

Ombudsman's Determination

Applicant	Mr N
Scheme	Broadband Pension Scheme (the Scheme)
Respondents	Rowanmoor Executive Pensions Limited (Rowanmoor) Rowanmoor Trustees Limited (the Independent Trustee) Mrs GF-R

Complaint Summary

1. Mr N has complained that Rowanmoor and the Independent Trustee have breached their duties of care and/or trust in their roles as administrator and independent trustee of the Scheme and that Mrs GF-R has breached her duty of trust with possible fraud as a trustee.
2. He says that the actions of the respondents have resulted in a declared value shift and unauthorised payment of £58,590, as filed with HMRC on 12 January 2017, but that the actual figure may be as much as £433,802.
3. He asks that Rowanmoor and the Independent Trustee be held financially accountable for the losses caused by their negligence and that the apportionment of the fund made between members in 2004 be examined as to its legality and re-evaluated in accordance with the changes introduced by the Finance Act 2004, and the Pensions Act 2004, that came into force on 6 April 2006.
4. He also asks that Mrs GF-R is removed as a trustee to enable the fund to be properly administered without deliberate obstruction and breach of trust.

Summary of the Ombudsman's Determination and reasons

5. The complaint is upheld against the Independent Trustee and Mrs GF-R.
6. Further action is required by the Trustees (as defined in paragraph 10 below). In order to put matters right the following actions shall be undertaken by the Trustees within 28 days of my Determination:-
 - The Trustees, led by the Independent Trustee, shall draw up a policy on how to manage conflicts of interest.
 - The Trustees will then have an opportunity to agree a basis for the share of the Fund, (as defined in clause 1 of the Rules and set out in Appendix 1) within 28 days following the drafting of the above policy.
 - If they still cannot agree the basis upon which a share of the Fund is to be derived within those 28 days, the Trustees, using their best endeavours, are to agree upon an expert and the apportionment of the Fund shall be determined by that expert.
 - In accordance with Clause 8.4 of the Rules, the determination of the appropriate members' shares of the Fund by the expert shall be binding on the Trustees.

Detailed Determination

Material facts

7. Rowanmoor (also referred to as the Rowanmoor Group Plc and Rowanmoor Group Limited) is now part of the Embark Group, which in turn became part of Lloyds Banking Group in January 2022. However, I have referred to Rowanmoor and the Independent Trustee throughout for consistency. It is clear that Rowanmoor employees have undertaken simultaneous roles for the Independent Trustee.
8. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
9. Mr N is aware that I can only investigate complaints relating to events that occurred three years prior to the complaint or three years after the date on which he became aware or ought to have known of their occurrence.
10. The Scheme was established in 1989 and is managed in accordance with the Definitive Trust Deed and Rules, as amended by a deed of amendment dated 1 July 2011 (the **Rules**) (extracts are set out in Appendix 1). The principal employer was the Convergence Group which liquidated in 2006. In 1996 Mr N and Mrs GF-R (the **Member Trustees**) were married but have since divorced. They are both members of the Scheme and Member Trustees. Together the Independent Trustee and the Member Trustees are the trustees (the **Trustees**). The Scheme is invested primarily in a property called Heritage Farm (the **Property**).

11. Mr N has provided The Pensions Ombudsman (**TPO**) with a copy of a client agreement between the former trustee, James Hay Pension Trustees Limited, and the Convergence Group dated 6 September 1999, that he understands forms the basis of Rowanmoor's' terms and conditions. This document was referred to by Rowanmoor's' solicitors, in a letter dated 26 November 2020, when it sought payment for its services. Under the heading "Services included in the annual administration fee" are the following services: transfer facilities; actuarial administration; consultancy; and trusteeship services.
12. During the course of TPO's investigation the following specific complaints have been identified:
 - the incorrect apportionment of a sizeable investment made by Mr N into the Scheme between him and Mrs GF-R, of which he became aware in April 2015;
 - the failure to call trustees' meetings since 15 September 2016;
 - the failure to report to HMRC, until January 2017, that unauthorised payments had been made to Mrs GF-R;
 - the ongoing failure to collect rent that was historically owed;
 - Rowanmoor's failure to show, in the 2017 accounts, that historic rent was due on an asset of the Scheme, and which was still outstanding; and
 - Rowanmoor's failure to take action when Mr N complained that unauthorised payments had been made from the Scheme.
13. Mr N has corresponded with both Rowanmoor, the Independent Trustee and Mrs GF-R in an attempt to resolve his complaint and there are numerous documents setting out his concerns. The following extracts cover some of the salient points:
14. In a letter to Mrs GF-R on 8 July 2014, Mr N said:

"I am concerned that your apparent breaches of trust and acts of potential fraud could be considered as criminal in nature under The Pensions Act 2004 and Trustee Act 1925 and I would strongly suggest that you seek legal advice on these matters before going further. I would also ask you to consider carefully your continued ability to act as a trustee of [the Scheme] and at a minimum I would insist that you reclus [sic] yourself of any and all Trustee decisions regarding the future of Heritage Farm."
15. Following this letter, a Trustees' meeting took place, at which the Trustees were present, on 1 April 2015. Both Mr N and Mrs GF-R were accompanied by their solicitors. At the meeting Mr N set out his concerns regarding the running of the Scheme. It was agreed that a further Trustees' meeting would take place, on 10 April 2015, after various responses were received.
16. On 19 August 2016, Mr N wrote to Rowanmoor in response to a letter it had sent, on 11 August 2016, in relation to its independent actuarial assessment of the Scheme. He said that a total of £433,802 had been made in unauthorised payments to Mrs GF-R plus the costs and losses incurred by the Scheme that were directly

attributable to her actions, this figure representing more than 65% of the value at that time. Mrs GF-R had rejected proposals to repay a substantially reduced amount to the Scheme and failed to offer any compromise proposal of her own. He was therefore of the view that the actuary should use the figure of £433,802 to complete the calculation of a revised notional fund allocation.

17. Mr N's breakdown of this £433,802 figure shows that the bulk of the costs and losses incurred by the Scheme took place in the years prior to 2015 as follows:-

- £242,456 was the sum paid out of the Scheme assets in October 2006 by Rowanmoor to purchase shares in CAFCO-C Ltd. The shares were subsequently sold without the approval of the Trustees by Mrs GF-R and no monies paid to the Fund, with £400,000 held in an escrow account by Charles Russell LLP under Mrs GF-R's signature.
- £82,883 was the unauthorised payment to Mrs GF-R for the non-payment of rent by Amador between 2008 and 2010.
- £36,094 was the unauthorised payment to Mrs GF-R for the non-payment of rent by Devon Bio-Nutrients and Energies Limited (DBNE) between 2010 and 2015.
- £9,384 was the expense incurred and paid out by the Scheme to retain solicitors to advise upon the removal of DBNE from the Scheme property and the employment of bailiffs in January 2015.
- £42,453 was the sum of the three independent quotes for remedial work to the Scheme property, submitted in January 2015.
- £20,532 was the lost rental for the 20 months up to August 2016.

18. Mr N added that actions, including payment by the Independent Trustee for remedial work on Scheme property, that had been agreed at a Trustees' meeting on 24 November 2015, had been deliberately thwarted and minutes of Trustees' meetings from 17 months previously remained unsigned.

19. In an email to Mr N dated 9 September 2016, Rowanmoor confirmed the basis on which the scheme split calculations were prepared since July 2004, attaching correspondence from 15 July 2004 that requested information from the principal employer on how the fund was to be allocated between the members.

20. On 15 September 2016, a further Trustees' meeting took place. It was minuted that there was no agreement by the Trustees on the wording of the minutes of the meeting which had taken place on 1 April 2015 and of a further one which had taken place on 24 November 2015. The main contention was noted as being over the liability for damages of the evicted tenant from Heritage Farm, being the trustee Mrs GF-R. Mr N asked to put on record his concerns that Mrs GF-R was not fulfilling her duty as a trustee to ensure that the Scheme secured rental income from Heritage Farm.

21. Rowanmoor confirmed that its independent actuarial assessment of the split of the Scheme's funds, the carrying out of which had been agreed by all the Trustees on 13 July 2016, had ceased for lack of response from Mrs GF-R in the timescale

allotted in its proposal. Mrs GF-R conceded that she had not responded to Rowanmoor as the figure of £433,806 for unauthorised payments which Mr N had submitted to Rowanmoor was so large and had been discussed so many times before that she saw no point in responding. She agreed that she could have given a counter number to Rowanmoor but had failed to do so.

22. It was agreed that the next Trustees' meeting would take place on 15 September 2016. Mr N says that no further meetings have taken place since.
23. On 14 October 2016, Rowanmoor emailed Mr N and Mrs GF-R. It said that a significant part of what Mr N submitted as constituting unauthorised payments, was not supported by the applicable pension legislation and would be more accurately described as a financial loss to the Scheme.
24. On 7 June 2018, Mr N wrote to Rowanmoor, copied to the Trustees, HM Revenue & Customs and this Office, setting out his view that Rowanmoor had misrepresented both the facts and circumstances of the liability that had arisen as a result of unauthorised payments, re-iterating points that he raised in his letter to Mrs GF-R dated 8 July 2014, and commenting on the fact that Rowanmoor had not taken any action at that time.
25. On 11 June 2018, Mr N wrote to Rowanmoor, copied to Mrs GF-R, expressing concerns about the preference given by it to a trustee (Mrs GF-R) over the interests of the members and a request from him, as a trustee and as a member, for an urgent meeting of the Trustees to discuss the reporting of unauthorised payments.
26. In a second letter of the same date, Mr N also detailed the fact that in three trustees' meetings Mrs GF-R blocked all attempts by the Scheme to repair the damages to the Property.
27. In a response to Mr N, dated 22 June 2018, Rowanmoor commented as follows:

"I do acknowledge your active involvement in dealing with Scheme related matters and note that a similar wish to deal with Scheme matters has generally not been forthcoming from [Mrs GF-R].

Some examples of this being her lack of response to:- the agreement to the Minutes of Trustee Meetings, and - the Indicative Actuarial assessment of the fund allocation that I proposed as a means of notionally factoring into the fund allocation any agreed 'losses' incurred by the Scheme as a result of her occupation of the scheme property. The results of the Indicative Actuarial assessment were intended for use in your discussions/negotiations taking place at the time relating to the financial aspects of your divorce. If this process had completed it would not have resulted in an automatic alternative allocation of the fund but merely provide information that might have been used for you to agree a different allocation of the Fund as part of your negotiations e.g. a formal pension Sharing Order or possibly offsetting value within the Scheme against other marital assets outside of it.

We do not consider that we can be held responsible for any failure by another in their capacity as either a member or trustee of the scheme.”

The letter concludes stating that “Given the personal differences and frustrations that we are aware exist between you and [Mrs GF-R] we have been careful to ensure that as an independent trustee we have taken an impartial position and dealt with each of you equally, without favour.”

28. In an email to Rowanmoor, dated 22 June 2018, Mr N specifically challenged Rowanmoor’s role and the fact that “in every instance that [Rowanmoor] has no responsibility or duty of care whatsoever as manager of the scheme or as an independent trustee.”

29. In an email, dated 5 June 2020, responding to six of Mr N’s complaints Rowanmoor, in its capacity as the Scheme Administrator and not as the Independent Trustee, said:

“For the avoidance of doubt, as Scheme Administrator, Rowanmoor remain impartial to the relationship of the Member Trustees and have adhered to Pension Legislation in order to resolve the disputes...Rowanmoor have administered the scheme in accordance with the pension legislation.”

30. In a letter to Mr N, dated 22 November 2021, the Independent Trustee said:

“I would be grateful if you could please send us a copy of the insurance policy in relation to the property/land as soon as possible.

It is important that we are able to evidence that sufficient cover is in place to protect the pension scheme, and we would therefore be grateful if you could please give this matter your urgent attention.”

31. And on 27 January 2022, the Independent Trustee said:

“The last copy of the insurance schedule we received has now expired. As pension trustee, we have a responsibility to safeguard pension assets and part of this is to ensure appropriate insurance cover is in place.”

Summary of Rowanmoor’s position

32. *The incorrect apportionment of a sizeable investment made by Mr N into the Scheme between him and Mrs GF-R.*

Its letter to Mr N, dated 11 August 2016, confirms how the underlying assets of the Scheme have been allocated by Rowanmoor’s actuaries. The letter confirms that the fund is allocated between the members in proportion to the liabilities for service completed. At the time of the actuarial report, September 2001, it was scheme regulation to prepare fund split calculations based on salary details and length of service with the company, rather than using just the level of contributions received. Once the Actuarial reports were prepared, these would have been issued to the

Member Trustees for approval. There is no evidence to show that Mr N objected to the fund split at this time.

33. The failure to call a trustees' meeting since 15 September 2016.

Rowanmoor and the Independent Trustee are not obliged to hold annual Trustees' meetings with the Member Trustees. However, Rowanmoor and the Independent Trustee will endeavour to attend such meetings at the Members' request.

Rowanmoor's and the Independent Trustee's attendance will be reliant on the acceptance and attendance of such meetings by both Mr N and Mrs GF-R. The Independent Trustee believes that Mrs GF-R is unwilling to attend meetings and as such, no further meetings have been held since 15 September 2016.

34. The failure to report to HMRC until January 2017 that unauthorised payments had been made to Mrs GF-R.

Records show that there was a Farm Tenancy Agreement in effect between the Scheme (Landlord) and Coxland Farm (Tenant) between the dates of 17 January 1997 and 14 January 2002 the annual rent of the agreement was set at £7,480.00 per annum. Following the end of the lease, Rowanmoor understood that Mrs GF-R continued to occupy the premises and establish new companies. The new companies continued to occupy the property, however a new lease was never arranged by the Trustees and there were no formal rent figures in place. It should be noted that it is the responsibility of the property manager to ensure leases are implemented.

The concept of unauthorised payments was introduced into pension legislation from 6 April 2006, and this is therefore the earliest date that this can be used. In view of the occupancy of the land by Mrs GF-R, for which the Scheme did not receive any rental payments, in the 2015/16 tax year Rowanmoor made the decision to treat Mrs GF-R's tenure of the premises without the payment of rent as a 'value shift' in accordance with the Pension Tax Manual (PTM133700) and as such triggered an unauthorised payment report to HMRC. As a rental valuation of the property had not been obtained, Rowanmoor used the rent dating back to tenancy to calculate the rent payable, this amount being £58,590. It should be noted that HMRC agreed to waive the scheme sanction charge applicable to the unauthorised payment and as a result, Mr N was unaffected by this.

35. The ongoing failure to collect rent that was historically owed.

It should be noted that Rowanmoor does not act as property manager and has never marketed itself as doing so. The responsibility of the property manager includes, but is not limited to, arranging and implementing a lease to the tenanting party and monitoring the collection of rent in accordance with the lease. In the absence of a professional property manager being appointed, this position defaults to the Member Trustees who are responsible for undertaking the property manager responsibilities. It should also be noted that as there was no lease in place following the dissolution of Mrs GF-R's former company, there was no formal rent for

collection and Rowanmoor would not establish expectations for the collection of rent within its systems.

36. Rowanmoor's failure to show in the 2017 accounts that historic rent was due on an asset of the Scheme, and which was still outstanding.

As Rowanmoor made the formal decision in the 2015/16 tax year to treat the non-payment of rent by Mrs GF-R as an unauthorised payment, this was reported with all applicable tax charges settled. This action clears any rental debt due to the Scheme and, as such, there would be no outstanding rent to report within the 2017 scheme accounts.

37. Rowanmoor's failure to take action when Mr N complained that unauthorised payments had been made from the Scheme.

The recognised unauthorised payments are dealt with above. It is unclear which other payments Mr N refers to as 'unauthorised payments'. Indeed, throughout the years of the Scheme, Mr N has made reference to unauthorised payments, but these are not what HMRC would recognise as 'unauthorised payments' under current legislation.

Summary of Mr N's position

38. The overall position being adopted by Rowanmoor and the Independent Trustee is that they have little or no duty of care as the Scheme Administrator and the Independent Trustee, and that they can ignore clauses 8.4, 8.7, and 12.5 of the Rules that are: Clause 8.4 regarding appointment of an expert in circumstances of failure to reach unanimous decisions; Clause 8.7 keeping of minutes of trustee meetings; and Clause 12.5 allowing known unauthorised payments to continue.

39. He contends that Rowanmoor has committed fraud in a number of ways, including the preparation of multiple false annual accounts and use of funds provided by him. It continues to do so as recently as July 2022, as can be demonstrated by correspondence from Rowanmoor. He has been reluctant to use the word fraud, given the threshold for such an accusation in law, but is prepared to file a new complaint for fraud, if that is deemed necessary.

40. There appears to be no concern whatsoever by Rowanmoor, as Scheme Administrator and the Independent Trustee, that members cash funds have continued to diminish since 2010 with no income and that the Scheme has no liquidity of its own.

41. In the past five years and more, Rowanmoor and the Independent Trustee's fees and expenses of £32,777.29 have come entirely out of funds Mr N has personally deposited into the Scheme from his Zurich pension fund.

42. The Property remains uninsured despite the fact that the Independent Trustee committed to deal with this at the Trustees' Meeting in April 2014.

43. The Property has lost approximately £90,000 capital value in the past two years through decay and lack of maintenance - it is not rentable.
44. There remain unauthorised payments that have not been reported to HMRC despite Mr N's requests to do so.
45. As regards his feeling that Mrs GF-R has been given preferential treatment, the fact that she has been permitted by Rowanmoor and the Independent Trustee to receive unauthorised payments of at least £65,780 and has been the cause of losses to the Scheme of over £400,000, makes this self-evident. In addition, as noted by Rowanmoor and the Independent Trustee, Mrs GF-R has refused to agree any minutes of Trustees' Meetings for the past six years. She continues to block any form of administration of the Scheme and its sole asset, Heritage Farm, by the Trustees and yet there has been no admonition forthcoming from Rowanmoor and/or the Independent Trustee or an attempt to invoke clause 8.4 of the Rules to seek referral to an expert.
46. Despite his numerous written complaints, it would appear Rowanmoor and/or the Independent Trustee is satisfied to allow Mrs GF-R to hold the Scheme to ransom and cause permanent stagnation until such time as the members' liquid funds are exhausted and the fees to Rowanmoor and/or the Independent Trustee can no longer be paid. In the four years since the failure of Mrs GF-R to provide information required for the independent actuarial assessment there has been no rebuke from Rowanmoor and/or the Independent Trustee, or effort to address and rectify the continuing obstruction of Mrs GF-R to the operation of the Scheme.
47. He contends that he was not in a position to complain to TPO until after his and Mrs GF-R's divorce hearing was held on 27 September 2016. It was anticipated by all of the Trustees and Members of the Scheme that a Pensions Sharing Order would be made by the judge as to, how the then current value of the Scheme should be divided as to contributions made to the fund by the parties. He says this was the reasonable expectation of all parties, including the Independent Trustee and Rowanmoor, given the specific directions contained in the Amended Order of District Judge Ball dated 9 May 2016 and the subsequent efforts of Rowanmoor to appoint and complete an "Independent Actuarial Valuation" ("IAV") of the Scheme in August 2016 – see attachments. However, the IAV was abandoned by Rowanmoor shortly after it commenced, due to the non-cooperation of Mrs GF-R.
48. On 14 October 2016, Rowanmoor wrote to both him and Mrs GF-R to say that the Pension Sharing Order could have been used to reset the allocation of the fund between them, but this was subject to them firstly reaching an agreement on this matter between them. It was only at this time and as a direct result of this correspondence from Rowanmoor, that he knew he had exhausted all available means to reset the Scheme's losses or "value shift" without resorting to a formal complaint to TPO.

49. Regarding Rowanmoor's response to his complaint, he says:-

- *The incorrect apportionment of a sizeable investment made into the Scheme between him and Mrs GF-R.*

Rowanmoor has been unable to produce any record that the fund split methodology employed in July 2004 by the Actuaries was ever presented to the Trustees or the members for their approval. To his knowledge there is no record of a meeting of the Trustees, or any direct correspondence sent to the members and Trustees for their unanimous approval as required under Clause 8 of the Rules. As a matter of fact, Rowanmoor has only been able to state:

“Actuarial reports were prepared, these would have been issued to the member-trustees for approval; [we are] unable to evidence that [Mr N] objected to the fund split at this time”.

- *The failure to call a trustee meeting since 15 September 2016.*

Rowanmoor and/or the Independent Trustees are correct that the Rules do not require Rowanmoor to hold annual Trustees' meetings. However, Clause 8 of the Rules does require several critical matters to be dealt with by the Trustees and for the Independent Trustee to be part of the Quorum at any meeting. He has requested in writing that Rowanmoor call for a meeting of the Trustees and it has failed to attempt to do so. The Trustees have been stymied in addressing critical matters such as unauthorised payments to Mrs GF-R and Rowanmoor and/or the Independent Trustee has not seen fit to take any action.

It is true that it has been difficult to get Mrs GF-R to agree a specific date to attend Trustees' Meetings, but with perseverance she has ultimately attended. What Mrs GF-R has not been willing to do is unanimously agree the minutes of any meetings since 2014. Clause 8.4 of the Rules does have a mechanism for dealing with this situation by the appointment of an expert, however Rowanmoor and/or the Independent Trustee have not been willing to consider addressing this route.

- *The failure to report to HMRC until January 2017 that unauthorised payments had been made to Mrs GF-R.*

Rowanmoor and the Independent Trustee have failed to address the question of why they permitted the unauthorised payments to Mrs GF-R to continue from 2010 and in any event beyond 8 July 2014, when he expressed verbally and in writing his personal concerns as to his own liability as a trustee in knowingly permitting her to use the Property without payment to the Scheme.

There was no “Property Manager to ensure leases are implemented” as Rowanmoor intimates and it acted as the gatekeeper on the Farm Business Tenancy Agreement (FBTA) and was fully aware when Mrs GF-R assumed the responsibility for the FBTA in 2009 and subsequently as Devon Bio-Nutrients

and Energies Ltd. The unauthorised payment Rowanmoor reported to HMRC of £58,590 was understated by £7,193. Using the method of calculation stated by Rowanmoor, the figure should have been £65,780 as the physical eviction of Mrs GF-R from the Property, was only affected on 18 January 2015.

- *The ongoing failure to collect rent that was historically owed.*

Rowanmoor's statement here is simply wrong. There never has been a property manager appointed by the Trustees as the FBTA in all of its lease extensions has been with a trustee's company and payment was due every six months to Rowanmoor, which took responsibility for approving the FBTA tenant.

Furthermore, the Independent Trustee did assume certain responsibilities as per the minutes of the Trustees' Meeting on 1 April 2015. It was recognised that Mrs GF-R accepted responsibility for the lease payments under an extension of the FBTA from 2011 to 2015. Rowanmoor and/or the Independent Trustee did establish the expectation for rent to be paid into the Scheme bank account and did account for the "Rent Accrued" in the Scheme's Annual Report and Accounts from year ending 31 July 1999 onwards.

- *Rowanmoor's failure to show in the 2017 accounts that historic rent was due on an asset of the Scheme, and which was still outstanding.*

Once again, Rowanmoor's statement is inaccurate and fails to address the actual accounting records produced by Rowanmoor. The "Rent accrued" for the Property was dropped from the Scheme Annual Report and Accounts from year ending 31 July 2012 onwards and, as such, does not appear to have anything to do with the formal decision in the 2015/16 tax year to treat the non-payment of rent from Mrs GF-R as an unauthorised payment.

Moreover, Rowanmoor has omitted various amounts from the accounts, such as £242,456 due to the Scheme in 2011, without informing the Trustees, giving any explanation or seeking the approval of the Trustees.

- *Rowanmoor's failure to take action when he complained that unauthorised payments had been made from the Scheme.*

Rowanmoor has failed to address his complaint that substantial sums of money, in excess of £400,000, have been lost from the Scheme through the direct actions of Mrs GF-R. Whether all or just part of this sum falls under the HMRC definition of "unauthorised payments" is irrelevant. This large sum, representing more than 80% of the present value of the fund, has gone missing and has been removed from the Scheme Annual Report and Accounts. No action has been taken by Rowanmoor in permitting these losses, however they are accounted for with HMRC.

Furthermore, in the Scheme Annual Report and Accounts for year ending 31 July 2018 there is no accounting for the loan of £32,777.29 that has come entirely out of funds he has personally deposited into the Scheme account from his Zurich pension fund and which has been used by Rowanmoor to pay management fees and expenses.

Mrs GF-R says:-

50. In 2006, the Convergence Group was involved in major Litigation in the Chancery Division of the High Court against Chantrey Vellacott (CV). The Court Case was lost resulting in an Order for costs. The company then had a freezing order placed on it.
51. During or just before the trial, Mr N together with Rowanmoor had organised the purchase of a share option agreement in Coventry Airport (CAFCCO-C) by the pension fund for of some £240,000. However there was no documentation. Mrs GF-R asked Rowanmoor several times for the documentation as the options required a valuation to be prepared but this was not done.
52. After the loss of the CV case, the Convergence Group was liquidated. As a result of the bankruptcy and liquidation of the company the other shareholders in Coventry Airport wanted to dissolve the relationship with it as shareholder relations had broken down. This was negotiated and agreed with the Liquidator in 2007/8.
53. A loan from Lloyds Bank (**Lloyds**) was secured on Coxland Farm originally for the sum of £750,000. During the course of the CV litigation this rose to £850,000 and Lloyds demanded £50,000 be repaid immediately. Mr N did this from his personal account, which the Liquidator found to be a preferential payment.
54. As a result of all the actions against the companies and sorting out the highly complicated inter-group company debts a Consent Order was agreed in December 2008 with the Liquidator resulting in the monies held in the escrow account. Mrs GF-R has no financial interest in the escrow account as she had to compromise any debts owing to her. The escrow account is held between Howes Percival LLP acting for the Liquidator and Charles Russell on behalf of Fergana Ltd. The sum held in escrow is some £410,000. Mr N saw the drafts of the Consent Order and made comments at the time. It was extremely difficult to negotiate anything given the size of the sums involved.
55. Further complications arose with the sale of Coxland Farm when Mr N issued a divorce petition and then refused to vacate the property on closing of the sale, claiming Squatters Rights, despite having attended a meeting with Lloyds, where they stated quite clearly that they would repossess the property. This was resolved by Mrs GF-R paying Mr N to move. However, the situation was further complicated when trying to move all the items from Coxland Farm and outbuildings as Mr N did not want anything moved and endeavoured to frustrate the process. A large container was purchased and placed at Hittesleigh to take some of the items particularly related to farming but some personal items as well. A herd of water

buffalos and a herd of deer also had to be disposed of in accordance with Defra rules.

56. The property was eventually sold in September 2009, but the Capital Gains Tax on disposal plus the accrued Heritage Farm rental pushed the company into liquidation in 2010. There were no funds available for distribution to creditors. Mrs GF-R was one of the largest creditors in the liquidation. The outstanding sums owed to the Scheme were accounted for in the liquidation. It should also be noted that no salaries or personal expenses were ever charged to Amador and any monies for hay or sheep keep from her personal land always went into Amador.
57. After the sale of the farm her marriage to Mr N had broken down completely. Mrs GF-R had three horses and could not find someone to either buy them or find a rest home for them. They were moved to a field of a local farmer until it could be resolved. Nobody was occupying Hittesleigh at that point. She only needed a small field but that also proved contentious.
58. The Defra Single Land payment was missed as a contract in the liquidation of Amador but all monies due under the agreement were paid into Amador. Eventually the horses went to Hittesleigh and were destroyed on 8 January 2015. Since that time Mrs GF-R has not been to Hittesleigh and the farm has been under the sole control of Mr N.
59. Unfortunately there has been an inability to calmly discuss and resolve matters as Mr N has made the sums so large that he is holding her responsible. It really should have been possible to come to an accommodation. Small issues she found unreasonable when set against years of not being allowed to charge anything. Also the lack of a business plan, showing the projected returns on an investment plan.
60. She has prepared Minutes and Rowanmoor has prepared Minutes but Mr N only accepts Minutes he has drafted.
61. She also does not understand how the land value has diminished so much since 2015 while Mr N has been in charge. She has checked land values and they have risen. The major problem in getting a return on Hittesleigh is that sub-contractors have to be hired to carry out farming activities as neither she nor Mr N are farmers. Its activities have historically been producing hay and silage, for cutting and baling and letting it for sheep keep, neither of which are high value income streams.
62. With regards to Rowanmoor she has never found it to be anything other than strictly impartial. She cannot comment on its interpretation of pension law.

Conclusions

63. Regulation 5 of the Personal and Occupational Pension Scheme (Pensions Ombudsman) Regulations 1996 sets out limitations on the complaints I can investigate. It states:

- (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.

64. Mr N contends that he was unable to bring his complaint until after the divorce hearing on 27 September 2016. Yet it is clear from the evidence he has provided that the bulk of the Scheme's losses or "value shift", as set out in paragraph 17 above occurred prior to and/or were known by him before January 2015. However, in a letter to Mrs GF-R dated 8 July 2014, Mr N set out his concerns with regard to her alleged fraud and the loss she had caused the scheme. Furthermore, an email from Rowanmoor to the Member Trustees dated 7 July 2016 said, "You have each mentioned the Judge has confirmed he is not interested in directing the split of the fund between you as part of the financial settlement so it is therefore obviously incumbent on you both (with your legal advisers) to come to an agreement regarding the Scheme." So clearly the question of the valuation was known to Mr N prior to the divorce settlement.

65. As this was more than three years before he brought his complaint these fall outside of TPO's investigation under Regulation 49(1) and (2).

66. Mr N was a Trustee and was aware of the issues involving the funding of the Scheme prior to 2015 and yet failed to do anything about it. I do not accept that this was dependent on the outcome of his and Mrs GF-R's divorce. In the circumstances I am not prepared to exercise discretion to accept this element of his complaint under Regulation 49 (3).

67. Clearly the relationship between Mr N and Mrs GF-R is a very strained one, as their individual testimonies show. But in the context of this complaint they are both Trustees of the Scheme and to that extent they are required to put their personal animosity to one side.
68. Together the Trustees are responsible for the effective management of the Scheme and have broad duties and responsibilities. They are required, in applying the Scheme's Rules, to act in the members' best financial interests.
69. While the Trustees as a whole are responsible for any breach of the Rules or law in respect of the management of the Scheme, it is arguable that the Independent Trustee and Rowanmoor have a higher standard of care in respect of the fact that the Scheme has not functioned effectively with no apparent controls in place for a considerable period of time. However, taking into consideration the wording of the Rules and the failure of the Member Trustees to reach an agreement it is unclear what more the Independent Trustee and Rowanmoor could have done.
70. The role of Scheme Administrator was undertaken by Rowanmoor from 1 July 2011, with separate responsibilities to those of the Independent Trustee as named in the Rules. Mr N's complaints against it are contested by Rowanmoor and without further evidence I do not consider it possible to reach a definitive decision on whether Rowanmoor is entirely at fault.
71. The Independent Trustee owes a fiduciary duty to the members of the Scheme when dealing with the Scheme's investments. However, this is a joint responsibility, with the Member Trustees, to ensure that the assets are protected. Ensuring that the Property is maintained, and insured is intrinsic to such a duty in order to protect against financial loss. The Independent Trustee recognised this in its recent correspondence with Mr N, referred to at paragraphs 28 and 29 above, however, prior to this the Independent Trustee was not proactive in fulfilling its duties despite Mr N's efforts to seek its active engagement.
72. I consider that this day to day duty does not fall within the definition of an "investment function" as referred to in s33 of the Pensions Act 1995, that refers to the exercising of investment powers and making investment choices. This is relevant as any Trustee breach of an investment function is not covered by the exoneration clause in the Rules.
73. The Member Trustees have been unable to agree on how the Scheme is managed with Mrs GF-R withdrawing from her role as a trustee. Despite recognising this position the Independent Trustee does not show that it has proactively sought a resolution to the difficulties faced by the members or actively sought the appointment of an independent expert to resolve any disputes.
74. Despite the availability of the Pensions Regulator's (TPR) Code of Practice 9, that sets out its approach to the establishment of adequate internal controls (an extract of which is set out in Appendix 2) the Scheme has had no effective governance processes in place for many years. This is reflected, at a basic level, by the fact that

trustees' meetings were not held on a regular basis and those that were held were at the insistence of Mr N. This reflects a fundamental failing by the Trustees.

75. I have seen no evidence to suggest that the Trustees took any steps to manage any conflict of interests in relation to the Scheme, or that any policy was in place to do so.
76. In many schemes, trustees manage their conflicts of interest by agreeing that a conflicted trustee should withdraw from discussions and the decision-making process. The trust deed and rules may require unanimous decisions, and, in this event, the withdrawing trustee should first share information that is relevant to the decision before further discussion takes place between the remaining trustees.
77. The fact that Mrs GF-R occupied the Property after January 2002 shows that she had a direct conflict of interest such that she should have stepped back in respect of any decision by the Trustees for establishing a new lease and the collection of any rent. Based on the fact that she or one of her companies has occupied the premises without paying rent she has breached her fiduciary duty as a member trustee not to personally profit from her actions or lack of action.
78. The Trustees have not fulfilled their trustee duties in correctly applying trust law and the Scheme Rules to act in the best financial interest of the Scheme and the members. However, the Trustees, including the Independent Trustee and Rowanmoor, are protected by Clause 13, the exoneration clause, so cannot incur a liability unless it is shown that they have committed fraud, or they have breached sections 33 and/or 34 of the Pensions Act 1995.
79. Mr N contends that Rowanmoor has committed fraud. He says he has previously been reluctant to use the word fraud, given the threshold for such an accusation in law. However, as explained at paragraph 70 above, there is no evidence that Rowanmoor, in its capacity as Scheme Administrator, has committed fraud or breached sections 33 and/or 34 of the Pensions Act 1995, and for these reasons it cannot be held liable under the Scheme Rules.
80. Mrs GF-R has not engaged with the other trustees to seek a resolution to Mr N's complaint and for this reason I consider that she is in breach of trust. However, having considered the evidence available, I do not find that Mrs GF-R has committed fraud or breached s33 and/or s34 of the Pensions Act 1995, within the timeframe I have investigated and for these reasons she cannot be found liable under the Scheme Rules.
81. As I have explained at paragraph 71 above, I consider that the Independent Trustee has not fulfilled its duties to act in the best financial interest of the members. However, there is no evidence that it has committed fraud or breached sections 33 and/or 34 of the Pensions Act 1995 and for these reasons it cannot be held liable under the Scheme Rules.

82. On balance I consider that Mr N has acted in good faith in bringing his complaint to TPO in an attempt to resolve the current impasse. However, the fact that the Trustees have to act unanimously means that they have all failed in their responsibilities to the members.
83. I find that Mr N's complaint is upheld in respect of the distress and inconvenience caused to him by the Independent Trustee and Mrs GF-R. Although I am unable to make a financial award to Mr N, I do consider that a resolution to the impasse needs to be reached.
84. I direct that the Trustees draw up a policy on how to manage the conflicts of interest that exist between the Member Trustees and the members, and that in applying this policy they should agree a basis for the share of the Fund.
85. Rowanmoor agrees this has been a very difficult situation which with hindsight could have been managed better.
86. However it is concerned at the practical implications of enforcing my directions. It believes that Mrs GF-R has a clear strategy of non-compliance/non-communication and it fears that she will not change that strategy and that any direction to appoint an 'expert' will fail because there will not be agreement amongst the Trustees on who that expert will be.
87. Mrs GF-R has now communicated with TPO and provided her comments as set out in paragraphs 50 to 62 above and I am hopeful that this is an indication that she is willing to take part in the resolution of this matter. However, should she and Mr N continue to fail to carry out the responsibilities required of them as Trustees, they or the Independent Trustee alone should approach the Pensions Regulator as directed in paragraph 91 below.
88. In the event no agreement can be reached by the Trustees on how to manage the obvious conflicts of interest and to agree the share of the Fund, there are a number of options as follows:
- The Trustees appoint an experienced pensions expert in accordance with Clause 8.4 of the Rules to determine the basis for the share of the Fund, or
 - The Trustees ask the Pensions Regulator to appoint a new independent trustee to manage the Scheme. This is, however, likely to be a drawn out process and would incur additional costs meaning the funds of the members would be reduced.

Directions

89. Within 28 days of my Determination, the Independent Trustee shall ensure that the Trustees draw up a policy on how to manage conflicts of interest. In doing so the Trustees need to take into account TPR's code of practice and ensure that a register of interests is compiled and explain how any trustee will manage that conflict.

90. The Trustees have a final opportunity to agree a basis for the share of the Fund within a further 28 days following the drafting of the policy on managing conflicts of interest.

91. If they still cannot agree a basis upon which a share of the Fund is to be derived within those 28 days, the Trustees, using their best endeavours, are to agree upon an expert with the relevant pensions experience and knowledge in respect of a SSAS within a further 28 days. The matter of the share of the Fund shall be determined by that expert in accordance with Clause 8.4 of the Rules. The determination of the appropriate members' shares of the Fund by the expert shall be binding on the Trustees.

Anthony Arter

Pensions Ombudsman
16 November 2022

Appendix 1 – extracts of the Definitive Trust Deed and Rules relating to the Broadband Pension Scheme – 1 July 2011

1. Definitions and Interpretation

Administrator means:

“(a) in respect of the period before A-day, any person appointed to meet the requirements of the Revenue under the terms of section 612(1) of the Taxes Act; and

(b) in respect of the period from and including A-day means the scheme administrator within the meaning of section 270 of the FA 2004.”

Fund means the monies, assets, property and investments held for by or on behalf of the Trustees on the trusts of and for the purposes of the Scheme and which from time to time constitute the fund of the Scheme. It includes (but is not limited) contributions from Employers and Members, assets accepted or acquired by the Trustees for the Scheme and any resulting investment gains, returns or interest. This expression includes where appropriate any part of the Fund.

1.11 The Trustees shall exercise their powers in a manner which they are satisfied will not give rise to an Unauthorised Payment, or to an Unauthorised Payment being treated as having been made.

3 Scheme Administrator

3.1 With effect from the Effective Date Rowanmoor Group plc will be the sole Administrator, and any Member Trustees or other persons who were Administrators immediately prior to the Effective Date shall insofar as the law permits, cease to be Administrators with effect from the Effective Date.

8. Trustee meetings

8.1 Subject to section 32 of the 1995 Act, the Trustees shall determine the frequency of their meetings.

8.4 Decisions at Trustee meetings...must be unanimous. If the trustees cannot reach a unanimous decision on any matter...the matter should be referred to an expert unanimously appointed by the Trustees whose determination shall be binding.”

12 Trustees benefiting from the Scheme

12.5 Nothing in this clause 12 shall authorise any action which would result in the Scheme making an Unauthorised payment or being treated as making an Unauthorised payment, whether by virtue of section 174 of the FA 2005 (value shifting) or otherwise.”

13. Exclusion of Liability

13.1 (d) To the extent permitted by law and subject to clause 14 and sections 33 and 34 of the 1995 Act no Trustee shall incur any liability for any other act or omission.

14. Limitation and extent of protection

14.3(c) The provisions of clause 13 and this clause 14 shall also apply in respect of the period beginning with A-day, to the Administrator of the Scheme.

16. Control of the Fund

16.1 The Fund shall be vested in the Trustees as joint tenants and held by them upon irrevocable trusts in accordance with the terms of the Definitive Deed.

16.3 Subject to clause 16.7, the Trustees may from time to time nominally allocate assets from the Fund for such purposes as they decide and may change any such allocation from time to time, provided Registration is not thereby prejudiced.

16.7 The Trustees shall exercise their powers under clause 16.3 in a manner which they are satisfied will not result in the Scheme making or being treated as having made an Unauthorised Payment.

18 Restrictions on investment

18.1 The Trustees shall exercise their powers under clause 17 in a manner which they are satisfied is not likely to result in the Scheme making or being treated as having made an Unauthorised Payment. Without prejudice to the generality of the foregoing, the Trustees will exercise their powers in a manner which they are satisfied is not likely to result in the Scheme making or being treated as having made an Unauthorised Payment pursuant to:

- (a) section 171 of the FA 2004 (scheme administration member payments);
- (b) section 173 of the FA 2004 (use of scheme assets to provide benefits to members and related persons);
- (c) sections 174 and 181 of the FA 2004 (value shifting); or
- (d) section 180 of the FA 2004 (scheme administration employer payments).

19 Trustees' borrowing powers

19.5 The Trustees shall exercise their powers under this clause 19 in a manner which they are satisfied will not result in the Scheme making or being treated as having made an Unauthorised Payment.

Appendix 2 - The Regulatory code of practice 9 – Internal Controls

Obligation on trustees

14. Section 249A of the Pensions Act 2004 gives effect to the requirement under Article 14(1) of the European Directive 2003/41/EC that schemes should have adequate internal control mechanisms in place. There is therefore a legal requirement in the Pensions Act 2004 that trustees of an occupational pension scheme must establish and operate adequate internal controls.

15. The Regulations state that:

“The trustees or managers of an occupational pension scheme must establish and operate internal controls which are adequate for the purpose of securing that the scheme is administered and managed:

1. in accordance with the scheme rules, and
2. in accordance with the requirements of the law.”

A proportionate approach

18. All schemes, unless exempt, are required to have adequate internal controls. Trustees must decide what internal controls are needed to satisfy themselves that the scheme is being well managed in accordance with the law and the scheme rules.

19. Not all risks will have the same potential impact or the same likelihood of materialising. Trustees will need to look at both these areas and assess which risks the scheme can absorb without the need to take further action, and which risks require adequate internal controls to reduce their incidence and impact.

20. When considering risk, trustees should be mindful of the nature of their scheme and the risks which are inherent in a particular structure. Smaller schemes may require less formalised controls than more complex larger schemes, but regardless of size, key risk areas will still need to be adequately controlled.

Appendix 3 - The Pension Regulators Guidance on Conflicts of interest – October 2008

1. The management of conflicts of interest is key to good scheme governance. While The Pensions Regulator recognises that many schemes have robust procedures, evidence suggests that there are aspects of conflicts management where further attention is required.

2. This *guidance aims to provide educational support*, particularly to smaller schemes, with a view to both *sharing good practice* and *raising standards*, in line with one of the regulator's statutory objectives.

3. This guidance acknowledges that there are certain aspects of the law relating to conflicts of interest which are unclear. This guidance concentrates on the governance aspects of conflicts management. It is not a substitute for taking legal advice.

4. A conflict of interest may arise when a fiduciary (which includes a trustee) is required to take a decision where:

the fiduciary is obliged to act in the best interests of his beneficiary;
and

at the same time he has or may have either

a separate personal interest or

another fiduciary duty owed to a different beneficiary in relation to that decision, giving rise to a possible conflict with his first fiduciary duty^[2], which needs to be properly addressed.

Such a conflict can inhibit open discussions or result in decisions, actions or inactions that are not in the best interests of beneficiaries. This, in turn, may result in the trustees acting improperly, lead to a perception that the trustees have acted improperly, and may invalidate a decision or transaction.

5. Conflicts of interest may be classified as either real conflicts or potential conflicts^[3].

6. Broadly, when considering conflicts of interest, this should be done in three stages:

identification - for any conflicts management procedure to be successful it must include a process for identifying conflicts;

monitoring; and

managing.

It is the third stage which is particularly difficult. The law relating to conflicts of interests is complex and comes from a variety of sources including common law (case law), the rules of equity and trust law, and pensions and general legislation. When trustees consider how best to manage a conflict, the role of the legal adviser is important.

7. The regulator recognises that it can be beneficial to appoint senior staff from the sponsoring employer as trustees, particularly in terms of knowledge, expertise and experience. However, conflicts are inherently likely to arise before and after appointing such individuals as trustees. It is therefore vital that those conflicts are appropriately identified, monitored and managed.

8. Throughout this guidance reference to 'employer' may include members of the employer group and other parties with a financial interest in the scheme.

9. Clearly the way in which conflicts are managed will be case specific and may reflect the nature or scale of the conflict. This may include the use of a number of measures (provided such measures are permitted by the scheme's legal framework). Some conflicts of interest may be so acute or pervasive that it would be better to avoid them entirely, for example, the acutely conflicted trustee could resign. In such circumstances they could be replaced, as appropriate, by the appointment of an independent trustee.

10. There are potential risks with any approach. When seeking to manage a non-trivial conflict of interest, and where the conflict could have the potential to be detrimental to the conduct or decisions of the trustees, the regulator would expect trustees to seriously consider obtaining independent advice from a lawyer when considering any option. Trustees should therefore assess the nature of the conflict being managed and the risk or threat to decision-making ^[6].

11. Trustees also need to ensure that adviser conflicts, which may affect the independence of advice, are identified and appropriately managed.

12. There should be a culture of openness: disclosure of conflicts should be embraced, not ignored. We expect all conflicts of interest to be resolved sensibly. Where a conflict comes to the attention of the regulator and the regulator considers that it is not being managed appropriately, we will take appropriate action. In some circumstances this might include the replacement of a trustee(s) and/or the appointment of an independent trustee.

The Trustees Role

21. A well-run scheme will be underpinned by a robust governance framework. It is vital that decisions are not affected or tainted by conflicts of interest so that valid decisions are made, and are perceived to be made, in the beneficiaries' best interests.

22. It is trust law which imposes on trustees a duty to exercise their powers in the best interests of the beneficiaries. While it may be inevitable that conflicts of interest sometimes emerge, the important point is that they should be properly identified, monitored and managed. The failure to deal properly with a conflict of interest could result in a trustee's actions being set aside and/or personal liability for the trustees.

23. Trustees who are directors of the employer will also need to consider requirements of the Companies Act 2006 relating to the avoidance of conflicts of interest.

24. Appointing senior staff of the employer as trustees can bring additional benefits which may not be easily replaced. They may make substantial contributions to the operational effectiveness of the scheme. However, it needs to be recognised that such trustees may face conflicts of interest by virtue of their employment.

25. Trustees who are trade union representatives may be subject to conflicts of interest which are specific to their role. This is due to the fact that the trade union representative role is focused on active members of the pension scheme, who are only one class of beneficiary.

26. Trustees should be aware that there are circumstances, for example a requirement to report a breach of law^[8], which override their other duties as trustees.

27. Trustees will need to decide the correct mix of trustees for their scheme. This will need to take into account the scheme's governing documents. This may include, where resources permit, the appointment of an independent trustee. Independent trustees will (almost by definition) ordinarily have no conflicts of interest yet will still bring knowledge and expertise to the scheme.