shareholder.

With regard to the company's assets, these were recorded as follows:

- 31 August 2016 - £112,637
- 31 December 2017 - £116,326
- 31 December 2018 - -£141,291
- 31 December 2019 - £3,679

According to Mr Reilly's report, the Scheme made a payment or a series of payments totalling £116,000 to this company, but this has not been evidenced in the bank account statements that have been made available. Further there is no evidence of the Scheme being a shareholder on any of the company's records.

Bangor City Football Club Limited

Although this company was established on 23 June 1995 and remains active, the following should be noted about its directorship:

- Mr Craig, James Lees, Andrew Ewing and Ivor Jenkins were all appointed as directors on 8 July 2016.
- Andrew Ewing and Ivor Jenkins resigned on 1 October 2017.
- Mr Craig and Mr Lees resigned on 9 January 2019.
- Stephen James Vaughan (of MBC) was appointed as director on 4 March 2019.

In addition, Vaughan Sports Management Ltd. was listed as a person with significant control on 30 December 2017 until 2 September 2019.

It seems, from Mr Reilly's reports, that the Scheme paid approximately £77,000 to Bangor City Football Club Limited, but I have not seen any documentation or an explanation for these payments.

Appendix 5

Extract of Mr Reilly's report to Mr Craig on the Scheme's investments

"Report on Investments

1. **Tulip Research Limited**.

The fund invested in this company by way of share purchase the sum of £1,008,000.00 November 2015. The share value was agreed at £1 per share se emails [Martin Dowd] et al. The main introducer was Dan Gregory.

There is an email dated 13.11.2015 between [Martin Dowd] and Vivek Sharma there is a comment of "75%" hair cut do you have any idea what this means?

I do not believe that [Martin Dowd] undertook any due diligence and simply advised you that the investment was bona fide.

I have checked out as much as I can re this company and can find very little information. The accounts show a dormant company (incorporation date was February 2015).

The accounts up to April 2016 show receipts of £5,879,000.00 and assets of same amount. I suspect this was simply a paper transaction and somehow [Martin Dowd] and [Dan Gregory] benefited, I have no evidence of this or any proof but the emails above cause me to be suspicious.

I do not believe we can cash in these shares nor does it appear there been any trading or growth. I suggest we do an analysis of which clients were directed to this investment. I have a breakdown of those who invested (which appears to be in contradiction to the scheme statement of investment principles). There appears to be 16 clients in total. 8 of the 16 clients with shares had bridging loans of which all 8-repaid bridge.

When reviewing the Tulip investments, I came across a letter to clients 15 June 2016 from Optimum states DFM used who is the DFM? [Martin Dowd] advising that there was a DFM in place and drafted the letter of the 15th.

Interestingly there is an email from Mr Keith Evans from Baker Street Media and Technologies dated January 2017 to [Martin Dowd] states shares still valued at £1? I certainly hope so if this is the case should we be seeking to sell shares back and get monies to invest elsewhere?

Further references are made to monarch trustees and RPM QROPS see letter [Scheme member] 30 August 2015. Can you explain who these people are or is it associates of [Martin Dowd].

2. **Heather Research**

The only in formation I can find is for dormant accounts filed showing £1 shares and balance sheet of £1 this was filed 2016. We have just received a share certificate for 240,000 £1 shares?

I understand that the shares relate to investment by 4 clients, 1 of whom was transferred out [Scheme member] value £72,000.00. Therefore, the fund is left with shares to that value or frankly a worthless investment.

[Scheme member] alleges that a bridging loan was repaid to [Gordon Craig]. £133,200.00 was repaid 21 December 2016 in two tranches to [Gordon Craig] account ending in 2184. Was [sic] the monies received?

See email 25.11.2016 [Martin Dowd] and Dan Gregory "£240k. Fee. Agreed by trustee today…" What is Fee? is this the cost for share purchase.

3. **Auto Enrolment**

The business never operated an auto enrolment scheme however I have uncovered invoices allegedly from OFSL and ORBP but with account details of what I believe is Routeright limited.

I have raised the issue and requested information on the individuals behind the company so I can question them about this. However, this has been to no avail. I am aware of 8 clients being put on Auto enrolment I have written to them advising we do not do auto enrolment and refunding the monies.

Unless this can be explained it is a fraud on both OFSL and ORBP and we need to report the same and take action. We are not aware of how many people organisations that they may have done this to for example I have an invoice noted as No 1 which it clearly is not to Pro Scaff Contracts Limited. The account states it is NatWest Preston when in fact it is NatWest Urmstone the account is Routeright Limited. ORBP account is Preston. Invoice to Js Gargare Undated predates invoice No 1 and again misleads as to the owner of the account. The invoice is different yet again passes off as ORBP. Adam Ball is the director of Routeright Limited I would suggest that we direct our enquiries to him in the first instance to see if we get any response.

Aspiro Investment LLP

The Aspiro is a generic terms [sic] used for the Tulip and Heather investments. I have looked on company's [sic] house at the accounts which appear to show £36 million on balance sheet.

Any reference to Aspiro relates to Heather and Tulip £1,248,000.00. The actual shares issues [sic] appears to be only £240,000.00.

4. **Payment out analysis.**

It appears that payments have been made out of the fund via OFSL and there is no explanation as to why or what for or what benefit it brings to the fund. By way of example:

1. Michael James McMahon, I have seen a penalty notice for speeding sent to OFSL. Why did the fund pay for a Mercedes hire care £2360 for this person? Who is he what value has been brought to the fund?

2. PHI monthly fee £3000 regulatory services. I know this is [Martin Kelly] can we have a synopsis of the work done, who made the agreement with fund and what benefit has been provided.

3. RMJ solicitors £750k -£1million there is absolutely no paperwork at all, why was this paid? What for? The firm has now been intervened by the SRA a good sign of dishonesty or impropriety re money. I have now seen an email from RMJ solicitors suggesting that the funds would only be released upon the registering of debenture against the company a charge on land albeit equitable not legal and a PG given by Stewart Day

The above is just a few of the matters I have identified.

5. RTC

Mr Bell who seems to be suggesting that payment of £137,500 and £96,465.00 is to be in full and final satisfaction of the advance made.

Again there is a paucity of documents but from the unsigned loan RTC are in breach of clause 5.3 in regards to any payments of interest.

The agreement to an assignment that has been signed suggests the value of the claims will be no less than the initial loan and interest. The agreement draft unsigned provided by Bell suggests the claims assigned are in full and final settlement.

There is provision for monthly interest and bordereaux neither has been undertaken, paid or provided.

The funds advanced are:

1. Ocean Equity Finance £850,000.00
2. Clear Financial Solutions £300,00.00 circa (I have seen no documents)

6. Platinum Credit Services Limited

£743,430.00 these funds have been paid out of ORBP. There is no paperwork what is the payment for? All payments save as for £15,000.00 went to platinum, the later went to All done Trading Limited who is C Haslam E Haslam and Glyn Torr.

I have looked at searches from companies house it appears D Haslam and E Haslam who I believe are [Andrew Haslam's] wife and daughter and were directors. The company has debtors of £310k. The shareholding is 100% owned by Shaw Hill Holdings Limited. I can find no information on this company and assume its registered abroad.

I have some emails stating plant hire was purchased by platinum. Do we have a loan with platinum or does the fund own plant or a plant hire company? Was any due diligence undertaken was any security considered?

There are emails from [Martin Dowd] to [Gordon Craig] [Glyn Torr] [Andrew Haslam] DR LB makes reference to loan agreement do we have a loan agreement? Reference is made to plant purchase, leasing company payments, Sawhill etc.

Some reference is made to **IP Fork Trucks Limited** which if it is the same company went into administration 18.5.2017 [Gordon Craig] is the Administrator.

7. **Voracity [sic] of schemes and regulatory compliance**.

I do not believe that the investments have been undertaken with other due diligence or within the remit of regulatory compliance, I make two provisos here, firstly I despite repeated requests have yet to see all the documents or be allowed access to all the information and therefore cannot with certainty say due diligence was not undertaken and second whilst I believe regulatory compliance on investments has not been adhered to again I have not been provided all the pertinent information nor do I have the relevant expertise in this field to comment.

8. **EMM**

There are various emails between [Simon] Hooper and [Martin Dowd] regarding the acquisition of shares in EMM. It is concerning at the same time [Simon Hooper] is saying purchase shares for fund and yet telling various other parties to sell.

[Martin Kelly] is saying (email 31 October 2016) to sell 200k of his shares from personal account yet does not mention to any trustee that he has personal interest when pressing for fund to pay lawyers re de listing and errant director? The information provided by [Martin Kelly] suggested it was imperative to secure asset of fund and it would have increased value.

Email sent to [Martin Dowd] saying bu[y] 27 October 8.03 yet [Simon Hooper] sends another email to [Martin Dowd] copy email 8.13 [representative] to [representative] Cornhil [sic] saying sell 1.2 million shares.

Clearly the fund has been duped and [Martin Kelly] had a conflict of interest.

9. **Malta Boxing commission**

£119,000.00 what is this for? I do not have any documentation other than an invoice for 25% shares. We do not have a share certificate.

10. **Civilized Investments Limited**

£50,000.00 we have share certificate for 4484 ordinary shares. The company are launching Forbes have recently purchased 4545 shares for £200,000.00. The bank will launch next year 2018. If this and my interpretation is correct this may be a good investment for the fund but it requires investigation.

11. **Regal Coins**

£70,000.00. We do not have any documentation re loans I have email [Gordon Craig] to DMR requesting payments of £30,000 18 March 2016 and £40,000.0 on 5.10.2016. to be allocated to Regal Coins Limited. Can we call in these monies what were terms of loan etc.

12. **Rationale Asset Management PLC**

There is a clear conflict of interest here between [Martin Kelly] and the fund. The fund has paid £998,000.000 with no explanation of that that was for. There are emails referencing shares but no share certificates were ever issued. The question is what was the investment was it a loan if so how was it agreed what are the term and what security do we have.

13. **R2R Management Services Limited**

No documents exist all we have is details of amounts paid being £116,000.00

14. **Merydon [sic] Corporation Limited**

No documents exist all we have is details of amounts paid being £50,000.00 30 June 2017 then a further VAG £50,000.00 13 July 2017 can you provide further information.

15. **[Scheme member]**

This is a loan that remains outstanding despite being called in I believe we should take recovery action.

16. **Ocean and Emfire**

There are two fee notes from [Gordon Craig] for £228,000.00 and £78,000.00. in relation to Ocean and Emfire paid by ORBP. However ORBP never received any funds from either scheme.

Statement of investment Principles

It appears that the fund has neither a DFM nor Adviser. I have reviewed the Statement of Investment Principles, it is conceding that Roderic Owen-Thomas is described as the DFM which is clearly not the case!! I have uncovered some emails relating to his proposed appointment which in themselves causes me some concerns.

The document has not in the main been adhered to why? The only point that appears to have been slightly adhered to is on page 5 when it suggests that the ….” Asset portfolio is predominately asset backed company loans.” the fact that various loans appears to have been made is correct what is incorrect is that from the paucity of paperwork I have seen is that there appears to be any form of security for the loans! I think that Nick Davenports email 14 June 2016 is correct I do not what investment he is referencing as “Unlawful “but we need to get a grip on what investments have been made, what paperwork is missing and the veracity of those investments. Sadly, as there appears to be no adviser or DFM any investments that fail or do not have adequate security unfortunately the fund has no recourse. The members of course could look to the trustee.

Chris Hoole (Hoole Limited et al)

I am concentrating on the transactions regarding **Chris Hoole**. The entities that he has been involved with are as follows;

a) Hoole Liverpool Limited £180,000.00
b) Sandymoor Consultancy Limited £172,000.00
c) Reid Fotheringham Investment strategies Limited £329,000.00
d) RMJ £750,000.00
e) Shawhil [sic] client [Member] £86,890.00

Total £1,517,890.00

The total transfers introduced by Hoole £3,876,076.00

I have held back all transfer requests made by Hoole and have written to him requesting a meeting. In addition, as per above I have tried to make contact with the SRA intervention agent of RMJ and have chased them today.

If the RMJ monies was to be held until security was put in place but the same hasn't been undertaken and it may be possible to pursue via breach of undertaking against the indemnity insurers.

One of the main issues re Hoole client is we cannot appropriate at any investment or fund. We have loan documents for abc and should we be calling in the loans?

Michael Corey

I have been in conversation with the solicitor for a Richard Murphy. It seems that monies were sent to Micore Leafield Limited from the funds held by ORBP clients. No monies were ever received from 5 MC clients to ORBP. Moines [sic] apparently were transferred to St James QROPS from the ceding companies. Notwithstanding non receipt of these moines [sic] ORBP paid out to Micro Leafield Limited £248,574.00

Quite disturbingly there appears to be emails suggesting that Richard Murphy has taken a loan for circa £35k but [Michael Corey] paid him £2k? not only does this appear to be liberation but also [Michael Corey] may have stolen client monies !!! Andrew Morton at my request will keep me informed I have advised we will assist in any way possible.

In addition Michale [sic] Corey was paid £25,104.00 in commissions needless to say no introducer agreements are in existence. I suspect he may be a man of straw and recovery actions may prove fruitless however Andrew will keep me in the loop.

Kenni James

Why have payments been sent to him what is the Nailtec Loans [sic] email shows a payment of £25,000.00 no documents can we call loan in

Regal coins Limited

£70,000.00 was transferred in total which I have ascertained from emails. There is an email regarding £40,000.00 loan note what is this for where is [sic] the documents can we call in the loan.

Fund Synopsis

The total fund value receipts as at 12.9.2017 is £7,107,060.71 I believe this is the total of genuine transfers in which I categorise as type 3.

1. The total fund value of all members excluding Ocean and Empfire [sic] is £13,866,752.36
2. The total paid out in lump sums as at 12.9.2017 £456,911.08
3. The total value of transfers out as 12.9.2017 £956,384.46
4. The Total value of investments as at 12.9.2017 £3,651,623.75
5. Ocean value buts funds never received by ORBP £984,458.85
6. Empfire [sic] value buts funds never received by ORBP £519,844.96
7. The value of estimated loans as at January 2016 £4,510,738.59.

The issue here is that simplistically if item 1 is accepted as the base figure after deduction of items 2,3 and 4 the gross investments not including deduction for expenses should be circa £8,072,498.00 this is significantly different from the figure in item 7. Even accounting for the payments to OFSL up to December 2016 £2,717,052.95 (which includes narratives entitles fees including introducers was £1,416,972.09) this still leaves a shortfall of which there is no explanation.

Ocean and Empire [sic] members paid out but funs never received by ORBP £285,789.00 transfers out and lump sums paid £153,686.68

On behalf of ORBP I want to seek to assign the RTC claims and the shares in

QROPS transfers missing funds

There are 12 clients total value £469,337.61 which relate to transfer to a Maruitis [sic] QROPS whose name we do not know to I understand the Refresh [Recovery Limited] account. As these transactions mainly predate OPRB there is a paucity of documentation. The issue I have re these transactions it appears most of the monies went to three individuals Kenni James £332,309.06 [Martin Dowd] £29,149.00 and Steven Vaugh £30,000.00. Why were these sums paid to these people is there any documentation? I suspect recovery may be fruitless.

Costs and fees

There is a charging clause in the Trust deed I propose that the fees for my time and the ongoing costs of the staff be secured for three months to undertake the task of winding down the fund and collecting in monies due. As previously agreed my fees are on a reduced hourly rate from my normal professional charging rate of £250 down to £200.I will render my fees

on a weekly basis these are including my trustee retainer of £4000.00 pcm. I estimate considering the last 4 months my weekly hours will be circa 30 plus I will cap fees in total to £20,000.00. As [Martin Kelly] has resigned and having spoken to Nick Davenport on the various issues he is of the opinion that as the fund has only one sponsoring employer i.e. OFSL there is no requirement that [Martin Kelly] needs replacing. GC has agreed in the meeting of 24 August that both his trustee fee and [Martin Kelly] can be used to cover my time the actual cost to the fund will only be circa £6-8k estimated pcm in excess of what has been paid historically in the event my time exceeds the principle.

[Scheme member] has asked to transfer her transfer value was £266,437.23 we received £253,569.41 where have the funds been invested.

What is the position re monies and liquidation of assets? there are some transfer requests and lump sum request that need dealing with urgently.

I am proposing to write to write to the Regulator, as I mentioned to you, my intention is to seek to the crystallise fund, collect in what I can and reassess the situation. Obviously, I wish to seek guidance and sanction to proceed as I propose."

Appendix 6

Extracts of the Trust Deed dated 30 June 2015, and Scheme Rules, as amended by the Deed of Amendment dated 1 July 2015

Recitals

"(1) The Administrator has decided to establish a trust with effect from the date of this deed (the "Commencement Date") for securing benefits under a pension scheme (as defined in section 150 of the Finance Act 2004 (the "Act") to be known as the (the scheme) [sic]."

Clause 4:

"4 Structure

[…]

4.3 The Trustee will be responsible for the administration and management of the Scheme. The Trustee may from time to time by resolution appoint one or more persons resident in the United Kingdom to act as Administrator. Where no such appointment is in affect [sic], the Administrator will be the Trustee.

Clause 5:

"5 Conformity with legislation

5.1 The Trustee will administer the Scheme in accordance with any overriding legislation affecting pensions [*sic*] schemes.

5.2 If any provision of the Trust Deed or Rules is inconsistent with the requirements in Clause 5.1, then those requirements shall prevail."

Clause 10:

"10 Investment Powers

10.1 Where required by the 1995 Act, the Trustee must keep any money they receive in an account by them with a deposit taker as defined in Section 49 of the 1999 Act.

10.2 The Trustee may invest the Fund and may transpose and vary any investment made as if they were absolutely and beneficially entitled to the assets of the Scheme. In particular, and without prejudice to the generality of the foregoing, the Trustee may invest any part of the Fund in any;

10.2.1 annuity contract or assurance policy effected with an Insurance Company and in any unit trust;

10.2.2 deposit with a local authority, bank, building society, insurance company or other financial institution;

10.2.3 stocks, shares, debentures, debenture stocks, bearer securities or other investments;

10.2.4 interest in land;

10.2.5 scheme of deposit administration or managed fund administered by an insurance company;

10.2.6 article or commodity, which in the Trustee's opinion will provide a capital profit;

10.2.7 pooled or common investment fund which will not prejudice the Scheme being treated as a Registered Scheme; or

10.2.8 acquisition, sale, exchange or cancellation of financial futures, options of any fund (including traded options whether call or put) and contract or rights or any nature relating to assets or property and whether or not receipt or delivery is to be at some future date.

10.3 The Trustee may lend money upon security and upon such terms as the Trustee thinks fit.

10.4 The Trustee may place any part of the Fund I the name in any corporate body that they have appointed as their nominee.

10.5 The Trustee may give guarantees or indemnities in connection with the exercise of their power under this Clause and may bind all or part of the Fund to give the effect thereto.

10.6 The Trustee shall have the power to appoint one of more persons as an investment manager or managers to the Scheme on such terms as to remuneration and otherwise as the Trustee shall from time to time decide. Any person so appointed shall be empowered to exercise or carry out the powers set out in the Clause (and, in particular, Clause 10.2) in relation to such part (or whole) of the Funs [sic] as the Trustee shall determined [sic] and such of the other powers and duties of the Trustee as the Trustee shall deem as expedient.

10.7 The Trustee may effect (without limitation) such insurance, as the Trustee considers prudent.

10.8 The Trustee may at any time or times, enter into any compromise or arrangement with respect to or may release or forebear or exercise or any of their rights as holders of investments in as creditors of any company and whether with connection with a scheme of reconstruction or amalgamation or otherwise and my accept in or towards satisfaction

of all or any of such rights such consideration of the Trustee shall think fit whether in the form of cash or stock, shares, debentures, debenture stock, or obligations or securities of the same or of any other company or companies without being any way liable or responsible for any lost resulting from any such compromise, arrangement, release or forbearance or in respect of in any inadequacy or alleged inadequacy in the nature of amount in such consideration."

Clause 13:

"13 Power to act on advice

13.1 The Trustee shall have the power;

13.1.1 To obtain and act on the advice or opinion of any profession advisor;

13.1.2 To settle, compromise or submit to arbitration any claim or matter relating to Scheme or the Trusts of the Fund.

13.2 The Trustee shall not place reliance on the skill, judgement of a person who is appointment otherwise than by the Trustee to perform any of the activities referred to in Section 47 (3) of the 1995 Act and no appointment shall be made by the Trustee in contravention of Section 47 of the 1995 Act.

Clause 14:

"14 Power to employ agents

14.1 The Trustee shall have power to employ such agents as they think fit in the transaction of any business of the Scheme or the Fund including the payment pensions and other benefits and any valid receipt therefore given to such agents shall be a good and sufficient discharge to the Trustee.

14.2 Subject to Clause 13, the Trustee shall have the power to delegate any of their duties, discretions or powers (other than the duties imposed on the Trustee regarding the termination of the Scheme and the distribution of assets) to any of their number or to any person whom they reasonably believe by qualification or training or experience is capable of carrying out such duties, discretions or powers.

14.3 Without prejudice to the generality of the powers set in Clause 13 and in this Clause, the Trustee may from time to time authorise such persons or persons as they shall think fit to draw cheques on any bank account or to endorse any cheque to give receipts and discharges for any monies or other property payable, transferable or deliverable to the Trustee and every such receipt or discharge shall be as valid and effectual as if it had been given by

the Trustee as a hole [sic] BUT SO THAT the Trustee may determined [sic] that a maximum limit shall be set (either express as a notional cash sum or a proportion of the Fund) on the amount that can be drawn on a bank account or in respect of which a receipt or discharge can be given by such person or persons and require that any amount or value above such limit shall be dealt with by the Trustee.

Clause 16:

"16 Appointment and removal of Trustees

16.1 The Administrator may, by deed

16.1.1 remove any Trustee' and/or

16.1.2 appoint, with no limit as to number any new Trustee or [sic] the Scheme

16.2 A Trustee may resign by giving written notice to the Administrator. The Trustee will be treated as having resigned on the expiry on any notice specified and otherwise on the date that the Administrator receives the notice. Each Trustee and the Administrator will take all necessary action to give proper effect to the Trustees resignation.

16.3 A body corporate may be appointed as a Trustee even if at the time the Scheme was established it did not have a sole corporate Trustee."

Clause 18:

"18 Trustees Indemnity and liability

18.1 The Administrator shall indemnify each Trustee and any previous Trustee against all liabilities the Trustee and previous Trustees incur in the execution or professed execution of the trusts of the Scheme and in the management and administration of the Scheme

18.2 To the extent that the Administrator fails to do so under Clause 18.1, each Trustee and previous Trustee will subject to sections 33 and sections 34 of the 1995 Act, be indemnified out of the Fund.

18.3 However,

18.3.1 no amount maybe paid from the Fun [sic] in contravention of Section 31 of the 1995 Act or Section 309A of the Companies Act 1985; and

18.3.2 no indemnity may be given under this Clause in respect of fraud or deliberate and culpable disregard of the interests of the Members, Dependent and other Beneficiaries on the part of any Trustee or previous Trustee.

18.4 each Member will reimburse the Administrator in respect of any payment it make [sic] under Clause 18.1 to the extent and in the proportion that the Administrator decides.

18.5 Subject to Section 33 and 34 of the 1995 Act, no Trustee or previous Trustee will be liable for;

18.5.1 any mistake or forgetfulness of law or fact of the Trustees or any previous Trustees, their agents, delegates or advisors; or

18.5.2 any breech [sic] of duty or trust whether by commission or omission."

Clause 19:

"19 Trustees conflicts of interests

19.1 Any Trustee, agent employ [sic] by the Trustee or delegate or nominee appointment by the Trustee may also be a beneficiary

19.2 No decision of the Trustee and no exercise of the power or discretion by them is invalid on the ground that a Trustee, agent, delegate or nominee has a personal interest in the matter."

Clause 20:

"20 Trustee renumeration [sic]

20.1 The Trustee may agree fees with the Administrator which may be paid out of the Fund. Any firm or company employing a Trustee or in which a Trustee has an interest is entitled to be paid proper charges for work carried in connection with the Scheme.

20.2 Where a Trustee has an interest in a company, business or partnership, he may retain remuneration he receives in respect of it even if the Fun [sic] has an interest in the company, business, partnership in question.

20.3 Any Trustee or any firm of which a Trustee is an [sic] partner and any subsidiary or associated company of a Trustee (or which he has an interest as an office or share holder) may retain any fees, brokerage, commission, remuneration and expenses it receives in connection with the Scheme."

Scheme Rule 14:

"14 Transfers Out

14.1 A Member may request that the Trustees transfer all of part of his Individual Credit (or an amount representing it) to:

14.1.1 a Registered Scheme;

14.1.2 a Qualifying Recognised Overseas Pension Scheme; or

14.1.3 any other scheme approved for the purpose of this Rule by HMRC

in order that he will become entitled to receive benefits under the receiving arrangement.

14.2 The Transfer may only be made if:

14.2.1 any requirements imposed by legislation are met; and

14.2.2 where the Member is not exercising a statutory right to a cash equivalent under the provisions of the 1993 Act, the Trustees agree to it.”

Appendix 7

Key provisions of the Scheme's SIP

Paragraph 1 and 2 of the SIP state the following:

> "In drawing up this statement, the Trustee (Mr Craig at the time) has considered advice from his investment consultant, and has consulted with all participating employers. The Scheme's Investment Consultant is Roderic Owen-Thomas who is the Discretionary Fund Manager at Logic Investments.
>
> The Trustee will review this statement once a year, or more often in the event of a significant change in investment policy."

Paragraphs 4 to 6 outlined the responsibilities involved with the Scheme's investments:

> "The responsibility for deciding investment policy lies solely with the Trustee. The Trustee is supported by the investment consultant, and consults Optimum Financial Solutions Limited (the 'principal employer') when formulating or changing the investment strategy. The Trustee will review the SIP at least once in every year, or immediately after any significant change in policy.
>
> Responsibility for the management of specific investments is delegated by the Trustee to investment managers who are, where required authorised under the Financial Services and Markets Act 2000. The Trustee will seek advice from the investment consultant as to the specific investments that are deemed suitable for Optimum Retirement Benefits Plan. He will also, periodically, seek further advice from the investment consultant, regarding the ongoing suitability of these investments.
>
> When choosing investments, the Trustee and the investment managers (to the extent delegated) are required to have regard to the criteria for investment set out in the Occupational Pension Schemes (Investment) Regulations 2005 and the principles contained in this statement."

The Trustee's investment objectives were listed in paragraph 7 as:

- To enable members to provide adequately for their retirement via an appropriate investment of their accumulated contributions
- To acquire suitable assets of appropriate liquidity that will generate income and capital growth to meet the cost of both current and future benefits
- To limit the risk of the assets failing to meet the cost of benefits
- To maximise the return on the assets within the context of the above objective

Followed by these aims:

- The trustee targets a return for listed companies of 5%-15% and for small cap investments a return of 20% to 60%.
- Targets for corporate bond focus on the income that the Scheme will receive.

- The Trustee aims to beat appropriate benchmarks (having regard to the target returns details above) on a yearly basis.

In paragraph 8, the SIP stated that there were three investment profiles for Scheme members to choose from (Balanced, Cautious and Adventurous):

> "New members are automatically placed into the balanced profile unless they choose otherwise. The balanced profile fund is also the default fund for auto-enrolment members.
>
> The strategy involved in choosing investments for each profile involves looking at both the fundamentals and technical aspects of each investment. High risk investments will be predominantly small cap stocks. Medium risk investments will focus on listed companies in the UK, U.S and Europe (predominantly UK and U.S). Low risk investments will involve corporate bonds or large dividend paying stocks.
>
> […]
>
> The Trustee aims to ensure there is a balance between, small cap, listed companies and corporate bonds.
>
> Currently the return-seeking asset portfolio is predominately [sic] asset backed company loans, both actively and passively manged, with a small allocation to illiquid private equity and property assets. The matching asset portfolio is a combination of index-linked and fixed interest gilts.
>
> Asset allocation is reviewed periodically. The Trustee will seek advice from the investment consultant in relation to investment policy and associated decisions.
>
> The Trustee's policy is that there will be sufficient investments in readily realisable assets to meet cash flow requirements in foreseeable circumstances so that, where possible, the realisation of assets will not disrupt Optimum Retirement Benefits Plan's overall investments. The Trustee will hold sufficient cash to meet benefit and other payment obligations.
>
> Investments are held on a medium to long-term basis, although assets will be realised periodically in order to meet benefit payments. The return-seeking asset portfolio is predominately [sic] asset backed company loans, both actively and passively managed, with a small allocation to illiquid private equity and property assets. The matching asset portfolio is a combination of index-linked and fixed interest gilts."

The SIP later listed the Trustee's investment beliefs as:

1. Understanding scheme member characteristics, circumstances and attitudes is essential to developing and maintaining an appropriate investment strategy.
2. As long-term investors, incorporating environmental, social and governance (ESG) factors is integral to the investment management process.
3. Taking investment risk is usually rewarded in the long term
4. Diversification is the key tool for managing risk

5. Risk-based asset allocation is the biggest driver of long-term performance
6. Taking account of asset values and asset prices, economic conditions and long-term market developments enhances long-term performance and informs strategic decisions.
7. Indexed management, where available, is often more efficient than active management.
8. Good governance, including an appropriate resourced in-house investment function, is in the best interests of members.

Following the above, the SIP outlined four principles that the Trustee had identified in order to create a best practice risk management framework. It concluded by stating that the Trustee believed that the strategy outlined in the SIP was appropriate for managing the risks and that each of the funds in place provided an adequately diversified distribution of assets:

- identify the most significant risk factors and rate them according to the impact they are expected to have on investment performance
- understand risks both individually and holistically
- identify available risk management tools and options - for each identified risk factor, a set of tools is used to monitor exposure to the risk and help to choose between the solutions to mitigate them
- invest within a clear and well-defined risk budget

With regard to the Scheme's asset classes, the SIP contained the following information:

"The Trustee regularly monitors Optimum Retirement Benefits Plan's funds to ensure that:

- the Scheme invest primarily in regulated markets
- investment in non-regulated markets is kept to a prudent level
- derivatives are used in a prudent and appropriate way to manage risk in the portfolio more efficiently and without excessive risk exposure to a single counterparty or other derivatives."

Appendix 8

The Trustees' submissions

B.1 Mr Craig

558. Mr Craig did not directly comment on Dalriada's referral or on Mr E's complaint, despite having been given the opportunity to do so. However, he provided a number of comments that are outlined below:

558.1. He has attempted to meet with a Dalriada representative but has been ignored and, after four years, he has still not had a meeting.

558.2. He has previously contacted four of the investments made by OFSL and not one of these has been contacted by Dalriada in nearly four years.

558.3. The main asset of the Scheme was £1.5 million owed by a company whose investment was made by the previous trustee of the Clear Fund. However, Dalriada accepted some £93,000 in full settlement of the amounts owed, based on an agreement with Real Time Limited. He believes the agreement is invalid, and fraudulently prepared by Martin Dowd and signed by him on behalf of the trust and sponsoring employer when he had no standing with either.

558.4. Despite his requests for a meeting with Dalriada, he was not afforded a meeting and so they "blindly accepted" a £1.4 million deduction. He estimates that the shortfall to members is about £2.5 million and this £1.5 million, plus other investments not chased by Dalriada would have paid it in full.

558.5. He never received Mr Reilly's resignation email, which he claims is a forgery. He said that Mr Reilly was working in the office until the day before Dalriada was appointed, and the reason Mr Reilly and Mr Kelly were appointed was due to his illness.

558.6. Pension funds, and members introduced for investment purposes, only commenced in late August 2017 as a result of a third-party marketing company. As these funds had a lead time of 10 to 12 weeks, they were only received by the Scheme in November 2017 onwards. He claims he was "off ill" from mid-November 2017, so all the investments after this time, which he claims were the majority, were not made by him.

558.7. He said that TPR lifted his suspension, retracted the press release about him and redacted the Minutes of the meeting on its website, where the suspension occurred. Neither BEIS, the liquidator of OFSL, or the official receiver, investigated him or brought any proceedings against him.

558.8. He has never met Mr E and has never spoken to him.

558.9. Mr Craig did not attend the oral hearing nor reply to the notice giving any reason for his decision not to attend. He has also not made written submissions

in response to the Preliminary Decision issued to him in advance of the hearing, setting out my initial findings and the purpose of the oral hearing.

559. After reading the Pensions Ombudsman's Preliminary Decisions, Mr Craig issued a substantive response, which included: copies of accounts; correspondence with the Insolvency Service, Dalriada, Mr Reilly and Real Time Claims Limited; and a number of diagrams demonstrating the layout of the Scheme, its purpose and its investments. The salient comments have been summarised in paragraphs 560 to 584 below. The claims made in paragraphs 560 to 579 below have not been substantiated.

560. Within the diagrams and documents Mr Craig provided, were the following statements:

560.1. "The purpose of the [Scheme] is not to grow the investment but to liberate a frozen pension".

560.2. "Whether the monies were invested in the original scheme with Au Capital Limited or in the alternate investment device using Shawhill Seychelles Limited made no difference to the commission received by the ORB Trustees".

560.3. "[Refresh Estates Account Number 3] was used to facilitate the pension liberation loan back to the pensioner, the loan back indicated it came from Shawhill Seychelles Limited but, in reality, the funds were paid from this account."

560.4. "[Mr Craig's] legal duty was to comply with instructions from [his] sponsoring employers' principal shareholder Ivor Jenkins".

560.5. "[The Scheme was] not involved or interested in the due diligence process".

560.6. "[Facilitating loan backs] was the position until December 2016 when the new trustees were appointed and there was a diversification of investment strategy implemented by OFSL by securing investments via call center [sic] who adopted cold calling and offered numerous incentives to IFA [sic] to secure investment clients".

560.7. "The actions of the co trustees undertaken in Gordon Craig's absence due to his illness illustrate that they may have breached their fiduciary duties as trustees by insider dealing and acting in a clear breach of their fiduciary duty, however clause 19 of the trust deed does not render the actions of the trustee invalid."

560.8. Between 1 June 2015 and 14 January 2017, Mr Craig received £110,000 from OFSL.

560.9. In December 2016, OFSL received £133,120 as commission for "non recourse [sic] deals".

561. He queried Dalriada's ability to bring a complaint to TPO and whether both Dalriada's and Mr E's complaints were time-barred. Subject to this, there should be a further oral hearing so that all relevant witnesses could be cross-examined.

562. He does not believe that the 1995 Procedure Rules were properly regarded when TPO served notice of the Oral Hearing.

563. He would have submitted medical evidence of his inability to participate in "any process which would involve him being exposed to the rigours of giving evidence and being cross-examined.", had he been served with notice of the Oral Hearing. He has provided TPO with a copy of the medical report to which he has referred to in this submission. He has submitted that, had I been aware of that issue, I would have considered it unfair and prejudicial to hold any oral hearing until such time as his mental health had sufficiently improved to enable him to properly participate in an oral hearing.

564. Dalriada had failed to engage with him, and had deprived TPO's investigation of relevant information, which compromised the integrity of the process.

565. Regarding the Ocean and Clear Funds, he made the following comments:

565.1. He was appointed the administrator of Ocean Equities Finance Limited on 4 July 2014. At this time, Mr Robert Winstanley was the director of the company and trustee of the Ocean Fund.

565.2. He was instructed by Mr Winstanley to transfer £350,000 to Real Time Claims Limited, and to draw £36,208.12 to cover the fees and disbursements of Refresh Recovery Limited. The direction given by Mr Winstanley, as trustee of the Ocean Fund, was consistent with how the funds had been dealt with previously and there was no reason for him not to follow the instructions he was given. He had transferred the money as this was pension funds, rather than the estate's money.

565.3. Due to ill health, Mr Winstanley was replaced by Mr Richard Jones, who became uncontactable. Consequently, investors started to contact Mr Craig, to complain. At around this time, he contacted Real Time Claims Limited to see if the funds could be returned, but he was told that the monies had been invested for a five-year period.

565.4. Nobody had warned him that the Ocean Fund was a "dishonest scheme" and notes that nobody connected to the Ocean Fund has been charged with any offence of dishonesty. A lack of caution is not the same as dishonesty.

565.5. He was appointed the administrator of Emfire Consulting Limited on 30 December 2014.

565.6. He attended a meeting in April 2015, where Martin Dowd and Kenni James discussed the Ocean Fund. It was decided that the members needed a new scheme to protect their interests.

565.7. Following this, steps were taken to form a pension fund under UK law with OFSL, and he was approached by Martin Dowd/Ivor Jenkins to the trustee of that pension fund (that is, the Scheme).

565.8. OFSL sought relevant authorisations from HMRC for the Scheme and a QROP in Mauritius. The latter was formed in July 2015.

565.9. As there was a delay in HMRC providing permissions for the QROP, Martin Dowd and Mr Jenkins decided to create a ‘loan back’ pension scheme for people with discontinued pensions. This was instead of investing in Ocean for onwards investment into the QROP until HMRC permissions were granted.

565.10. Every prospective Scheme member were advised by their own IFA and by OFSL compliance manager Andy Ewing, and given full advice on the ramifications of investing in the Scheme using the loan back third-party scheme.

565.11. The Scheme received pension monies from OFSL, via documentation prepared by Turner Parkinson, to be re-invested in a fund named AU Capital Plc. However, Martin Dowd saw that OFSL could receive a bigger return by cutting out AU Capital Plc and doing it ‘in house’. So, Shawhill Seychelles Limited became involved, providing loan backs to pensioners at a commercial interest rate.

565.12. As the Scheme’s trustee, his only decision was to invest Scheme members’ funds into one of these two companies, in line with their request. He believed he was compelled to invest them according to the members’ mandate. So, there would always be a balance on the trust account of zero.

565.13. The paperwork for the merger of the Ocean Fund into the Scheme, was prepared by Turner Parkinson in June/July 2016.

566. As OFSL experienced delays with its attempts to open a trust account for the Scheme, an account was opened by Refresh Recovery Limited, in a dedicated trust account (G Craig No. 3 estates account), to expedite matters. This was done after having sought legal advice. This account was audited by a third-party compliance company each year, as well as the DTI and the ICAEW every three years, and no irregularities were ever reported. Monies were never intermingled with those of Refresh Recovery Limited.

567. When a winding up order was presented against OFSL, their bank closed their account. So, when funds started to come in from late October 2015 to early November 2015, and OFSL were entitled to commissions, they could not bank them. Out of expedience, he offered to facilitate a banking arrangement for OFSL, so that it could receive its commissions and pay its expenses. This was named “G Craig No 1 Account” and was not a personal account. The BEIS incorrectly reported the payments to the “G Craig No 1 Account” as being personal payments.

568. He is personally owed over £128,000 for monies he put into the Scheme from his own funds to pay for the Scheme’s expenses. His 2017/18 tax return shows that in that year alone, he paid £114,626.23 into the Scheme.

569. In August 2016, a call centre was opened in Manchester by Martin Dowd. Mr Craig claims he had no knowledge of this. Until this time, with a few exceptions, all pension funds received were invested into “the schemes”, mainly AU Capital Plc and Shawhill Seychelles Limited.

570. Martin Dowd was the business development manager of OFSL, received his salary from OFSL, and was not involved in administering the Scheme.

571. He became ill in early November 2016 and stopped work due to his health. He states that he was dysfunctional for the next two to three months and thereafter. He did not know that Mr Kelly and Mr Reilly had been appointed in December 2016 and only started coming back to work in April 2017.

572. He believes that the Scheme’s resources started to be maladministered in December 2016. As the new Scheme bank account opened at that time, with a second verification machine in the office, over £1 million was paid out the week prior to Christmas 2016, without his knowledge. He believes that this was done by Mr Dowd and Mr Haslam with the consent of the two new Trustees.

573. By January 2018, he had secured the position regarding Real Time Claims Limited, a charge over Northrop Hall and a Solicitors Compensation Claim of over £1 million.

574. In June 2018, he prepared accounts up to 31 December 2017 for the Scheme, at his own expense. These were amended in October 2018 to show the Scheme’s “true position” and sent to the police and TPR.

575. Dalriada has never investigated the Scheme’s “true position” and instead assumed that all receipts into the Scheme have been lost. Had it met with him and seen the final accounts, it would have rendered this whole complaint without foundation, as it would have seen the Scheme’s solvency.

576. Dalriada also relied upon an agreement with Real Time Claims Limited, which is a forgery for the following reasons:

    576.1. It was signed by Martin Dowd as a trustee of the Ocean Fund, when he was not.

    576.2. On the signature page there are crosses from previous draft agreements which have been cut and pasted.

    576.3. It was purportedly signed by him, but it is in fact a computer-generated signature.

577. Mr Reilly was involved in a company called A-Z Admin Limited from June 2017, alongside Ivor Jenkins, which traded directly in pensions liberation with Phil Buchanan and his company Blue Cannon Limited. It sent over £3 million of UK pension funds via a Maltese QROP called Elmo to a Mauritius Wrapper that was destined for the U.S. He believes that Kenneth Mallard, who was part of the Kajani operation, ran this.

578. Mr Kelly was a close friend and colleague of Martin Dowd. During his period as a trustee of the Scheme, he invested in Rationale Plc, RAM Plc and Cornhill Insurance Limited, which were all related companies. Upon his resignation, he became a director of "Rational Plc [sic]" and Martin Dowd became its business development manager.

579. Mr Craig does not accept that this was a pension liberation scheme, it was an investment in non-recourse third party investments. The third parties offered loan back facilities which had nothing to do with him, and each member individually agreed to the loans. In any event, pensions liberation is not illegal. Given that he and his colleagues discussed the Scheme and took advice demonstrates that they were conscious to ensure there was no impropriety.

580. He was fully aware of the Statement of Investment Principles.

581. He believes that similar allegations have been addressed by other bodies such as the police, the Business, Energy and Industrial Strategy (BEIS), the Official Receiver as Liquidator of OFSL, but no charges of dishonesty have been made.

582. He believes that Dalriada based its complaint on the BEIS' report, of which he has not had sight. He thinks this is unfair and a breach of the principles of open justice. Further, nowhere in its complaint is there a mention of the merger of the Funds into the Scheme, yet this was his "*raison d'etre* [sic] for creating the fund."

583. He believes that the pension fund liabilities due to the fund are approximately £3 million, of which £1.2 million relates to the Funds, and some £800,000 - £850,000 who were unhappy and wanted transfers out towards the end of his administration of the Ocean Fund. The balance of pensioners had not made any contact.

584. With regard to the reasonable costs Dalriada incurred from referring the complaint to TPO, Mr Craig made the following comments:

584.1. He questioned whether was a provision that maintained it could claim these costs.

584.2. As Dalriada had submitted an hourly rate, with no explanation as to why the rate charged was reasonable and no breakdown of who had done what and for how long, neither he nor TPO could make any observations on this. He believes a properly itemised fee/bill breakdown should be provided.

584.3. It was premature to consider costs when he submits that the complaint is not within TPO's jurisdiction, and that Dalriada had failed to engage with him and had a "skewed depiction of the facts".

B.2 <u>Mr Kelly</u>

585. In response to Mr E's complaint and Dalriada's referral, Mr Kelly made the following submissions:

585.1. He was not involved in any investment discussions/decisions, nor did he have access to the Scheme's accounts or bank accounts.

585.2. He was not aware that a SIP had been produced for the Scheme.

585.3. He has no recollection of any correspondence between Mr E and himself and believes that Mr E became a member of the Scheme prior to his appointment.

585.4. He was also not involved in Mr E's attempts to transfer out of the Scheme and was unaware of his intentions until receiving correspondence from TPO.

585.5. During his short tenure, he was not involved in any investment decisions or any banking transactions on behalf of the Scheme. He was not involved in the "onboarding" of any new members, as this was undertaken by the Scheme administrator.

585.6. He believes that he took reasonable steps to ascertain the state and condition of the Scheme but, ultimately, he was frustrated in his attempts to do so. This was because the necessary, fundamental records were not made available.

586. During the Oral Hearing, Mr Kelly's submissions included the following:

586.1. He invoiced OFSL separately for "any FCA work", carried out for OFSL during his time as a Trustee, such work being parallel to, rather than strictly connected with, the Scheme.

586.2. He considered that new membership, which BEIS' enquiry had affected, would have provided liquidity, which was important as he thought that "a lot of the administrative staff were paid out of the revenue that they generated from bringing in new membership". As far as he could see, there was no income coming from any of the Scheme's investments.

586.3. Nothing he could have done would have prevented the Scheme from reaching the condition that it was in; involving TPR any sooner would not have changed anything and, given HMRC's and BEIS' involvement, he was "pretty sure [TPR] knew about the Scheme in any case".

586.4. No investments were made after he and Mr Reilly had become Trustees.

586.5. His last involvement in EMM had been "to find it a new Chief Executive who could bring a credible investment strategy staff and investment proposal to re-launch it as a name-listed vehicle. That didn't work out, but I found the chap and that was that. So I had no interest left in that.".

586.6. He had not been involved in RAM's investments. RAM was going down a property route, which was largely unregulated, and Mr Kelly was not a property expert, so his day-to-day involvement had been decreasing before he resigned as a director and he had only been nominally a director before his resignation from that position. When he became aware that the Scheme was going to be investing in RAM, he resigned from his office as a director of RAM. The transactions involving RAM happened after that point. There was no conflict of

interest regarding his relationship to RAM, as he received no payments from RAM while he was a Trustee.

586.7. He had not been aware that Mr Dowd had been charged with money laundering offences until around June 2017, at a meeting at which Mr Dowd and his lawyer were present. The charges against Mr Dowd became apparent from the conversation at that meeting. He could not recall who had attended that meeting, but thought that around half a dozen people had been there.

586.8. He found out that Mr Dowd had been found guilty of the charges against him a day or two after that finding had been made. He did not consider that this finding could affect the Scheme, on the basis that it could not affect “the past”. He had understood that Mr Dowd’s operation had been closed down contemporaneously with his and Mr Reilly’s appointment as Trustees and there were no new funds coming in. Mr Dowd was no longer working for the Scheme at that stage and his arrest had occurred before Mr Kelly had been appointed as a Trustee.

586.9. He found out, in April 2017, that BEIS had attended either the Scheme’s or Mr Dowd’s offices, although Mr Kelly was not sure which. Further, he had received a letter from HMRC, as a ceding scheme had objected to a requested transfer into the Scheme on the basis that its checks on the Scheme had revealed that HMRC suspected the Scheme either of not being registered or of performing pension liberation. Given that two Government bodies were looking into the Scheme, it seemed inconceivable to him that they had not informed TPR, as he had thought that they would be “the primary people responsible for telling the regulator”.

586.10. He did not know Mr Craig prior to his appointment as a Trustee.

586.11. He had not known that the Scheme was using Introducers until he was informed that the Scheme had ceased to use the Introducers. The mention of and discussion about Introducers at the December 2016 Meeting “did not hit me with a great deal of significance at the time”.

586.12. He did not ask for details of the Scheme’s investments before he became a Trustee and did not consider that anyone from the Scheme would have been permitted to divulge such information to him before he became a Trustee. Mr Kelly had no understanding of how the Scheme’s assets were invested prior to joining the Scheme as a Trustee.

586.13. Mr Reilly had volunteered to investigate what the assets of the Scheme were; it was more convenient to do it this way, “substantially due to a geographical proximity to the offices”. He had discussed this with Mr Reilly and agreed that Mr Reilly would take the “project” forward. He had been happy with the way in which Mr Reilly had been doing that work.

586.14. He had known, before being appointed as a Trustee, that trustees were "the legal owners and as the legal owners they're totally responsible to the beneficiaries for all aspects of their assets held in the trust".

586.15. He undertook no research of his own regarding the role and requirements of a pension scheme trustee, as Mr Reilly had done this and had circulated what he considered were the relevant websites to look at and the relevant documentation, and had arranged for a file to be set up in the office, which was "no good" to him as he was not in the office. He did not take the TKU Course that Mr Reilly had suggested taking and he could not remember why not.

586.16. In response to my questions concerning whether he was aware of, and had met, the requirements under the 2004 Act, section 247, Mr Kelly stated that "once becoming a Trustee, as soon as I could, I obtained a copy of the scheme particulars and read them…as regards the statement of investment principles, I didn't see one of those – I've subsequently seen in your pack that there is one – but our priority was to establish what the assets were. I mean, obviously, the statement of investment principles presupposes the existence of a portfolio over which to apply this. If we can't establish what the portfolio is, establishing a statement of investment principle would be of little comfort."

586.17. He took legal advice from Mr Davenport, which confirmed that he had no responsibility for any "actions of the trust" prior to becoming a Trustee.

586.18. All of the Scheme's investment decisions had been made before he became a Trustee and there was a "moratorium on incoming investors upon joining", so it appeared that the Scheme's activities were on hold. Nothing happened during his term as a Trustee and Mr Reilly's notifying TPR earlier would not have prevented anything, as it had already happened. He was unable to envisage "action that we could have taken that could have undone the wrongs that were done before we became Trustees".

586.19. He believed that he had had no involvement in managing the Scheme's assets.

586.20. He did not ask to see the Scheme accounts himself, as he had agreed with Mr Reilly that Mr Reilly would be "leading that charge" and he had no doubt that Mr Reilly asked for the Scheme accounts as often as he saw Mr Haslam, if not more often. It would have been a duplication of work for him to have asked the same questions as Mr Reilly.

586.21. Everyone whom he or Mr Reilly asked for Scheme records failed to provide them. For example, Mr Haslam refused to disclose anything without Mr Craig's consent. He recalled that Mr Haslam was an employee of Refresh Recovery Limited and it seemed that "once things had to link in through Refresh, you got nowhere".

586.22. As well as discussing his concerns regarding the lack of access to the Scheme's accounts with Mr Reilly, he was "fairly sure" that the matter came up

in his and Mr Reilly's conversation with Mr Craig during their meeting with him in February 2017.

586.23. He went out of his way to meet with Mr Craig on a number of occasions, only to be stood up at short notice.

586.24. When he found out that £50,000 of Scheme monies were being held in Refresh Recovery's bank account and tried to arrange for that money to be transferred into the Scheme's bank accounts, Mr Craig told him that BEIS was blocking that transfer. He recalls that he drafted "a letter to go to the Scheme" with Mr Davenport's assistance.

586.25. In March 2017, as he could not get Mr Craig to agree to anything, he instructed Mr Davenport to draft a Deed of Removal in relation to Mr Craig, which was sent to Mr Jenkins, expecting that Mr Jenkins would show it to Mr Craig, on 24 March 2017. This was mainly intended to be "a lever to get [Mr Craig] to the table".

586.26. He was not aware that loans were being paid to members from Scheme funds.

586.27. He was not aware of RMJ Solicitors' involvement and became aware of their name only after he had ceased to be a Trustee.

586.28. Before he had become a Trustee, EMM had gone into liquidation so any shares that he held in EMM would have been in a delisted company in administration. He saw no point in trying to find out how many "worthless" shares anybody might have at this stage. The point of spending money on legal fees to see if the Trustees could extract any value from EMM was simply that. He did not believe that he had any shares in his personal account when he was a Trustee. He thought that he may have held some in a SIPP, 'which he had invested £30,000 worth into, and he invested at the top of the market, the highest ever price, and they went to nothing'. He had forgotten that when he responded to my earlier question about whether he had any personal holdings.

586.29. While the Trustees had instructed lawyers, Marriott Harrison, with a view to trying to redeem some of the money invested by the Scheme in EMM and the lawyers had drawn up the necessary paperwork to replace EMM's director, Mr Nicholls, they never proceeded with replacing Mr Nicholls, as they had been advised, by Marriott Harrison, that doing so would involve spending more than they would get back.

586.30. In relation to the Hotel Purchase, he was not involved in any hotel investment and made no recommendation in that regard. He drew a distinction between knowing of a proposed transaction and recommending it.

586.31. Nothing he could have done would have prevented the Scheme from reaching the condition that it was in; "bringing in the regulator any quicker would not have changed anything. The BEIS and HMRC were already over it, so I'm

pretty sure they knew in any case. There were no investments made after we became Trustees.”.

586.32. His understanding of the responsibility to report to TPR was that it was based on unlawfulness, not merely on irregularities. Reporting matters to TPR “would not have solved a thing”.

586.33. His and Mr Reilly’s priority was to identify the Scheme’s assets.

586.34. As he and Mr Reilly had been frustrated in their attempts to obtain information about matters such as the Scheme’s investments, he could not have reported matters to TPR.

586.35. There had been no deliberate non-co-operation with Dalriada on his part; he had provided Dalriada, verbally, with any information he had.

586.36. He had understood that the “distribution office had ceased to do business” so there was, in effect, a “moratorium”, with no new members joining the Scheme. However, when Dalriada pointed out, during the Oral Hearing, that it had evidence that £1,994,351 of transfers in had been accepted by the Scheme between 1 January and 23 March 2017, He theorised that those transfers represented a “tail of activity that was undertaken prior to the Manchester office being closed”; he had not been aware that that was “new money” and would not have been aware of it as he had no sight of the Scheme’s bank account, but he had meant that there had been a “moratorium on a proactive sales process”.

587. Mr Kelly also provided the following written statement and documents for consideration before and after the Oral Hearing:-

587.1. He claimed that he did not receive any payment via PHI Consulting or directly from RAM while he was a Trustee of the Scheme.

587.2. RAM’s bank statements for the period of December 2016 to July 2017 and for August 2018.

587.3. An email from Simon Hooper to Jon Golding dated 12 January 2017, asking him to be removed as a director of RAM so as to remove any conflict of interest.

587.4. An email from him to Mr Davenport of Turner Parkinson dated 21 March 2017, where he asked for advice on the procedure to remove a Trustee of the Scheme.

587.5. Another email from Mr Davenport to him dated 24 March 2017, with a draft Deed of Removal. On the same date, he forwarded this to Mr Jenkins and Mr Reilly saying they were aiming to execute this document on the following Monday at Turner Parkinson.

588. After reading my second Preliminary Decision, Mr Kelly made a number of submissions, together with comments on the contents of my second Preliminary

Decision. I have addressed those comments within the Determination and have not repeated them here. I have summarised the salient submissions below:

588.1. The nature and purpose of the Oral Hearing was misrepresented to him as a "solely fact-finding process". Because of this, he attended voluntarily, without representation, advice or proper defensive preparation.

588.2. He considers that the purpose of the hearing was "more a theatrical show of process for the benefit of the complainants, to fire unsubstantiated allegations, and attempt to use my reactions to support what appears to have been an entirely pre-judged outcome". Any representation that he made during the hearing that did not support the desired conclusions "appears to have been disregarded absolutely. This impression was completed by [Dalriada] being permitted to produce previously undisclosed email correspondence during the hearing, several years old and entirely devoid of context, and being permitted to demand on the spot explanations".

588.3. He did not think there was an evidential basis for TPO to make adverse findings against him. Notably, he was not involved in any of the payments made by the Scheme.

588.4. He had no reason, given the Scheme's arrangements to believe that his remuneration was at an unreasonable rate.

588.5. There is nothing to evidence that he was in control of Merydion and in *de facto* control of RAM at the time the Scheme invested in RAM.

He provided a written statement from Simon Hooper[141], former director of RAM, who made the following points:

588.5.1. Merydion held shares in RAM Plc solely as "bare trustee" on his behalf. It was not a controller of RAM Plc, nor did it exercise any day-to-day or strategic decision-making responsibilities over RAM Plc. It did not gain any commercial benefit for doing so, and transferred its holding to him, free of consideration.

588.5.2. Mr Kelly was not involved in the Scheme's decision to invest in RAM. The terms were agreed between Simon Hooper and Martin Dowd prior to Martin Kelly's appointment.

588.5.3. The timings of the investments were determined by the ability of an existing trustee of the Scheme to release monies and were unconnected to the appointment of Mr Kelly as Trustee.

[141] TPO has seen evidence that Mr Hooper has been convicted of an indictable offence and, consequently, disqualified as a company director. See paragraph 215 above.

588.5.4. Mr Kelly acted solely as a regulatory consultant to RAM and was only a director to help meet its statutory obligations. He "did not exercise any day-to-day or strategic control over RAM Plc's operations."

588.6. With regard to EMM, there were no transactions during or post his tenure as Trustee. The stock had been de-listed from the Stock Exchange before his appointment, and he thought the holding he had was valueless. The Scheme was a very significant shareholder of EMM and the latter's announcements indicated its management's intention to wind-up the firm. So, the only action he took was to agree to seek legal advice on whether there were any worthwhile commercial avenues to explore, to seek value for the Scheme. The interests of the Scheme were substantially greater than his own and aligned with his own. So, to contrive this as a conflict of interest is disingenuous.

588.7. He disputes the findings that: 1) as the Trustees did not delegate the duties of investment management to another person, they remain responsible for the investment and that they will be deemed as to have undertaken this function despite there being no evidence to support this; and 2) any action taken by one Trustee is also the responsibility and liability of the others, regardless of their involvement or knowledge of the event. He believes these are legally overstretched and problematic.

588.8. While it was clear there was some explaining to do regarding the Scheme, there were no matters that came to light, prior to his resignation, of criminality or of a sufficiently serious nature to warrant reporting the Scheme to TPR. He believes that Mr Reilly would have informed him, as a lawyer, had this been the case. Further, it does not seem reasonable to assume that if such a report had been made, that the Scheme's bank accounts and affairs would have been frozen at that precise moment and conclude that he is liable for all events undertaken after his resignation, simply because a report had not been made.

588.9. In any case, he has no assets, merely personal effects. There is no likelihood of any economic benefit to the Scheme in the event TPO successfully determines this matter. The only likelihood would be to damage him reputationally and financially.

589. Mr Kelly did not provide any submissions regarding the costs claim Dalriada had put forward to TPO.

B.3 Mr Reilly

590. During TPO's investigation into Mr E's complaint and Dalriada's referral, Mr Reilly has provided information demonstrating that Mr Kelly had a personal involvement in EMM and that the transactions under which shares in EMM were purchased on behalf of the Scheme had been completed prior to 28 November 2016.

591. He provided screenshots of messages between himself and Mr Craig, to evidence his attempts to meet up with Mr Craig.

592. He also named OFSL as the Scheme Administrator.

593. With regard to Dalriada's and Mr E's complaints, he made a number of comments, which are outlined below:

593.1. He was unaware of the Funds until his investigation into the Scheme's investments. As far as he was aware, the Funds were not incorporated into the Scheme and he had raised questions as to when the Scheme received any money from the Funds.

593.2. He was never consulted, nor did he approve any investments. Most of these were undertaken prior to his appointment. He was not provided with any information or documentation in support of any investments, other than what he found during his investigations. When he started investigations into the "purported investments" he raised issues with Mr Craig, Mr Torr and Mr Haslam, who, he was advised, was the Scheme's accountant.

593.3. It does not appear that the SIP was followed.

593.4. Although there was a discretionary fund manager (**DFM**) named in Scheme documentation, it did not appear that one was formerly appointed nor was any advice sought from any DFM.

593.5. He does not believe the investments were undertaken in accordance with the SIP. He agrees that Scheme assets were put at risk and ultimately lost.

593.6. He raised issues with regard to what he considered were excessive payments being made to Introducers. The only person who had made any payments and had complete control of the funds and banking facilities was Mr Craig.

593.7. He agrees that there was a failure to maintain adequate records of information relating to the investments made on behalf of Scheme members, as it became clear that this was the case when he started to undertake his due diligence. However, Mr Craig, Mr Haslam and Mr Torr failed to be candid, so he was unable to complete his report.

593.8. He also did not believe that there were the necessary controls to ensure the effective and transparent administration of the Scheme by the Scheme Administrator, so he had attempted to implement these.

593.9. He had concerns that money that related to the Scheme was being paid into Mr Craig's personal bank account. In particular, a loan 'refund' was paid directly to Mr Craig rather than being paid into the Scheme's bank account.

593.10. He raised concerns about Mr Dowd and recommended that he be dismissed as he thought Mr Dowd was misappropriating funds by way of excessive salary bonus and inducements to associates of his.

593.11. He believes that pension liberation occurred in the Scheme, but he was blocked from investigating further as the Shawhill companies were based in

the Seychelles and so he could not get details of them. However, he believes Mr Craig, Mr Haslam and Mr Torr were involved in this.

593.12. He does not agree that he failed in his duties as a trustee. He undertook investigations, attempted to chase and recover funds, and report matters to the appropriate authorities.

593.13. He believes there was a complete lack of proper due diligence.

593.14. He agrees that member requests were not acted on in a timely fashion. He chased Mr Craig to make the payments but he never did, despite saying that he would. As a result, Mr Reilly resigned as his requests were not being actioned, and meetings were constantly being cancelled.

593.15. He claims that during a meeting on 23 August 2017, Mr Craig and his associates physically threatened him as they did not like the fact that he was raising matters of ‘a serious nature’ and demanding answers.

593.16. Mr Craig used illness as an excuse to cancel many meetings, or as an excuse for his failure to provide information and documentation.

593.17. All investments must have been approved by Mr Craig prior to Mr Reilly’s appointment. It was agreed and stated at the first trustee meeting that the Trustees had to approve any investments, but at no time was he approached to approve any investment.

593.18. There are at least four people who can attest that Mr Craig received his resignation and his report.

593.19. Mr Kelly was involved in the initial investment of EMM and had explained that solicitors had been instructed to save the investment from the director at the time.

593.20. He was not a Trustee at the time Mr E joined the Scheme and had no access to the accounts as he was not put on any mandate. He attempted to “forensically analyse” the Scheme without any assistance from the other trustees. However, he was misled and misinformed and was not provided with the information and document access that he ought to have been provided with as a Trustee.

594. At the Oral Hearing, Mr Reilly made the following additional points:

594.1. He did not become aware of the Insolvency Service’s investigation into OFSL until after February 2017. This was, in part, because he only worked as a Trustee of the Scheme for four days in total during January and February 2017. He was not sure when he became aware of that investigation, but thought that it may have been in March 2017. He had a meeting with Mr Kelly about it in Chester, as he was not happy that they had not been kept informed. When he became aware of it, he raised concerns with Mr Jenkins and with Andy Ewing,

OFSL's compliance officer. While Mr Reilly does not recall the detail of what Mr Jenkins and Mr Ewing said on the matter, he recalls that he was told not to be concerned about it and was shown the draft responses to the "DTI".

594.2. He only knew Mr Dowd through the Scheme and only met him a small number of times.

594.3. The company in Manchester that provided the scripts and other documentation in respect of the Introducers failed to provide Mr Reilly with any of the information that he requested, so, in February 2017, he recommended that the Scheme's contract with them should cease.

594.4. He was absent from his role as Trustee for three or four months from March 2017, owing to illness which required major surgery.

594.5. Despite working as a Trustee for only four days in total during January and February 2017, he had achieved a great deal, having: asked for Trustee training to be set up; requested all of the Scheme documentation; asked for Trustee emails to be set up; and identified that there were issues concerning Mr Dowd and with the business development company in Manchester.

594.6. He had not been aware of Mr Dowd's criminal convictions when he met him at the December 2016 Meeting.

594.7. On first being appointed as a Trustee, Mr Reilly looked into the Scheme's expenses, with a view to ensuring that the Scheme was receiving value for money.

594.8. Mr Reilly did not consider his Trustee's fees of £4,000 per month for two days' work per month to be overly generous, given that his fees for his work as a Solicitor were based on his hourly rate of £250 per hour. He had considered a report on average trustee fees, prepared by PwC, when setting his Trustee fee level.

594.9. As a "solicitor for many years standing", who dealt with client monies as a matter of course, Mr Reilly knew that client money was "sacrosanct" and was fully aware of the need to ensure that "people's pension funds are protected".

594.10. When he started investigating the Scheme's investments, they looked "ok on the surface". It is often "only when you go behind the companies" that it becomes apparent that, for example, the company has never traded.

594.11. He went through a large volume of documents and saw no reference to Shawhill Securities Limited. He saw a reference to Shawhill Holdings Limited and investigated it as far as possible, but was unable to find out much owing to its location in Seychelles and Mauritius. He checked Shawhill Securities Limited (having read my first Preliminary Decision) and noted that it had been dissolved almost a year before his appointment as a Trustee.

594.12. His involvement in the Scheme as a Trustee was mainly that of investigation, trying to “pull together everything and making sure that people did things properly”.

594.13. Payments of £15,000 and £12,000, shown in the Scheme’s bank statements, related to the agreed Trustees’ fees and the agreed extra fee in relation to the work that Mr Reilly spent pulling together information and preparing his report on his return from his sickness absence. This added up to a significant amount of time, in addition to his agreed two days per month as a Trustee, and was an ongoing process as further information kept coming to light. Mr Craig had agreed to pay those monies and Mr Davenport, whom Mr Reilly had sought guidance from, advised that paying Mr Reilly those monies was “allowable”. Mr Reilly had capped his fees at £20,000 and had persuaded Mr Craig not to take his own fees, in order to partially meet Mr Reilly’s fees. Mr Reilly envisaged that his intended course of action, which was to “go to court, seek a moratorium for the fund and start pursuing the likes of RTC claims and Kenni James and a variety of other people”, would be very time consuming.

594.14. Mr Reilly was not aware how much Mr Craig was paid as a Trustee. However, he had assumed that Mr Craig’s fees would be at the same level as his and Mr Kelly’s, on the basis of the PwC report mentioned in paragraph 97 above.

594.15. He could not recall whether he was paid his monthly fee of £4,000 during his sickness absence. However, he was not paid for the later part of his term of office as Trustee and continued to work at his own cost and expense.

594.16. Regarding the Hotel Purchase (see paragraphs 130 and 131 above), he had asked for a copy of the hotel’s valuation and for details of the proposed transaction, such as the proposed security to be taken. However, Mr Reilly said that he had never received those details and never heard whether the transaction went ahead.

594.17. He had thought that the correct way to deal with the situation was to seek “a moratorium from the Court on everything, and then take action”, rather than to hand matters over to TPR immediately.

594.18. On seeing that Mr Craig had been paying substantial amounts to Mr Dowd, on the basis that Mr Craig was a Chartered Accountant licensed as an Insolvency Practitioner and used to dealing with “presumably errant company directors and unsavoury characters” Mr Reilly considered that Mr Craig must have been threatened, duped or complicit. Mr Reilly gave Mr Craig the benefit of the doubt when Mr Craig informed him, in August 2017, that he would provide him with further information. He subsequently waited only two weeks before sending his report to Mr Davenport and seeking his advice.

594.19. Further delays in reporting to TPR were caused by Mr Craig’s failure to pay Mr Davenport’s invoices, so Mr Davenport was unable to complete the necessary work in preparing the report to TPR and drafting a cover letter, which Mr

Davenport had informed Mr Reilly was necessary. Mr Davenport had advised Mr Reilly not to report matters until Mr Davenport had redrafted the report and letter.

594.20. While he admitted that he could have taken action “a bit quicker”, he was the only person who had uncovered the fact that money was missing from the Scheme and who was attempting to trace it back.

594.21. Regarding the payments to RMJ Solicitors, he had visited RMJ Solicitors' offices, which he found had been closed down. Having made enquiries, Mr Reilly obtained the details of the SRA's intervening agent and made contact with that agent. Mr Reilly discovered that RMJ Solicitors had released funds in respect of “proposed developments” without having put in place a charge on the property to secure the funds, despite the documentation having stated that a charge was required. Mr Reilly submitted that, on becoming aware of this, he considered that it would be necessary to look at RMJ Solicitors' indemnity insurance, as they had clearly acted either incompetently or deliberately. This was taken no further, due to Mr Reilly's illness. At this point, he was no longer being paid for his work as a Trustee, but was continuing with it as he believed it was the “honourable thing to do”.

594.22. His concerns relating to Mr Kelly's involvement in RAM arose after Mr Kelly had resigned as a Trustee, so he did not raise those concerns with Mr Kelly.

594.23. He recalls discussing with Mr Kelly whether it might be worth engaging a firm of solicitors to assist in removing an errant director from EMM and whether paying the solicitors' fees would be a good use of the Scheme's monies and what benefit this might achieve for the Scheme's members. Mr Reilly recalled, however, that the solicitors advised eventually that it would not be worthwhile taking that course of action.

594.24. On discovering a member payment into the Scheme that appeared to relate to automatic enrolment, despite the Scheme not having been registered for automatic enrolment, Mr Reilly took this up with the member and asked the member to send him further information. That information showed that “another account passing off as Optimum” had been set up and Mr Reilly discovered that that company's registered address was the same as that of Refresh Recovery Limited. Mr Reilly considered that Mr Craig, Mr Torr and Mr Haslam were involved and he visited the company's offices, with a view to catching them out. While those individuals denied any knowledge, Mr Reilly thought that this amounted to fraud, which should have been reported to the Police, but he did not take this action.

594.25. He decided to resign from office as a Trustee in November 2017, after Mr Craig had failed to pay Mr Davenport's bills to enable Mr Davenport to carry out the work that he considered necessary to prepare a report to TPR.

594.26. He arranged to meet with Dalriada immediately after having been contacted by it, following its appointment by TPR.

594.27. He recalls having written to some of the Scheme's members, to explain his frustration and to inform them of his frustrated attempts to meet with Mr Craig and to obtain Scheme documents.

594.28. Following his resignation, he had very little involvement with the Scheme, as he was very ill. He does not recall any member having attempted to contact him at his solicitors' practice.

594.29. He has sought to assist Dalriada in its investigations into the Scheme and in its attempts to recover funds by being available to everybody to assist in recovery and to provide any information he has. However, no one has contacted him. He has made a full statement to the "fraud squad".

594.30. He was aware that pension liberation and/or unauthorised payments were or might be going on within the Scheme. However, he had only anecdotal evidence and was unable to prove anything. His serious illness slowed down any action he had intended to take. He had intended to "seek a moratorium to put a freeze on [further activity]".

594.31. In only 12 weeks, he had managed to compile his report, conduct an investigation and speak with Mr Davenport as the Scheme's solicitor, while having corrective surgery in the meantime.

594.32. A corollary of any argument that he should have handed matters to TPR sooner on the basis that he was very ill and therefore unfit to do anything about the Scheme was that, as a "solicitor to the Supreme Court" and as a trustee, he still would not let matters go; he was "a dog with a bone". He only learned about many of the issues concerning the Scheme on his return from his sickness absence, having had no concern about the assets and the funding before he became ill in March 2017.

594.33. He had understood that the "distribution office had ceased to do business" so there was, in effect, a "moratorium", with no new members joining the Scheme.

595. In advance of the Oral Hearing, and shortly after it, Mr Reilly also submitted the following written evidence and documents:

595.1. An email dated 26 September 2017, from Mr Reilly to Mr Davenport of Turner Parkinson. Mr Reilly shared his summary report of investments with Mr Davenport and confirmed that he would like to write to the 'regulator' and asked Mr Davenport to draft a letter.

595.2. Emails between himself and Mr Davenport, which demonstrate that, in October 2017, Mr Davenport intended to draft a report for Mr Reilly for him to send to TPR, and Mr Reilly had intended on submitting a Triggering Event Notification form to TPR, but Mr Davenport said he should refrain until Turner Parkinson

had prepared a detailed letter about the Scheme. It appears that Mr Davenport would not complete the report until Turner Parkinson had received payments that were due from the Scheme.

595.3. Further emails in January 2018, between Mr Davenport and Mr Reilly, with regard to a meeting with Mr Craig. In these emails, Mr Reilly said he needed to consider informing TPR, and apologised that Mr Craig had not paid Turner Parkinson's accounts. Mr Davenport responded by recommending that Mr Reilly reported his concerns to TPR. In a later email dated 23 January 2018 to Mr Davenport, Mr Reilly explained that he had met with Mr Craig on 12 January 2018, where Mr Craig claimed Mr Reilly's report was wrong and that he could provide the necessary information. However, Mr Reilly had not received that information.

595.4. A written statement from himself outlining how much of a commitment he thought his Trustee role would require and how the remuneration was set. In that statement, Mr Reilly explained that there had been no discussion of training/educational needs to allow Mr Craig and Mr Kelly to adequately perform their duties as trustees after his initial email dated 10 January 2017. He said that, as he never received full and frank disclosure of documents, he had been unable to adequately exercise his powers of investment in a manner that assessed the security, quality, liquidity and profitability of the Scheme's portfolio.

595.5. He claims that he started his report in August 2017, and sent a copy of this to Mr Davenport at Turner Parkinson. This was after having health problems in March and April 2017. He returned to work in July 2017.

595.6. After his resignation, he became ill again and so was not fit for work until January 2018. Consequently, he was only fit and well enough to carry out his trustee duties for a few months of his tenure.

595.7. He stated that OFSL was no longer his client at the time of being appointed as a Trustee and so there was no conflict. He also did not profess to hold the necessary skills in making investments, and he stated that he had made concerted efforts to ensure Mr Craig and Mr Kelly were trained in the TKU requirements.

595.8. He believes that Mr Kelly's resignation demonstrates the frustrations in obtaining sight of Scheme accounts and said it substantiates his claims. Given that he made enquiries into the Scheme's "issues", he does not believe his enquiries into the Scheme's administration and policies fell short of the statutory and regulatory requirements.

595.9. He noted that SSL was dissolved on 15 March 2016, almost a year before his appointment. On that basis, he would have had no reason to believe this company would have had any involvement with the investments being made within the Scheme.

595.10. He believes he adequately carried out his duties and responsibilities as a trustee, as required under statute, case law and regulations. It was the lack of cooperation by Mr Craig that did not allow him to conduct his due diligence in investments and further the Scheme's administration and governance procedures.

595.11. He understands that by virtue of the 1995 Act, sections 33 and 34, a trustee's liability for failure to exercise care of skill in the performance of any *investment* [Mr Reilly's emphasis] functions cannot be excluded by any instrument or agreement. So, if it is found that he breached his duties outside of the performance of investment functions, which he denies, he thinks section 61 of the Trustee Act 1925, applies, concerning the relief of personal liability if it appears that he has acted honestly and reasonably notwithstanding his personal health issues.

595.12. A statement signed by Mr Jenkins, apparently in his capacity as director of the Scheme's principal employer (OFSL), dated 28 March 2022, which indicates that OFSL was no longer Mr Reilly's client following his appointment as a trustee of the Scheme. He also supported Mr Reilly's claims that Mr Craig had threatened him in a meeting on 23 August 2017. He believed this was as a result of Mr Reilly having sent out letters to members setting out his frustrations in trying to ascertain a picture of the investments. Mr Jenkins claimed that Mr Craig assured Mr Reilly during that meeting that he would be provided with the information that showed his preliminary report was incorrect.

595.13. In addition, Mr Jenkins confirmed that Mr Reilly did not have the necessary information to carry out due diligence, as his requests were ignored or he was told that his requests were unreasonable. He also supported Mr Reilly's claim that he was limited by health problems and confirmed that he had received Mr Reilly's resignation email.

595.14. Mr Jenkins claimed that, during Mr Reilly's tenure, Mr Reilly had also sought to undertake a forensic analysis of the investments within the Scheme in the interests of the members. Analysis was carried out by Lindsey Brock who carried out Scheme administration.

596. After reading my second Preliminary Decision, Mr Reilly submitted a substantive response. I have summarised the salient comments in paragraphs 597 to 604 below. In addition, I have referred to, and addressed, Mr Reilly's submissions concerning procedural fairness, or relating to specific content of my second Preliminary Decision, within my Determination. With regard to documentation, the following documents had not been submitted before:

- An email dated 6 April 2017 sent by Mr Reilly to Mr Craig and Mr Kelly.
- Emails dated 7 to 18 August 2017, regarding Northop Hall.

- Invoices to OFSL for January, February, March, June, July and August 2017. These totalled £35,000.
- Emails between Mr Reilly and the SRA, during January 2018.
- A copy of an unsigned, undated witness statement from Mr Reilly to the police.
- 2013 Winmark Pension Chair Remuneration Survey
- PwC Trustee Pay Survey 2020 Lite Report

597. Mr Reilly made the following remarks regarding trustee liability:

597.1. He had no access to the Scheme's bank account and was not involved in payments from the Scheme's fund.

597.2. Clause 18.5 of the Trust Deed provides that a Trustee is not liable for the mistake of a Trustee or any breach of trust.

597.3. As a matter of law, a trustee is not vicariously liable for the acts or defaults of his co-trustee, only for his own acts or defaults. He would only become liable if: (a) he hands over trust property without seeing to its proper application; (b) he improperly allows his co-trustee to receive funds without making due inquiries; or (c) he is aware it is a breach of trust and abstains from taking steps to redress it.

597.4. The position at equity is that a trustee is not liable for the acts or defaults of their co-trustees unless the same happened through his own wilful default, meaning the trustee was conscious that a breach was being committed either by act or omission or was recklessly indifferent to whether there was a breach of duty. So, they will be liable where they know of a breach of trust and conceal it, or take no active measures to protect the beneficiaries.

597.5. In either event, there will still be no liability if the trustees are protected by an exoneration clause. So, the trustee will only be liable if they commit a breach of trust dishonestly.

597.6. Wilful default and dishonesty are not the same thing. It is possible to exclude liability for the former, for any breach of trust. While the trustee's own fraud cannot be excluded, wilful default is wider than fraud. This is because a deliberate breach of trust is not to be equated with fraud. A trustee who deliberately exceeds his powers in good faith and in belief, which does not fall below the acceptable standards of honest conduct, that he is acting in the interests of the beneficiaries, is not committing a fraud.

597.7. Fraud, in this instance, means dishonesty. The test for this in respect of a professional trustee was confirmed by Arnold LJ in Sofer v Swissindependent Trustees [2020] EWCA Civ 699:

- A deliberate breach of trust;

- Committed by a professional trustee:
  - Who knows that the deliberate breach is contrary to the interests of the beneficiaries; or
  - Who is recklessly indifferent whether the deliberate breach is contrary to their interests or not; or
  - Whose belief that the deliberate breach is not contrary to the interests of the beneficiaries is so unreasonable that, by any objective standard, no reasonable professional trustee could have thought that what he did or agreed to do was for the benefit of the beneficiaries.

597.8. In Fattal v Walbrook Trustees (Jersey) Ltd [2010] EWHC 2767, Lewison J commented that it would be harder to characterise as dishonest the preference of one duty at the expense of another where the allegation does not involve the trustee in question preferring their own interests.

597.9. In addition, if there is a breach of duty, then there is a question of making good that loss. An authorised payment or misapplication will be disallowed on an account and the trustee will be held strictly liable to restore it to the trust. Otherwise, for breach of trust and equitable duties of management and administration, the trustee will be liable to make reparative or substantive equitable compensation for loss caused to the trust fund. There is a requirement that, but for the breach, the loss would not have occurred by analogy with common law principles of loss. The loss sustained must also fall within the scope and purpose of the duty in question and it is not appropriate to judge the trustee’s performance with hindsight.

597.10. He cannot be held liable for the conflicts of interest that arose before he became a Trustee. He is not bound to investigate dealings with the trust property before his appointment and cannot be liable for breaches or failure to prevent breaches before that time. He is entitled to assume that his predecessors acted properly in the absence of circumstances indicting a breach of trust or possible breach.

597.11. He also cannot be held liable for the payments made to OFSL from 7 April 2017 onwards, as there is nothing to suggest that he was aware of them, nor that these were a breach of duty as being contrary to the conflicts rule. Consequently, he cannot be held liable for any transactions made by Mr Craig in breach of the conflicts rule, even vicariously as there was no wilful default and no dishonesty.

597.12. He was not aware of the payments to RAM and did not know that Mr Kelly had an indirect personal interest in it. The knowledge of conflict came later in his August 2017 Report, but this does not give rise to a vicarious liability for the payments when they were made. It would only give rise to a liability if he, in

wilful default and dishonestly, refrained from taking action thereafter to seek redress in respect of the loss to the Scheme that would not have otherwise incurred. He believes this loss would have been incurred regardless.

597.13. With regard to EMM, he did not become aware of this conflict until his August 2017 Report. However, it cannot be said that, had he taken action sooner to redress this, it would have prevented any loss to the Scheme.

597.14. If, by not following the 2004 Act, section 249A and TPR's 2016 Code on conflicts, it is argued that he was jointly liable for payments to RAM prior to 7 April 2017 and payments to OFSL thereafter, he disagrees for the following reasons:

597.14.1. He joined an already established scheme with an administrator and various other people involved in the Scheme's administration. He was entitled to take the view that the Scheme had been properly administered and there were no causes for suspicion when he was appointed. Awareness of breaches of conflicts came later in August 2017.

597.14.2. Internal controls under s249A should ensure that the Scheme is administered and managed in accordance with the Scheme Rules and the requirements of the law. Clause 5.1 of the Trust Deed and Rules requires the Scheme to be administered in accordance with overriding pensions legislation. The overriding legislation said nothing about conflicts of interest and so it would be incorrect to say that any failure to have conflict controls was a direct breach of Clause 5.1 and s249A. The absence of conflict controls themselves does not make the controls inadequate, but begs the question what controls are adequate to the administration and management of the Scheme.

597.14.3. While TPR Code 13 deals with the question of conflict controls, a failure to observe this does not mean he becomes liable in law, as outlined in the 2004 Act, section 90(4). As paragraph 3 of Code 13 recognises, trustees may take differing approaches and a judgment will need to be made on what is reasonable and proportionate.

In the Scheme's instance, it was not very large, and there was nothing prior to August 2017 to suggest to him that he should have done more than he did.

597.14.4. His emails dated 5 and 10 January 2017 showed that he had regard to TPR's Codes as he suggested that a register of Trustee conflicts should be established. Given that, in February, it was agreed that no new investments would be made from the Scheme, there is an implication that a conflicts register would be constructed when

investments were made. So, there could be no breach of section 249A or Code 13.

597.14.5. Further, a breach of section 249A and/or Code 13 could not amount to wilful default so as to make him liable for the breaches of the other Trustees.

597.14.6. He did not deliberately abstain from dealing with conflict controls and he did not know that failure to do so would be contrary to the members' interests. He was also not recklessly indifferent to the requirements for conflict controls.

597.14.7. Even if a register and declarations of interest were required, there is no evidence that Mr Kelly and Mr Craig would have been honest. By August 2017, the losses had already been incurred so any failure to act would not have been the cause of the loss.

597.14.8. A breach of Code 13 appears only relevant if he was found to have acted in fraudulent breach of trust by failing to report the matter to TPR and that the relevant payments would have been avoided.

598. Mr Reilly also made the following comments regarding the Scheme's investments:

598.1. A co-trustee will be liable for breaches of duties in relation to those investments where he acts passively and leaves the decision over the investment to the other (section 34(5) of the Pensions Act 1995). In this instance, no decisions in respect of investments were left by him to Mr Craig. As far as he was concerned, there had been an agreement that no new investments would be made from February 2017 unless all Trustees concurred, while he became acquainted with the Scheme's assets and investments.

598.2. He did not exercise any investment powers and he did not act passively by allowing Mr Craig to make decisions. So, he cannot be responsible for the decisions Mr Craig made unless he was guilty of wilful default.

598.3. Knowledge of the fact of a proposed or actual investment does not, without more, amount to wilful default. He would have had to have known that it amounted to a breach of trust, which was not the case with the hotel investments. In addition, it cannot be argued that he was recklessly indifferent, as he had asked for further information when he became aware.

598.4. Therefore, it cannot be said that he acted in wilful default by taking no active steps to protect Scheme members, or otherwise that he was dishonest. In any case, there is no evidence to show that, had he acted differently, the Scheme would not have suffered any loss in respect of those investments.

598.5. He was told that there was an investment manager, but he was unaware that investments were being made. There was no reason for him to obtain advice because he did not think any investments were being made.

598.6. Had there been an agreed investment, having read the SIP, he would not have sanctioned any investment that was not approved by an investment manager and was contrary to the SIP. It was only after his investigations into investments already made that he noted the SIP had not been adhered to, but it was too late to do anything about it.

598.7. He was not exercising a power of investment and so could not be in breach of the 1995 Act, section 36.

598.8. Moreover, in the absence of wilful default, he could not be liable for a breach by his co-trustees, or a breach of duty of care.

598.9. The 1995 Act, section 33, would not prevent Clause 18.5 of the Trust Deed and Rules from excluding liability for his actions or omissions in relation to the investments. This section only applies to a breach of an obligation to use care and skill in the performance of any investment function. As he did not undertake any investment function, the question is whether he is liable for wilful default in failing to prevent the investments of his co-trustees. This is not covered by the limitation in section 33.

598.10. There is no evidence that he was dishonest, so the only basis for holding him liable for the investments is that he acted in fraudulent breach of trust by failing to report the matter to TPR in April 2017. The problems with his are the following:

- this could only apply to payments to Merydion, as payments to RAM had already occurred;
- there is an assumption that TPR would act immediately; and
- any such breach was not the cause of the loss.

599. After considering payments made to and by the Trustees, Mr Reilly submitted the following:

599.1. He could only be ordered to repay Scheme fees and expenses if:

- they were either unauthorised or misapplied.
- the payments amounted to a breach of trust/fiduciary duty giving rise to reparative equitable compensation to make good the loss caused.
- The payments were made from the Scheme account by other persons and he is vicariously liable for the same.

599.2. The payment of fees and expenses is not an exercise of a power as such, it is the exercise of a right of indemnity and to be remunerated. So, the proper purpose/best interests doctrine is not applicable.

599.3. The Scheme's Trust Deed and Rules provide that the Scheme's fund is held "subject to the payment of all outstanding expenses properly incurred in connection with the scheme" and to apply the fund and provide benefits "in accordance with the Trust Deed". Clauses 20.1 and 20.2 make it clear that he is entitled to charge and retain fees, remuneration and expenses from the Scheme. So, while the purpose of the Scheme is to provide retirement benefits to members, the Trust Deed and Rules make it clear that their benefits are subject to his rights to his expenses and fees.

599.4. There was nothing showing that he had subjectively charged for his fees improperly or that his motives for doing so were improper.

599.5. Clause 19.2 of the Trust Deed and Rules means that there can be no breach of the no conflicts or profits rule. However, the no conflicts rule is not apt to find him liable to repay his fees. In any event, it cannot invalidate a transaction where the transaction is expressly authorised by the trust instrument or the trustee does not place himself in a position of conflict, but is placed in that position by the terms of the trust. This also applies to the non-profits rule.

599.6. Apart from properly incurred expenses which are provided for by section 31 of the Trustee Act 1925, a trustee is entitled to charge remuneration for their time, where it is expressly provided for in and authorised by a charging clause in the trust instrument. So, there is no breach by him.

599.7. It is not correct to conclude that no fee was reasonable for Mr Reilly's work. £27,000 is not unreasonable and there is evidence to show otherwise. He circulated the 2013 Winmark Pension Chair Remuneration Survey to the trustees, where the figures are not dissimilar to his fees. Moreover, PWC's 2020 Trustee pay survey is also supportive.

599.8. He argues that he worked approximately 8 days a month, more than what he invoiced which was far below his hourly rate, in the interests of the Scheme members.

599.9. There is nothing to suggest that the legal fees paid on 26 May 2017 were not properly incurred and payable under section 31 of the Trustee Act 1925 and that he should be liable for them.

599.10. He believes that the analysis in respect of the payment of fees or expenses by and to Mr Craig and Mr Kelly as being in breach of trust is not correct. Nevertheless, he cannot be held liable for those payments as he did not make them.

599.11. To make him liable for Mr Craig's payments, there would need to be evidence that: (1) he allowed Mr Craig to make the payments without proper inquiry, or was conscious that Mr Craig was acting in breach of trust (or was recklessly indifferent to it) without taking action; (2) that his acts or omissions were deliberate; and (3) he did so otherwise than in good faith and belief, which fell

below the normal standard of honest conduct, that he is acting in the interests of the Scheme members.

599.12. As a result of Clause 18.5 of the Trust Deed and Rules, this applies as much to payments of fees by Mr Craig to Mr Reilly as they do to payments of fees and expenses made by Mr Craig to himself or others.

599.13. A case cannot be sustainably made against Mr Reilly, as the evidence is that Mr Reilly believed that he was entitled to charge, there is no evidence that he was conscious that Mr Craig was in breach by making those payments to Mr Reilly, still less that Mr Reilly acted deliberately knowing or being recklessly indifferent that receiving the same was contrary to members' interests. The latter is subject to his right to retain a fee on the basis of a trustee charging clause that he relied on and sought specific legal advice upon. Given his actions, it cannot be said that his belief was so unreasonable that no reasonable professional trustee could have thought that his charges were for the benefit of the members.

599.14. With regard to Mr Kelly's and Mr Craig's fees and expenses, there is no evidence that Mr Reilly: (1) allowed these or knew of them; (2) was conscious they amounted to a breach of trust; (3) acted deliberately in breach of trust and that he knew or was recklessly indifferent as to whether they were in members' interests; or (4) held a belief that his charges were for the benefit of the members, which was so unreasonable that no reasonable professional trustee could have thought that.

599.15. The only basis on which he could be held liable for these fees and expenses is that they amounted to an actionable loss, and he had acted in fraudulent breach of trust by failing to report the matter to TPR in April 2017. The problems here are:

- There are no findings, and could be none, that there was cause for him to report the payments to TPR such that he was in breach for failing to do so.
- Such a finding is unsustainable.
- These are not all actionable losses (at least payments to Mr Reilly).
- Any such breach was not the cause of the loss, either because if a report had been made there is no evidence that it would have caused the payments not to have been made or they would not have been paid when they were in any event.

599.16. He is entitled to relief pursuant to section 61 of the Trustee Act 1925 on the basis that he has acted reasonably and honestly throughout. So, he does not believe he can be held liable for £70,871.51 of fees and expenses.

599.17. He cannot be held vicariously liable for the introducer payment of £12,500 on 26 October 2017. There is no evidence that he knew it was a payment in breach of trust, and he could only be held liable if he acted in fraudulent breach of trust by failing to report the matter to TPR, and this would have prevented the payment. This also applies to payments made to other companies, such as Shawhill, other assets not accounted for and governance.

600. Mr Reilly also reviewed the action of reporting the Scheme to TPR and made the following comments:

600.1. The 2004 Act, section 70, does not provide a strict liability. A breach will depend on whether:

- There is reasonable cause to believe an administrative duty imposed by law has not been complied with
- There is reasonable cause to believe that the failure to comply is likely to be of material significant to TPR in the exercise of its functions
- He has failed to give a written report to TPR as soon as reasonably practicable.

600.2. Notably, it is not triggered on mere suspicion without more, and it is a belief that a breach has actually occurred, not that it may have occurred. In addition, there must be a fact or matter that would cause a reasonable person to believe that the breach is more likely than not to be of substantial and important influence on the judgment of TPR.

600.3. Taking into account TPR's Code 1, it states the following:

600.3.1. TPR expects reporters to act conscientiously and honestly and to take account of expert or professional advice where appropriate.

600.3.2. Not every breach has to be reported.

600.3.3. Imposed by law means by statute, trust law and common law. Breach of trust law includes trustees acting in a way which would appear unfair or wrong to a reasonable and objective person.

600.3.4. A reasonable cause to believe that a breach has occurred means more than merely having a suspicion that cannot be substantiated.

600.3.5. Where a reporter does not have all the facts or events around a suspected breach, it would be appropriate to check with the trustees or others who are in a position to confirm what has happened, unless there is a suspicion of theft or fraud by those persons.

600.3.6. Trustees are expected to seek legal advice to the extent necessary to form a view.

600.3.7. TPR is interested in the cause of the breach, particularly if based on dishonesty, poor governance resulting in deficient administration, or is deliberate. It is not interested in isolated incidents.

600.3.8. TPR also considers the effect of the breach on scheme members, so that there are appropriate safeguards in place and properly considering their investment policy and investing in accordance with it and schemes are administered properly.

600.3.9. TPR notes the reaction to the breach. Breaches are not significant where trustees take prompt and effective action to investigate and correct breaches and their causes once identified.

600.3.10. TPR also notes the wider implications of the breach.

600.3.11. A reasonable timeframe for reporting depends on all the circumstances and will take into account time taken to reach a judgment on the first two limbs.

600.3.12. There is no requirement for a reporter to search out for breaches.

600.3.13. Although it is not necessary to gather all the evidence, a report should describe the breach or breaches and why it is materially significant.

600.4. He believes that there is in effect a fourth limb to the question of liability. Namely, that a failure to report was ‘without reasonable excuse’. As this defence would be available to a person against whom TPR sought to impose a civil penalty under s10 of the Pensions Act 1995, it stands to reason that the same defence would be available to a trustee against whom it is sought to enforce the whistle-blower duty as a breach of trust.

600.5. It is well established in the context of the reasonable excuse defence in the tax field that reliance on a professional advisor can amount to a reasonable excuse if doing so is reasonable (Tipping v HMRC [2017] UKFTT 0485 at [25] – [29]).

600.6. Section 70 cannot be utilised to find vicarious liability for another’s defaults under trust law. Wilful default and section 70 would not necessarily produce a different result, and would not necessarily be inconsistent where the hurdle is set high. Nonetheless, wilful default is based on consciousness of a breach or reckless indifference to it. Section 70 cannot be used to make Mr Reilly liable for Mr Craig’s and Mr Kelly’s breaches in the absence of wilful default.

600.7. Irrespective of the above, Mr Reilly can only be liable if his failure to report was dishonest and he would only be liable for loss caused by a failure to report (on the but for test) and which falls within the scope of the duty to report.

600.8. Taking the above into account, he did not consider he had a duty to report to TPR in April 2017, for the following reasons:

600.8.1. He did not have reasonable cause to believe that there had been a breach of duty to ensure effective system of governance. He had access to bank statements and files and was seeking further information, but he had no cause to believe that difficulties in obtaining information and not having access to the Scheme's bank account was due to a deliberate breach of duty or dishonesty on the part of Mr Craig, or a lack of administration. At most, there would have been a mere suspicion.

600.8.2. There was nothing at the time to suggest it was of material significance, and/or that it would have any immediate effects or wider implications.

600.8.3. Given the above, there could be no wilful default.

600.8.4. There is no evidence of dishonesty, and nothing to suggest that he was in fact conscious that any such failure was contrary to the interests of the members.

600.8.5. It cannot be said that he was recklessly indifferent to the interests of members, given his January 2017 emails and his comments above.

600.8.6. It was not immediately apparent what difference a report to TPR would have made. Given the circumstances, TPR would have asked for further information about governance and, subject to that, would have issued an improvement notice under the 2004 Act, section 13. It is not apparent that this would have been effective to prevent Mr Craig's fraud. It is also difficult to see how this would have stopped the RAM payments in February/March.

600.8.7. Not being given access to the Scheme's bank account did not give rise to a reasonable cause to believe a dishonest breach of duty had been committed by Mr Craig. It appeared to be a simple omission, that was not necessarily a problem when no investments were being made without his concurrence.

600.8.8. A lack of documentation cannot give reasonable cause to believe the Scheme's assets were at risk by reason of some breach of duty. The investments he reviewed appeared to him, at the time, to be within the SIP.

600.8.9. Although he made enquiries in April 2017, there was nothing to show reasonable cause to believe that the Scheme's funds had been invested in breach of the statutory and common law

investment duties. His review was ongoing, and his investigations were incomplete.

600.8.10. Given the contents of Code 1, it was appropriate to question Mr Craig, rather than immediately report to TPR.

600.8.11. Even if there was a breach, he does not believe that the circumstances warranted a ‘red’ situation breach. At its highest, it is an amber breach and he cannot be criticised if a report was not made.

600.8.12. There was no duty to report prior to him going on leave and the delay itself does not give rise to a requirement to file a report with TPR. He would submit that his illness would give rise to a reasonable excuse not to have reported to TPR.

600.8.13. A failure of care and skill cannot be consistent with a finding that he was conscious of a breach of duty. The fact he was asking questions means that it cannot be found that he was recklessly indifferent to a breach.

600.8.14. Without being conscious of a breach, he could not be dishonest. There was nothing that indicated that he knew or was recklessly indifferent that his omission to report was contrary to the interests of members or his belief was so unreasonable so to fall below an objectively acceptable standard.

600.8.15. There was also nothing to suggest that he had favoured Mr Craig’s interests over the Scheme’s members. The opposite is suggested by the fact he was making enquiries and investigating matters.

600.8.16. Even if he had ignored Mr Craig’s trustworthiness, this would amount to negligence or gross negligence. It is not recklessness and is not a finding that his conduct was so unreasonable that no reasonable professional could have taken it.

600.8.17. Consequently, it cannot be said he deliberately refrained from making a report, and his actions cannot amount to fraud. So, the question of dishonesty is not satisfied.

600.8.18. At best, the making or not making of a report was a matter of fine judgment, for which it cannot be said was so unreasonable that no reasonable trustee could have formed that judgment.

600.8.19. There was no question that he preferred his own interests, making it much harder to show dishonesty.

600.9. If he was found liable for dishonestly failing to make a report in April 2017, he does not believe it would have made a difference in terms of the payments

made from the Scheme's bank account. On balance, he does not think TPR would have taken any action under its powers until at least around September or October 2017, noting that it took months for Dalriada to be appointed in February 2018.

600.10. In any case, he did not believe that the payments made after April 2017 were within the scope of the duty to report, apart from £100,000 to Merydion. So, these are not recoverable.

601. With regard to the August 2017 Report, Mr Reilly submitted the following comments:

601.1. According to Code 1, he was justified in approaching the Scheme's solicitor.

601.2. There was a delay because he required Mr Davenport's assistance in drafting a report, and this was subject to his fees being paid. At the time, he believed that Mr Craig had confirmed the instruction and that payment was on its way.

601.3. By 19 October 2017, he had attempted to draft a report in the form of a Trigger Event Notice, as Mr Davenport had advised. However, he had been advised to refrain from filing the form until Mr Davenport had prepared a detailed letter to TPR.

601.4. It should be noted that he was ill at this time, was in effect working for free at this stage (despite being entitled to charge) and had written to members.

601.5. Given the advice from Mr Davenport, he believes he was still within the reasonable period for filing a report, but in any event, he had a reasonable excuse for not filing a report at this point.

601.6. Although Mr Reilly was conscious by September and October 2017 that Mr Craig had historically committed breach of trust in the past, this is not the same as saying he was conscious that Mr Craig was committing continuing breaches.

601.7. Given that he knew of the need to report and his intention to report to TPR, it cannot be said that he was recklessly indifferent to the same. In any case, it is not evident that the payments out of the Scheme bank account from the end of September were as a result of any breach by Mr Craig.

601.8. Deliberately delaying reporting to TPR is not the same thing as saying that he deliberately breached his duty in that regard. He had a reasonable time to make the report and a reasonable excuse for not doing so in a timely fashion. Namely, the non-payment of Mr Davenport's fees and the latter's advice asking him to refrain from sending a report.

601.9. The decision to follow Mr Davenport's advice and hold off from sending a report cannot be said to be so unreasonable that no reasonable trustee would have so decided. This cannot be characterised as dishonest.

601.10. He believed that he was acting in the members' best interests, so there was no question that he knew his delay was contrary to their interests or that he was recklessly indifferent to it. He thought he had reported to TPR in 2018, and he had reported to the SRA and the police, so he did not turn a blind eye to his duties.

601.11. In any event, there was no loss that would have been prevented thereafter and there is no evidence to suggest that the Scheme would have been in any better position than today, had a report been made at that point. Even if it is found that there was a dishonest breach in not filing a report, it is unlikely that anything would have been done to prevent payments out of the Scheme account. Further, none of the post August payments would appear to fall within the scope of the reporting requirement. So, they are not recoverable.

602. With regard to section 61, Mr Reilly submitted:

602.1. If he was not dishonest such that the exonerations clause applies, there is no breach. So, section 61 is not relevant.

602.2. The exoneration clause prevents any liability for the breaches alleged, including vicarious liability in respect of breaches of investment duties.

602.3. If that is wrong, he believes he acted reasonably and honestly and ought fairly be excused of all and any breaches of investment duties (not just those in respect of RAM/Merydion and post 7 April 2017), for omitting to seek court directions and relieved from any personal liability.

603. Taking into account paragraphs 597 to 602 above, he does not believe he is liable. If this is wrong, he believes he could only be liable for £796,552.02.

604. If he is jointly and severally liable to pay an aware, he is entitled to a contribution from Mr Craig and Mr Kelly under the Civil Liability (Contribution) Act 1978. Having regard to their contributions towards the Scheme's losses, he believes that an award should be made such that they are ordered between them to pay Mr Reilly 100% of the liability.

605. In response to Mr Craig's comments regarding A-Z Admin Ltd. (see paragraph 577 above), Mr Reilly made the following comments:

605.1. A-Z Admin Ltd. was created to handle and deal with the administrative and due diligence procedures that would be regulated before any client's pensions could be transferred to the Elmo International Retirement Scheme (**Elmo**).

605.2. Elmo was a QROP which was authorised and regulated by the financial conduct authorities in Malta.

605.3. A-Z Admin Ltd. was to act for brokers and was at no stage acting for individuals. At the time [summer of 2017], the company was in the preliminary stages of being set up and, ultimately, it did not trade as no income was ever received

through the company. It ceased all operations as Mr Reilly did not wish to be associated with Mr Craig “et al” and was subsequently dissolved.

606. After being notified of the reasonable costs incurred by Dalriada with regard to its complaint referral to TPO, Mr Reilly made the following comments:

606.1. He wanted to know how Dalriada had reached its blended rates and whether they were biased or skewed towards the hourly rates of senior staff members. He believes that some of the activities could have been carried out by junior employees.

606.2. He asked TPO to conduct an assessment of costs so that there was consideration of the reasonableness.

Appendix 9

The Applicants’ submissions

C.1 Mr E

608. When he made his request to transfer out of the Scheme, he spoke to a Scheme representative on the telephone, who said that they would process this. After some time, he contacted the Scheme again as he had not heard from it. At this point, the Scheme said it did not have his bank account details. The Scheme issued a withdrawal form that he completed and returned, but he did not hear anything further from the Scheme.

609. His further attempts to contact the Scheme by telephone and email were ignored. However, as the emails were sent from his work email address, he is unable to provide copies.

610. During the Oral Hearing, Mrs E made the following additional points, on behalf of Mr E:

610.1. She outlined how Mr E came to know of the Scheme, that a Mr Croston had met with Mr and Mrs E at their home, and how Mr E had felt pressured into signing paperwork, as explained in paragraphs 29 to 33 above.

610.2. It was possible Mr Croston took the Pension Summaries away with him, leaving Mr E without a copy.

610.3. Mr E had signed additional paperwork brought to him, by an associate of Mr Croston, a couple of days after Mr Croston’s visit, but he was not given a copy of this either.

610.4. As the brochure appeared legitimate, Mr E did not do any research into the Scheme following Mr Croston’s visit.

610.5. Neither Mr Croston nor his associate had suggested that Mr E should seek independent financial advice in relation to transferring to the Scheme. They had not mentioned or described the Scheme as an automatic enrolment arrangement, nor did they talk about the types of investments the Scheme held or the risk associated with these investments.

610.6. Had Mr Croston discussed risk, Mrs E did not think Mr E would have transferred into the Scheme as he and his family were dependent on the pension and would not have risked losing this. They had assumed, at the time, that the Scheme was similar to Scottish Widows in that it was a well-run company. However, Mrs E admitted that they had probably been naïve.

610.7. Mr E had never invested before and he did not take any financial tax advice when he took the lump sum.

610.8. When Mr E found out that OFSL had gone into administration, he had contacted Mr Croston, as he had been the only person that he had had contact

with. Following this, Mr E had attempted to transfer from the Scheme in January 2018, but after signing and returning the paperwork, he did not hear from the Scheme, nor could he successfully get through to anyone at the Scheme.

611. After the Oral Hearing, Mr E provided a copy of the brochure he received before joining the Scheme, saying that Mr Croston had circled OFSL's FCA registration number.

C.2 Dalriada

612. Since its appointment as independent trustee to the Scheme, it has sought to investigate the actions of the Trustees, administrators and other individuals/entities with control and influence in regard to the Scheme.

613. It considers that Mr Craig was intimately involved in the set up and operation of the Scheme, ranging from being the initial Trustee, being involved in the merger of the Funds with the Scheme and his subsequent involvement in the day to day running of the Scheme as Trustee.

614. At the time Dalriada was appointed, Mr Craig was listed as an active director along with Mr Glyn Torr (as recorded on Companies House) of Refresh Recovery Ltd. Following the merger of the Funds with the Scheme, the assets of the Scheme were mixed with the finances of Refresh Recovery Ltd. This represented a clear conflict of interest on the part of Mr Craig as Trustee and was entirely improper for the operation of an occupational pension scheme.

615. From the information made available to Dalriada, including documentation obtained from OFSL, it understands that the Scheme had 288 members with total transfers-in valued at approximately £13.4 million. However, it has not been able to confirm these figures due to a lack of Scheme funds and information.

616. It also considers Mr Dowd, referred to by Mr Craig as the "Business Development Manager", was central to the running of the Scheme. Mr Dowd was convicted of conspiracy to launder money in 2017 and sentenced to 63 months in prison. Mr Dowd was involved in many aspects of the Scheme, including the organisation of the investments, liaising with introducers and directing administrative staff.

617. Its main conclusions, other than those listed in paragraph 1 above, are the following:-

617.1. The Scheme Investment Consultant named in the Statement of Investment Principles (Logic Investments) denied providing any investment advice and it appears that an Introducer, Mr Fox (of European Product Sourcing House Limited) advised that Logic Investments be named as the Scheme Investment Consultant, despite having no standing to advise on the Scheme's investments.

617.2. Scheme assets were put at risk, and ultimately lost, due to breaches of statutory investment duties and the misuse or misappropriation of Scheme

assets by the Trustees and other individuals connected to the operation of the Scheme.

617.3. The Trustees allowed and facilitated the payment to numerous Introducers of substantial sums from Scheme funds, for referring new members to the Scheme. There is evidence to suggest that EPSH received 20% of each member's transfer into the Scheme as a "marketing fee", while there is evidence of other Introducers receiving payments of 6% of the member's transferred pension.

617.4. The Trustees failed to maintain standard governance documentation, hold Trustee meetings, record Trustee meeting minutes, obtain regular administration reports, produce a statutory Chairman's Statement or publish financial statements for the Scheme.

617.5. Mr Craig personally profited from his position as Trustee, with significant sums being transferred from the Scheme to his personal account. Most of the individual payments being in the tens of thousands of pounds, representing remuneration far in excess of what might be reasonably expected for an individual trustee of an occupational pension scheme of the size of the Scheme "(or indeed any size)" over that period of time.

617.6. Despite OFSL being named as the Administrator of the Scheme in the Trust Deed & Rules, it would be more properly considered to be the sponsoring employer of the Scheme, yet there is no evidence that any employees of OFSL were members of the Scheme.

617.7. Mr Dowd received a salary from the Scheme of £120,000 per annum plus a car, which in Dalriada's experience of administering pension schemes, would be far from typical remuneration for a pension scheme representative. Due to his criminal convictions, Dalriada would consider he was not a fit and proper person to have had a position of authority or responsibility in relation to the running of an occupational pension scheme.

617.8. There is evidence that pension liberation occurred in the Scheme, through a collection of companies (named Shawhill) that provided members with loans representing a significant proportion of the member's transferred pension (meaning in excess of the 25% tax free pension commencement lump sum entitlement), accompanied by an agreement, by the member, to repay the said loans on their 65th birthday. There is also evidence that such payments were, on occasion, made to members who were below the minimum pension age of 55.

618. During TPO's investigation, Dalriada provided a number of documents to support its conclusions. These included, but were not limited to, the following:-

618.1. Copies of the Scheme's application form.

618.2. A number of member complaints about the Scheme not actioning requests either in relation to accessing their 25% PCLS, a transfer out of the Scheme or issuing benefit statements.

618.3. Member complaints that demonstrated a number of members received 20% of their pension in the form of a loan.

618.4. Another member complaint claiming that Mr Dowd offered them £20,000 in lieu of their pension (which was more than double that figure) when they were not yet age 55.

618.5. Information relating to the Scheme's Introducers.

618.6. A number of Refresh Recovery Ltd.'s and the Scheme's bank account statements.

618.7. Letters from members to Mr Craig, confirming that they had taken a loan from Shawhill Securities Limited, which was due to be repaid when they reached age 65, which appeared to be 12 years away.

618.8. A spreadsheet demonstrating a number of members with a loan from Shawhill Securities Limited, shares in Tulip or Heather Research Limited, or both.

618.9. Mr Dowd's employment contract.

619. It also provided the following comments during the course of TPO's investigation:

619.1. It was difficult to provide information or documentation that has led to the conclusion that the Scheme's assets have been lost for good. The conclusion is based on the entirety of the information available, the actions of the Trustees and the fact that the Scheme accounts had little to no funds on Dalriada's appointment[142].

619.2. In response to Mr Craig's comments, it said it had attempted to organise a meeting with Mr Craig and his representatives on a number of occasions. Two scheduled meetings were cancelled at short notice by Mr Craig due to medical reasons. Two further attempts to set a date for a meeting did not proceed by reasons of Mr Craig's health and a court appearance.

619.3. Despite being asked to provide information and documentation in relation to the Scheme, the first being in a letter to Mr Craig dated 14 February 2018, Mr Craig has not forwarded the same to Dalriada since its appointment. Mr Craig has been at liberty to send Dalriada any and all information in his possession or otherwise at his disposal, but has chosen not to do so.

619.4. It has made extensive efforts to recover members' funds from the purported investments made by the Trustees. Due to the unsuitable and inappropriate

[142] Based on the bank account statements shared with TPO, it appears that the Scheme held a total of £1,319.68 in its bank account.

nature of these, recoveries have generally not been possible, with the member funds already having been lost or otherwise irretrievable.

619.5. With regard to the recovery it made in respect of the purported investment in RTC, it categorically denies that the funds that it recovered on behalf of the Scheme were obtained “unlawfully”, as Mr Craig alleges. The recoveries made, which were approximately £122,000, required significant time and effort on the part of Dalriada and its legal advisors. The sum recovered was indeed lower than the member funds provided to the purported investment by the Trustees in the first instance, however it was the best recovery achievable in the circumstances.

619.6. The original sum loaned to RTC, which it understands to have been approximately £850,000, was converted by way of a settlement agreement (to which Mr Craig was a party) to rights in the proceeds from a PPI debt-book held by RTC, which represented an undefined sum. Dalriada attempted to recover the Scheme’s interest in this debt-book from RTC, the value was only approximately £122,000. It was the settlement agreement and the actions of the Trustees that resulted in the loss to the Scheme, not the actions of Dalriada.

619.7. It does not agree with Mr Craig’s claim that he was uninvolved with the investments of the Scheme, by reason of ill health, or the implication that he was in effect a bystander to the other Trustees. Mr Craig has claimed that member funds and investments were not made until ‘mid-November 2017 onwards’ when he claimed to be ‘off ill’ and thereby not involved with the investments made. Investments, and the vast majority of transfers-in by members, were made much earlier than November 2017, when Mr Craig was the Trustee of the Scheme and active in its operation.

619.8. Mr Craig has been unable to provide or otherwise verify his assertions regarding his suspension and the alterations made to TPR’s press release.

619.9. During the Oral Hearing, Dalriada’s agents made the following further submissions:

619.9.1. Following its appointment by TPR, starting from around March 2018, Dalriada made multiple attempts to meet with Mr Craig, which were cancelled by Mr Craig, his wife, or his associates on grounds such as ill health or needing to appear in a hearing as a key witness.

619.9.2. Other than the recovery of approximately £122,000 from RTC, which was “ringfenced pending the outcome of discussions with Griffins [a third party creditor]”, Dalriada had not been able to recover any of the Scheme’s funds. The Scheme’s bank account held approximately £1,000 in cash.

619.9.3. The investments mentioned by Mr Reilly in his report included all of the investments of which Dalriada was aware. However, it was not clear to Dalriada whether some of the payments made from the Scheme related to investments or payments towards alleged services provided to the Scheme. Dalriada's Announcement to Members, dated June 2020, was Dalriada's summary of investments that it had been able to "decipher".

619.9.4. Dalriada had been trying to make contact with whichever individuals it had been able to identify in relation to the entities to which the Scheme had made payments, in attempts to recover the monies. However, often, Dalriada had been met with a lack of information and/or a lack of engagement.

619.9.5. Dalriada's investigations concerning the Scheme's payments to RAM had been conducted with Mr Simon Hooper and, regarding Merydion, Mr Michael McMahon. Mr Hooper had contacted Dalriada and had attempted to advise Dalriada that it had misunderstood the situation concerning the Scheme's investment in RAM as outlined in Dalriada's 2020 Announcement. Mr Hooper tried to "pass blame onto Mr McMahon" and the information that he provided to Dalriada was "self-serving". Dalriada understands that Mr Hooper has subsequently been convicted of fraud, having pleaded guilty to three counts of fraud in relation to RAM in September 2020.

619.9.6. From the information available, it appeared to Dalriada that the payments from the Scheme to RAM actually related to investments in one or more Ibis hotels and another hotel, Northrop Hall, which Merydion was involved in. Given that there were no assets in the company to buy hotels with, these payments appeared to be "a kind of venture capital transaction"; and a "very, very risky investment".

619.9.7. Dalriada understood that part of the Scheme's payment to RAM, for shares priced at £1 per share, were made through a nominee; Cornhill Capital Limited, which now goes by the name of Pello Capital Limited.

619.9.8. Despite having been informed, on attending OFSL's offices, that there were 118 Scheme members, the database of members contained approximately 326 members. This could, however, include some members whose transfers in were cancelled and never completed. Dalriada has not yet carried out a full reconciliation.

619.10. Very shortly before, and shortly after the Oral Hearing Dalriada provided further documents:

619.10.1. Correspondence demonstrating that Mr E attempted to withdraw his funds in January/February 2018. It does not appear that this completed, despite there being a draft payment acknowledgement letter from the Scheme.

619.10.2. A letter from Mr Craig to RTC dated 11 October 2018, requesting that approximately £1.4 million be sent to his “liquidators account”, which did not match the Scheme’s bank account details at the time, nor the Refresh Recovery Limited bank account that had previously been used. Dalriada commented on this as Mr Craig had confirmed that Real Time Claims Limited was an asset of the fund, yet the letter asked for the monies to be transferred so they could be held in relation to the liquidation of Ocean Equities Financial Limited and Emfire Consulting Limited. Dalriada claimed that this suggested an attempt to direct member funds to a non-Scheme bank account, despite Mr Craig being aware of Dalriada’s appointment with exclusive powers and having been asked to desist from all matters in relation to the Scheme and its investments.

619.10.3. It provided ‘Attendance Notes’ from when Dalriada was initially appointed and provided an example of the ‘Directly Affected Party’ Letter that was issued. The latter stated that the addressee had no legal power to sign any document or process any payment in relation to the Scheme and that Dalriada required them to deliver all documents, papers, financial records, whether held physically or electronically. It also stated that Dalriada required all details relating to the Scheme’s investments and that they must take no action with regard to surrendering, moving or otherwise realising any of the Scheme’s investments. In relation to the Attendance Notes, I have listed the salient points at Appendix 9.

619.10.4. Emails between Mr Craig, a Refresh Recovery Limited employee and Mr Dowd, asking for £65,000 to be transferred to Mr Craig’s account in respect of two loans/investments through the Scheme. In the email, Mr Craig explained that this was £40,000 repayable with interest by 30 October 2016 to Regal Coins Limited and £25,000 over two years at 10% per annum with debenture to Nail Tech Limited. Mr Dowd responded by saying that he would go to the office and prepare a loan note for Clear Laser Clinics, which appears to be linked to Kenni James.

619.10.5. An invoice from Mr Kelly to OFSL, for a “monthly fixed fee arising from services primarily in connection with the development of FCA

regulated entities and associated expenses". The invoice is dated 9 February 2017 and is for an amount of £3,595.

619.10.6. Emails between Mr Reilly and Mr Dowd, demonstrating that Mr Reilly had sent emails to Mr Dowd after February 2017, which were contrary to his account at the Oral Hearing. One of the emails from Mr Dowd to Mr Reilly contains the April 2017 Report in the exchange.

619.10.7. An email from Mr Kelly to Mr Craig, dated 20 February 2017, stating that, in order to resolve the "BIS enquiries", an "independent party" would likely need to be appointed "to undertake analysis provide comfort over the status, cash flows of certain activities".

619.10.8. An email exchange, dated 10 February 2017, between Mr Kelly and Mr Dowd, referring to the temporary suspension of EMM from trading on the Alternative Investment Market (AIM) and in which Mr Kelly outlined his intention to: replace EMM's board [of directors] with a new one and stated that the business that he and Mr Dowd were reviewing in Ireland could be "backed into this" and then EMM could then be refloated.

619.10.9. Emails, of 1 March 2017, between Mr Kelly, Mr McMahon and Jon Golding, regarding setting up email addresses, a telephone answering service, business card and letter heads and a website in relation to Merydion

619.10.10. A number of emails that Mr Dowd sent and/or received which related to appointing auditors "to resolve the BIS enquiries", Emerging Market Minerals having been temporarily suspended and a restaurant reservation for Mr Kelly, Mr Dowd and Simon Hooper.

619.10.11. Emails of 5 and 6 April 2017, between Mr Reilly, Mr Kelly, Mr Craig and Mr Jenkins, which included the April 2017 Report (see paragraph 64 above).

619.10.12. Emails of 17 to 18 January 2017 between Mr Dowd, Simon Hooper (using Mr Hooper's RAM email address) and Mr Kelly, suggesting that they and one other were to meet at the Savoy Grill on 19 January 2017.

619.10.13. A couple of emails demonstrating Mr Kelly's involvement with Merydion in March 2017.

619.10.14. TPR's response to various submissions from the Directly Affected Parties dated 27 March 2018.

620. After reading my Preliminary Decisions, Dalriada provided a copy of the Real Time Claims Limited settlement deed dated 4 April 2015. This contained the following information:

620.1. The parties to the deed were Ocean Equities Financial Limited, the Liquidator (Gordon Craig and Refresh Recovery Limited), Martin Dowd (named as trustee of the Ocean Fund) and Real Time Claims Limited.

620.2. Real Time Claims Limited's business was processing and managing claims for mis-sold payment protection insurance (PPI) policies on behalf of claimants. If a claim was successful, RTC would be entitled to a fee equal to a specified percentage of the compensation awarded to the claimant.

620.3. On or around July 2013, RTC borrowed £850,000 (the loan) from the Ocean Fund.

620.4. The parties have entered into negotiations with a view to reaching an agreement in relation to the repayment of the loan in full and final settlement.

620.5. RTC agreed to assign to the Ocean Fund all its rights, title, interest, and benefit in and to the Debts with effect from the date of the Deed. However, it could substitute any claim for another, provided that the total number of claims assigned to the Ocean Fund shall not be less than 2,000 or more than 3,000.

620.6. The Ocean Fund agreed that it had made its own independent analysis and decision to enter into this agreement, based on information it deemed appropriate in the circumstances, without reliance on Real Time Claims Limited.

620.7. The Deed was in full and final settlement of the loan.

620.8. It appears signed by Gordon Craig, Martin Dowd, a D. Booth as a witness, Stephen Bell as director of Real Time Claims Limited, and a Paul Calland as a witness.

621. It also submitted the following statements:

621.1. The Settlement Deed pre-dates Dalriada's appointment to the Scheme and the recoveries made in respect of this investment came about after Dalriada issued a Statutory Demand to RTC on 9 December 2019, in relation to a liquidated debt of £97,432.53 which represented the outstanding amount owed from the value of the PPI debt book communicated by RTC on 11 April 2018 to Dalriada, totalling £122,432.53. A partial payment was made by RTC on 3 September 2019 of £25,000 but Dalriada had to issue the Statutory Demand to recover the remaining sum.

621.2. Recovering this sum required significant time and effort, and Dalriada would submit that it was the Settlement Deed that caused the loss to the Scheme by

converting a defined cash loan into rights in the proceeds of a PPI debt book held by RTC that was an undefined sum.

621.3. It has no evidence that this agreement was, or indeed, was not forged.

621.4. It cannot offer firm evidence on how the agreement was executed at the time. However, Dalriada had a telephone call with Stephen Bell of RTC on 16 February 2018. Mr Bell confirmed that he knew Mr Craig in relation to the Ocean Fund and that RTC had signed the Settlement Deed with Mr Craig as the “administrator”, and Mr Dowd acting as trustee of the Ocean Fund.

621.5. Dalriada has no further evidence to demonstrate that Mr Craig signed the agreement or accepted it as valid. However, it notes that the two signatures on the document appear to match the signature on other Scheme documents, such as the welcome letter issued to members by Mr Craig.

621.6. It notes that by the second signature box, there is a handwritten addition of the words “without personal liability”. This relates to Mr Craig’s personal liability and it is reasonable to assume it could only have been intended to protect his personal position. If the document was indeed forged, the person forging the document would be unlikely to make such an addition.

622. With regard to the reasonable costs Dalriada has incurred by submitting a complaint to TPO, it provided a table breaking down the costs for: making the referral; responding to the parties’ submissions; preparing for the oral hearing; and commenting on the Preliminary Decisions.

Appendix 10

Rule 18 of The Personal and Occupational Pension Scheme (Pensions Ombudsman) (Procedure) Rules 1995

"18 Method of sending or delivering documents etc

(1) Any document required or authorised by these Rules to be sent or delivered to any person shall be duly sent or delivered to that person: -

(a) if it is sent to him at his proper address by post;

(b) if it is sent to him at that address by facsimile or other similar means which produce a document containing a text of the communication, in which event the document shall be regarded as sent when it is received in a legible form;

(c) if it is delivered to him or left at his proper address.

(2) The proper address for the Pensions Ombudsman is the address of the office of the Pensions Ombudsman.

(3) The proper address of any other person to whom any such document is to be sent of delivered shall be the address given by that person or, if none, the last known address of that person or, in the case of an incorporated company or body, the registered or principal office of that company or body."

Appendix 11

Extracts from The Occupational Pension Schemes (Investment) Regulations 2005 and the Pensions Act 1995

The Occupational Pension Schemes (Investment) Regulations

Regulation 2: Statement of investment principles (as at 2016)

“(1) The trustees of a trust scheme must secure that the statement of investment principles prepared for the scheme under section 35 of the 1995 Act is reviewed—

(a) at least every three years; and

(b) without delay after any significant change in investment policy.

(2) Before preparing or revising a statement of investment principles, the trustees of a trust scheme must—

(a) obtain and consider the written advice of a person who is reasonably believed by the trustees to be qualified by his ability in and practical experience of financial matters and to have the appropriate knowledge and experience of the management of the investments of such schemes; and

(b) consult the employer.

(3) A statement of investment principles must be in writing and must cover at least the following matters—

(a) the trustees' policy for securing compliance with the requirements of section 36 of the 1995 Act (choosing investments);

(b) their policies in relation to—

(i) the kinds of investments to be held;

(ii) the balance between different kinds of investments;

(iii) risks, including the ways in which risks are to be measured and managed;

(iv) the expected return on investments;

(v) the realisation of investments; and

(vi) the extent (if at all) to which social, environmental or ethical considerations are taken into account in the selection, retention and realisation of investments; and

(c) their policy (if any) in relation to the exercise of the rights (including voting rights) attaching to the investments.”

Regulation 4: Investment by trustees

“(1) The trustees of a trust scheme must exercise their powers of investment, and any fund manager to whom any discretion has been delegated under section 34 of the 1995 Act (power of investment and delegation) must exercise the discretion, in accordance with the following provisions of this regulation.

(2) The assets must be invested—

(a) in the best interests of members and beneficiaries; and

(b) in the case of a potential conflict of interest, in the sole interest of members and beneficiaries.

(3) The powers of investment, or the discretion, must be exercised in a manner calculated to ensure the security, quality, liquidity and profitability of the portfolio as a whole.

(4) Assets held to cover the scheme's technical provisions must also be invested in a manner appropriate to the nature and duration of the expected future retirement benefits payable under the scheme.

(5) The assets of the scheme must consist predominantly of investments admitted to trading on regulated markets.

(6) Investment in assets which are not admitted to trading on such markets must in any event be kept to a prudent level.

(7) The assets of the scheme must be properly diversified in such a way as to avoid excessive reliance on any particular asset, issuer or group of undertakings and so as to avoid accumulations of risk in the portfolio as a whole. Investments in assets issued by the same issuer or by issuers belonging to the same group must not expose the scheme to excessive risk concentration.

(8) Investment in derivative instruments may be made only in so far as they—

(a) contribute to a reduction of risks; or

(b) facilitate efficient portfolio management (including the reduction of cost or the generation of additional capital or income with an acceptable level of risk),

and any such investment must be made and managed so as to avoid excessive risk exposure to a single counterparty and to other derivative operations.

(9) For the purposes of paragraph (5)—

(a) an investment in a collective investment scheme shall be treated as an investment on a regulated market to the extent that the investments held by that scheme are themselves so invested; and

(b) a qualifying insurance policy shall be treated as an investment on a regulated market.

(10) To the extent that the assets of a scheme consist of qualifying insurance policies, those policies shall be treated as satisfying the requirement for proper diversification when considering the diversification of assets as a whole in accordance with paragraph (7).

(11) In this regulation—

"beneficiary", in relation to a scheme, means a person, other than a member of the scheme, who is entitled to the payment of benefits under the scheme:

"derivative instrument" includes any of the instruments listed in paragraphs (4) to (10) of Part 1 of Schedule 2 to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001;

"regulated market" means—

(b) a UK regulated market or an EU regulated market within the meaning of Article 2.1.13A and 2.1.13B respectively of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments; or

(c) any other market for financial instruments—

(i) which operates regularly;

(ii) which is recognised by the relevant regulatory authorities;

(iii) in respect of which there are adequate arrangements for unimpeded transmission of income and capital to or to the order of investors; and

(iv) in respect of which adequate custody arrangements can be provided for investments when they are dealt in on that market;

"technical provisions" has the meaning given by section 222(2) of the 2004 Act (the statutory funding objective)."

The Pensions Act 1995

Section 35: Investment principles

"(1) The trustees of a trust scheme must secure—

(a) that a statement of investment principles is prepared and maintained for the scheme, and

(b) that the statement is reviewed at such intervals, and on such occasions, as may be prescribed and, if necessary, revised.

(2) In this section "statement of investment principles", in relation to a trust scheme, means a written statement of the investment principles governing decisions about investments for the purposes of the scheme.

(3) Before preparing or revising a statement of investment principles, the trustees of a trust scheme must comply with any prescribed requirements.

(4) A statement of investment principles must be in the prescribed form and cover, amongst other things, the prescribed matters.

(5) Neither a trust scheme nor a statement of investment principles may impose restrictions (however expressed) on any power to make investments by reference to the consent of the employer.

(6) If in the case of a trust scheme—

(a) a statement of investment principles has not been prepared, is not being maintained or has not been reviewed or revised, as required by this section, or

(b) the trustees have not complied with the obligation imposed on them by subsection (3),

section 10 applies to any trustee who has failed to take all reasonable steps to secure compliance.

(7) Regulations may provide that this section is not to apply to any scheme which is of a prescribed description."

Appendix 12

Extracts from section 70 of the Pensions Act 2004

"70 Duty to report breaches of the law

(1) Subsection (2) imposes a reporting requirement on the following persons –

(a) a trustee or manager of an occupational or personal pension scheme;

(aa) a member of the pension board of a public service pension scheme;

(b) a person who is otherwise involved in the administration of an occupational or personal pension scheme;

[…]

(2) Where the person has reasonable cause to believe that –

(a) a duty which is relevant to the administration of the scheme in question, and is imposed by or by virtue of an enactment or rule of law, has not been or is not being complied with, and

(b) the failure to comply is likely to be of material significance to the Regulator in the exercise of any of its functions,

he must give a written report of the matter to the Regulator as soon as reasonably practicable.

(3) No duty to which a person is subject is to be regarded as contravened merely because of any information or opinion contained in a written report under this section.

This is subject to section 311 (protected items).

(4) Section 10 of the Pensions Act 1995 (c. 26) (civil penalties) applies to any person who, without reasonable excuse, fails to comply with an obligation imposed on him by this section."

Appendix 13

Extracts from Dalriada's Attendance Notes

Mr Craig

- Mr Craig said he was happy to be rid of the Scheme and claimed that he had personally paid the wages of staff for the last 3 or 4 months (as at February 2018).
- Mr Craig said that, in order to gain access to the Scheme's files, an appointment would need to be made with Mr Torr at Refresh Recovery, as the documents were now kept in offices belonging to OFSL, which was "going bust" and would be closing in a couple of weeks' time.
- Mr Craig had specifically asked whether Mr Kelly would be talked to and said, in his view, that he may be a person of interest to the case. He had also said that the 'accounts had recently been dealt with'.

Mr Reilly

- Two of Dalriada's representatives attended the offices of BMD Law Solicitors, being Mr Reilly's business address, and were greeted by an individual Mr Michael Wilcox who advised that he was the office manager. That individual appeared "nervous and defensive" and stated immediately that the firm had no involvement with the Scheme and that Mr Reilly "operated the Scheme from another location".
- Mr Reilly said his requests for information were ignored, and he did not receive any of the documents. "Mr Reilly began making is own enquiries about the Scheme which 'threw up a lot of red flags'". He had serious concerns, including that pension liberation had been occurring, and so had decided to compile a report, which he planned to pass to TPR.
- Mr Reilly confirmed that there had been three or four Trustee Meetings but, due to a heated conversation between Mr Craig and Mr Reilly, only two of these had been minuted. Mr Reilly said that in the first meeting, the Trustees agreed that no payments, including investments, would be made without the agreement of at least two of the Trustees, but this was never put into action.
- Mr Reilly said that he had asked for information and documents concerning the Scheme's Introducers, but that those requests had not been met and this had been "the source of a heated conversation with Mr. Craig".
- Mr Reilly raised concerns about Rationale Asset Management Plc. and said he did not have a good working relationship with Mr Kelly as he was unable to provide documents when requested. He also said he believed members were told that they would receive 8% interest per annum.

- Mr Reilly stated that Mr Craig and Mr Torr were "joined at the hip" and that "Mr Torr raises invoices for the administration and Mr Craig pays them". Mr Reilly stated that Mr Torr was a shareholder in "Shawhill".

Refresh Recovery Office

- Ms Grass advised that OFSL's offices had been closed recently and that its staff had been "transferred across to Refresh Recovery Ltd". On speaking to Mr Torr on the telephone, Mr Torr advised Dalriada that the Scheme was not related to Refresh Recovery Ltd. Optimum's "office" was "a very small area, segregated from the main Refresh Recover Ltd offices by a wall of racking storage boxes of books and records."
- Ms Grass and Ms Marsh advised that they had only ever seen Mr Craig once, that there were 318 members in the scheme and that they had encountered problems with some ceding schemes. They had not processed any transfers in during the previous 12 months (approximately). However, they also could not process the eight transfers out due to lack of funds. They suggested that 12 members had transferred out so far, totalling £956,384.46.
- They did not use accounting software, with Ms Brock carrying out the accounting etc. using Excel. No administrative staff had access to the Scheme's accounts, although bank statements would arrive at the office via the post, nor did they deal with the investments. Mr Craig has full control of the bank account and all payments out of the account were authorised by him.
- The office staff received no direction from Mr Craig or from Mr Kelly, although Mr Reilly, who had engaged with staff and who had "tried to get engagement with Mr Craig regarding the investments" had been appointed as a "part time trustee to "help sort out the mess"".
- To the best of their knowledge, governance was not addressed and they never had sight of any documents of this nature. They did not think a Chairman's Statement was completed. Ms Brock did not believe that TPR's levies were paid nor were annual scheme returns completed. They had not heard of Exchange and did not consider that this was updated by anyone in relation to the Scheme. They did not engage with HMRC or believe that any of the Trustees had.
- The staff confirmed that they had not worked in pensions prior to their employment for the Scheme, nor had they received any pensions training, and that Mr Dowd had conducted their employment interviews. They also said that when they contacted Mr Craig for advice, for example in relation to requests to transfer out of the Scheme (given that Mr Craig was the only person with access to the Scheme's bank account) he had ignored them. Prior to January 2016, Ms Hodgson of Refresh Recovery Ltd had carried out the Scheme's administration.
- They advised that Mr Dowd had a lot of contact with Mr Davenport from Turner Parkinson, as the Scheme's legal advisor, when he was involved in the Scheme, and

that Mr Dowd had been the boss at that time. Namely, he gave the instructions concerning paperwork and he had dealt with the investments.

- As far as Ms Brock was aware, members were not asked about investments or their attitude to risk, nor was she aware of any of them being certified, sophisticated investors, but she considered that the introducers involved might have been able to provide clarity on this point.

- Mr Kelly had first become involved (to the staff's knowledge) in December 2016. He was purportedly a friend of Mr Dowd's.

- The staff had little contact with the Introducers. However, they understood that the Introducers cold called potential members initially and the visited them at their homes in order to get them to sign paperwork.

- Ms Brock advised that OFSL's primary area of business was to manage the Scheme.

- Ms Brock said that shares in Heather and Tulip Research Limited appeared to be allocated to certain members. In addition, the Scheme had provided loans to companies (Shawhill and Sandymoor), which in turn provided loans to members. Members were under age 55 and were supposed to start repaying the loans back to the companies when they reached age 65. However, none of the members had repaid the money. She thought that Mr Craig had arranged this, and that the majority of members in this regard had been introduced by Michael Corey.

- Martin O'Malley was the manager of the Manchester office and had been employed by Mr Kelly. The office was in operation from May 2016 to February 2017 but was closed due to the "DTI investigation". Mr O'Malley had begun to sign companies up for auto-enrolment before the Scheme was registered to do so. Companies had been paying "holding fees". Those that had paid those fees to the Scheme's bank account received a refund. However, certain companies had been provided with an invoice from the Scheme but with another company's bank details; that of Routeright Ltd, whose registered office was the same as that of Optimum's. Adam Bell of Routeright Ltd. paid the staff at the Manchester office. The Scheme was never registered for auto-enrolment.

Turner Parkinson/Mr Davenport (visit to Turner Parkinson LLP's offices, 20 February 2018)

- Mr Davenport had known Mr Craig from his insolvency practice, as Turner Parkinson had a large insolvency [advice] practice. However, he had worked little with him in the past two years. Mr Davenport speculated that this was because Turner Parkinson and Mr Craig may not have always agreed on what was appropriate.

- Approximately three years prior to February 2018, Mr Craig had approached Mr Davenport about a pension scheme. Some time after that, Mr Dowd, who Mr Davenport said had no pensions knowledge and had initially wanted to set up a personal pension scheme, contacted him to continue the discussion. Mr Davenport had advised Mr Dowd that, owing to the requirement for FCA authorisation for a

personal pension scheme and the fact that Mr Craig was considering setting up a pension scheme for the employees of a business, an occupational pension scheme may be more appropriate. A number of months later, Mr Dowd contacted him again to say that an occupational pension scheme had been set up. However, Mr Davenport only heard from Mr Craig when problems arose, such as ceding schemes refusing transfer requests into the Scheme.

- Mr Davenport said that it was Mr Dowd that was in charge of generating transfers. Mr Davenport had provided governance advice, but it was often ignored by Mr Craig and Mr Dowd. For example, when he had flagged the annual report as non-compliant (see paragraph 139 above).
- He had confirmed that he had drafted merger documentation which would execute a transfer of assets from the Funds into the Scheme but he had never had sight of any signed copies.
- Mr Davenport confirmed that he had seen a report from Mr Reilly. However, he had not seen anything that concerned him or had alarmed him of the possibility of pensions liberation.
- Mr Davenport confirmed that he had not seen anything to cause him concern regarding pension liberation within the Scheme.

Mr Kelly: telephone call between Mr Kelly and Dalriada on 19 February 2018

- He became involved with the Scheme as a result of a conversation he had had with Mr Dowd at a social event [at the Savoy], where the latter had suggested that they needed more trustees to comply with legislation. He met, initially, with Mr Jenkins and, around a month later, then met with Mr Craig and Mr Reilly.
- Mr Dowd was involved in sales and distribution. He brought on new business. However, this appeared to stop when Mr Kelly was appointed as a Trustee.
- He had no insight into the introducers or what commission they were charging.
- Mr Jenkins was in charge of the administration of the Scheme.
- He had asked questions about the Scheme's investments but could not get any satisfactory answers. As a result, he did not sign any documentation.
- He had been concerned about monies held in a liquidation company owned by Mr Craig. Mr Craig had maintained that he could not transfer the money.
- Mr Kelly was paid £4,000 per month for his role as a Trustee. In addition, he billed Mr Jenkins separately for "any FCA work" and had been exploring an ISA product as an investment vehicle. He received £2,000 to £3,000 per month for such work, but had been owed two or three months' payments when he resigned from office as a Trustee.

- Any governance documentation would have gone through Mr Davenport at Turner Parkinson, as it was his role to provide advice when required.
- He was told that the Scheme had an investment advisor, but he was never given a name. Nevertheless, Mr Craig was essentially the decision-maker and Mr Kelly stressed that he signed no documentation himself.
- He was involved in setting up “Rationale plc”, but did not know what it did or that it may be one of the Scheme’s investments. Mr Kelly became “noticeably defensive” on being questioned about RAM.
- Mr Kelly said that he did not know about Shawhill’s involvement in the Scheme.
- Mr Kelly said that he did not consider that Mr Craig welcomed his or Mr Reilly’s involvement in the Scheme. Regarding Mr Reilly, while Mr Kelly had thought that he had a good working relationship with him, he found that he appeared to be working behind Mr Kelly’s back, for example, keeping documents relating to the intended opening of a Scheme bank account in the boot of his car instead of signing them as he had told Mr Kelly he would.
- Mr Reilly had printed some Trustee guidance but it was not taken further than that.
- The Scheme did not enter into auto-enrolment when he was a Trustee. He believes there was confusion amongst the ‘subscribers’ as they were led to believe the Scheme was an auto-enrolment pension scheme.
- He did not have a specific concern about the Scheme, only he could not get the information he requested.

Steven Bell – Real Time Claims Ltd: telephone call on 16 February 2018

- He was unaware of a scheme called Optimum or that of a similar name.
- He knew Mr Craig and was aware of the Funds. He stated that it was only the Ocean Fund that had invested in Real Time Claims Ltd. It had made a five-year loan to Real Time Claims Ltd. that had an interest rate of 5% per annum and all interest would be rolled up until the end of the investment period.
- Real Time Claims Ltd. owed no monies to any party in respect of the loan, which included the Scheme. It had signed a settlement agreement three years ago with Mr Craig and Mr Dowd. This effectively meant that Real Time Claims Ltd. did not owe any party any funds and instead it would transfer ownership of its claims book to the Trustees. Real Time Claims Ltd. would then manage the claims book on behalf of the Trustees and pay any returns as and when generated.
- He had previously provided a large bundle of documentation to the police, which he would share with Dalriada once he had checked the appointment order.