PO-28532

Ombudsman's Determination

Applicants	Mr A, Mr S and Mrs S (**the Applicants**)
Scheme	The Positive Retirement Potential Plan (**the Plan**)
Respondents	Mr Bupendra Haribhai, as the Trustee (**the Trustee**)
	PR Potential Limited (**PRP Limited**)

Complaint Summary

1. The Applicants have made the following complaints about the Plan:

    1.1. The Trustee invested the Plan's fund inappropriately, which has resulted in the Plan's members' benefits and rights under the Plan being lost.

    1.2. The Trustee and PRP Limited have failed to provide the Applicants with information concerning their funds under the Plan.

Summary of the Ombudsman's Determination and reasons

2. Having fully considered the evidence and submissions presented on the papers, and those provided at the Oral Hearing, I uphold the Applicants complaints. My reasons are as follows:

    2.1. the investments made by the Trustee in Store First and Park First were made in breach of the Trustee's statutory and common law investment duties;

    2.2. the Trustee has breached his statutory duty under section 249A of the Pensions Act 2004, to have in place adequate controls to ensure the effective administration of the Plan;

    2.3. The Trustee breached his equitable duty of care in failing to take any steps to seek or appoint a replacement for himself when he became incapable of fulfilling his role as Trustee and in failing to alert The Pensions Regulator (**TPR**) to the lack of any active trustee in relation to the Plan.

    2.4. There was maladministration on the part of PRP Limited by failing to provide members with information concerning their Plan funds and properly carrying out the Plan's administration.

Jurisdiction

2. Pursuant to section 146(1)(e) of the Pension Schemes Act 1993 (the 1993 Act), the Applicants have brought a dispute against the Trustee and PRP Limited.

3. Under general trust law principles, any individual beneficiary has the right to take action and challenge trustees to account for breaches of trust. I have the power to seek recovery of any assets of the Plan applied in breach of trust and/or to seek remedy in respect of any such breaches.

4. I have the power to direct the Trustee to restore, or pay, to the Plan, 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 liability of the Trustee to the Plan is to put it back into funds as if there had been no breach of trust.

5. Any money recovered by the Plan as a result of my directions is available for the general benefit of any member, including the Applicants, 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."

6. 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).

Oral Hearing

7. On 3 February 2022, I held an oral hearing (the **Oral Hearing**) in relation to the complaints, 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 Trustee might be personally liable for the losses caused by his acts and omissions.

8. Only Mr A attended the Oral Hearing. The Trustee and PRP Limited were duly notified of the Oral Hearing and of the matters to be considered at the Oral Hearing, which included the question of whether the Trustee should be held personally liable for the losses caused by his acts and omissions. However, the Trustee and PRP Limited chose not to attend the Oral Hearing. Instead, the Trustee's representative, Mr Abdul

Polli[1][2], submitted a written statement for my consideration, in advance of the Oral Hearing. No representative of PRP Limited attended the Oral Hearing, and I received instead a written statement made by Mr Polli on PRP Limited's behalf, also in advance of the Oral Hearing. A summary of the Respondents' submissions is included under the sections 'The Trustee's position' in Section C below and 'PRP Limited's position' in Section D below.

9. When it became apparent that neither PRP Limited nor the Trustee would be attending the Oral Hearing, and having received no explanation of any good reason why I should not proceed in their absence, I conducted the Oral Hearing without them.

Detailed Determination

A Material facts

A.1 <u>The Plan</u>

10. On 27 April 2012, AC Management and Administration Limited (**AC Management**) was incorporated, under the Companies Act 2006, as a private company. The company director was listed as Mr Mark Harris. It had an initial shareholder listed as "Alexandra Chambers"[3].

11. On 20 May 2013, PRP Limited was incorporated, under the Companies Act 2006, as a private company. The company director was listed as Mr Gordon Kingsmal Percival Campbell. Mr Campbell resigned, and was replaced by Mr Saaqib Naseer as sole director, on the same day.

12. On 20 May 2013, the Trust Deed of the Plan (the **Trust Deed and Rules**) was executed. The Trust Deed shows PRP Limited as the Principal Employer and Mr Haribhai as the Trustee. The Trust Deed was signed by Mr Campbell, on behalf of PRP Limited, and by Mr Haribhai, as the Trustee, and those signatures were witnessed by Mr Naseer.

13. The Trust Deed confirms that the administration and management of the Scheme is vested in the Trustees, with AC Management acting as the Administrator for the purposes of section 270 of the Finance Act 2004.

14. On 29 May 2013, the Plan was registered with Her Majesty's Revenue and Customs (**HMRC**). The Plan was given the tax reference 00800277RX. I understand that a total of 42 individuals transferred funds into the Plan.

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[1] Mr Polli has been sole director of PRP Limited since 13 July 2016 and is currently sole trustee of the Plan, as explained in paragraphs 21 to 23 below. The Trustee has informed my Office that Mr Polli is to act as his representative in this matter.

[2] References in this Determination to the Trustee's submissions include submissions made on his behalf by Mr Polli.

[3] A company with the name of Alexandra Chambers Limited (Company number 07986950), of which Mr Harris was a director until its dissolution on 4 August 2015, is listed at Companies House. I assume that it was this company that was the sole shareholder of AC Management.

15. According to the Trustee, Mr Harris had proposed the Plan to be an occupational pension scheme catering for self-employed people. The Trustee's understanding was that Mr Harris had intended that the Plan would become a master trust that employers could join, in the context of the staging of the automatic enrolment requirements under the Pensions Act 2008.

16. The Trustee had been a "trustee with experience for some time" prior to taking on the role of trustee of the Plan. He had previously held a role, for approximately ten years, within his community as trustee of the Bolton Asian Elders Initiative and treasurer for Levua Paditar Samaj, a charity supporting families of the Hindu community. The Trustee had also been a committee member of a government-funded programme for delivering change and support in deprived areas. The Trustee has informed The Pensions Ombudsman (**TPO**) that, despite his ill health, he had endeavoured to keep up his knowledge "as required" in relation to the Plan's investments and "in the field". In addition to his lengthy career as a trustee, the Trustee ran his own business[4].

17. The Trustee had first become aware of the role as a trustee in relation to the Plan as his wife had informed him of it. He met with Mr Mark Harris of Alexandra Chambers Limited, as he had "always been interested in trusteeship roles" and had wished to continue and develop his career "on that path". He was appointed as the Trustee on the understanding that AC Management was the Plan's administrator and the Trustee has submitted that he relied upon that when he decided to take on the role of Trustee. The Trustee has also said that he received no payment in relation to the Plan and that Mr Harris, in his capacity as director of AC Management as the Plan's administrator, was paid the annual management charges from the Plan, which amounted to £436.80 per client each year. According to the Trustee, those payments ceased after July 2015, AC Management having become uncontactable.

18. According to the Trustee, the Plan has not accepted new members since April 2015, when AC Management "became absent". It seems that, between April 2015 and July 2016 when PRP Limited took over as the Plan's administrator, the Plan had no administrator.

19. On 28 February 2016, Mr Saqib Naseer resigned as Director of PRP Limited and Mr Mohammed Ataur Rahman was appointed.

20. On 13 July 2016, Mr Abdul Ismail Polli was appointed as director of PRP Limited. The Trustee has submitted that Mr Polli took over as the Plan's Administrator when he was appointed as a director of PRP Limited. The Trustee has informed TPO that, prior to that, he had been experiencing severe ill health, which had begun to develop in October 2013 and had impacted upon his ability to fulfil his role as Trustee. The Trustee has submitted that he had been on "light duties" having been unwell in 2016, before PRP Limited took over as Scheme administrator, and has found it difficult to get back into a full working capacity.

[4] I understand that the Trustee currently runs a travel business.

21. Mr Polli has informed TPO that he took on the role of Plan administrator, having been approached by a "previous director" and family friend "who was himself intending to hold the [Plan] for his business employees believing it was suitable to do so and had recognised the need for someone more capable to come onboard in the absence of the then Administrator". Mr Polli was interested in the role, wished to support the Trustee and "subsequently undertook it as an experienced person" and, since the [Plan] was "small and in need of support", he assumed the role as a "commercial challenge".

22. The Trustee was removed as the trustee of the Plan and replaced by Mr Polli by deed of appointment and removal dated 11 May 2021. I have referred to Mr Haribhai as the Trustee throughout this Determination, as he was the Trustee at the time the Plan was set up and when the relevant investments were made.

A.2 Introductions to the Plan

Mrs S

23. In February 2013[5], Mr Paul Dingsdale, a representative of Group First Global Limited (**Group First**)[6] visited Mrs S' house to discuss "a matter" with her husband. During that visit, Mr Dingsdale asked Mrs S if she was happy with her pension and the percentage rate of growth that she was receiving. Mrs S, who had no prior investment experience herself, told Mr Dingsdale that she did not really understand pensions, although she thought what she had was "alright".

24. Mr Dingsdale said that he knew of a good pension scheme, which would produce a profit for Mrs S if she left her benefits there for five years. Mr Dingsdale called back a couple of days later and brought with him "coloured brochures" explaining how the investment would work. Mr Dingsdale explained to Mrs S that a storage pod would be bought, which would be rented to other people who would pay rent, meaning that Mrs S could leave the Plan five years later with more money than she had transferred into the Plan. Mrs S discussed the investment with Mr Dingsdale and asked him whether she would be able to leave the Plan at any time. He informed Mrs S that it would be possible. She decided to go ahead with the transfer and Mr Dingsdale advised her that he would contact Coats Pension, her pension provider at that time, and that he would be back in touch having done so. Mrs S completed the application form to join the Plan on 4 November 2013.

25. Coats Pension Office had initially warned Mrs S that she should reconsider the transfer. However, the transfer went ahead and Mrs S was notified of this by a letter dated 24 April 2014. Mr Dingsdale had left Mrs S the telephone number of an individual named

[5] Mrs S has stated February 2014 in her correspondence with TPO. However, given the other dates and the documents submitted by Mrs S, I consider that Mrs S must have meant 2013.

[6] Group First owns Park First Limited and Store First Limited.

Gordon, who he said was the Plan administrator, in case she needed to ask any questions concerning her pension.

26. On 5 June 2014, a handwritten letter was sent to Mrs S from Group First, signed by "Paul". This confirmed that £23,500 had been invested with interest payable at 8% guaranteed over the first two years. The Plan was described as an occupational pension scheme. In the letter, Group First explained that, when Mrs S reached pension age, she would be able to take 25% of her benefits as tax free cash. It also said that: there were several options that would be available for the pension when it came into payment; the pension would be payable for life; and, in the event of Mrs S' death, the value of her pension fund would be payable to her spouse.

27. Mrs S received a letter dated 21 November 2014 (**Mrs S' Letter**), which said that a purchase costing £22,500 had been made, of "Store First @ 100%". The letter was signed by Graham Cantwell, Operations Manager, and was printed on the headed paper of 'The Positive Retirement Potential Plan…Administered by AC Management & Administration Ltd'. In that letter, Mr Cantwell informed Mrs S that the Plan would write to her again on her "Scheme Anniversary".

Mr A

28. Mr A explained, at the Oral Hearing, that Mr Naseer, who was his partner's nephew, was living with him in 2013 when he told Mr A about the Plan. Mr Naseer had assured Mr A that he would be able to pay off his mortgage and still have some of his pension remaining. Mr A said that, at that time, he had been in extremely poor health and had feared that he might not have long to live, so he had been trying to make sure that his family was financially secure. Mr A had considered that, if he could access the pension, it would have helped him financially. However, Mr Naseer advised him that he should leave his pension fund in the Plan, to allow for investment growth. He did not have any investments other than his mortgage and his pension within the Local Government Pension Scheme (**LGPS**). Mr A did not make any enquiry as to what options would be available to him due to his ill health under the LGPS. Other than buying a house, Mr A had no prior investment experience at all.

29. Mr A's LGPS pension had been "dormant" as he had not wished to invest in interest-based schemes, as that was against his religion.

30. Mr A initially turned down Mr Naseer's proposal on religious grounds. However, Mr Naseer then told Mr A that the Plan was not interest based. Instead, parking spaces or storage units would be purchased, and deeds would be received and the rental income from those parking spaces or storage units would provide an investment return. Mr Naseer said that other family members had entered into these investments which, Mr A submitted, later turned out not to have been true. Mr A said he did not seek financial advice on the transfer or on the investment, as he had received personal assurances from Mr Naseer and no one had suggested to him that he ought to take advice. Mr A said that he had trusted Mr Naseer and that he had only found out later, through his

divorce court proceedings, that Mr Naseer was the director of PRP Limited, and not just an agent of PRP Limited and the Plan as Mr Naseer had made himself out to be.

31. Mr A said, at the Oral Hearing, that he had asked Mr Naseer for the relevant Plan paperwork before transferring into the Plan and that Mr Naseer had assured him that he would provide that paperwork. However, Mr A's continued attempts to access those documents were met by excuses each time from Mr Naseer. When Mr A signed the Plan documentation on 24 April 2014, he asked Mr Naseer for a copy. Mr Naseer told him that he would provide a copy in due course. Mr A had not read the document before he signed it, as: he took Mr Naseer's word "as gospel"; there had been no suggestion that he should read it; and Mr Naseer had promptly removed the document from him as soon as he had signed it.

32. On 30 May 2014, £156,663.09 was transferred from the LGPS to the Plan, via AC Management, on behalf of Mr A. Although there is a transfer request form, sent to LGPS and apparently bearing Mr A's signature, dated 24 April 2014, Mr stated, at the Oral Hearing, that he had not completed any such documentation himself.

Mr S

33. Mr S was introduced to the Plan by Mr Gordon Campbell, a former Director of PRP Limited (see paragraph 12 above). Mr Campbell informed Mr S that he would receive a guaranteed 8% return on his investment in both year one and two, increasing to 10% in years three and four "with the first two years paid up front" and that after five years he would have the option of selling his investment back to Park First or Store First at its actual value rather than a discounted value. Mr S has informed my Office that, prior to having been introduced to the Group First portfolio by PRP Limited, he had had no knowledge of it.

34. Mr S completed the application form to join the Plan (the **Application Form**) on 15 July 2014. PRP Limited wrote to the Co-operative Group Pensions Department on 25 July 2014, requesting that Mr S' fund be transferred from his Co-operative Pension to the Plan.

35. Mr S had worked in retail banking prior to transferring his pension fund to the Plan and has informed TPO that he had no investment planning experience himself. He had established a company, LDB Financial Limited, on 30 May 2014 and his occupation was listed at Companies House as 'Financial Advisor'. PRP Limited has sent TPO a copy of Mr S' Application Form, in which Mr S described his occupation as 'FA'. However, according to Mr S, LDB Financial was not set up to provide financial advice and has never been financially regulated. TPO's search of the FCA's register revealed no record of Mr S' having been carrying out activities regulated by the FCA prior to 11 April 2016 or any record of LDB Financial as a regulated firm.

36. Mr S received a letter dated 10 November 2014 (**Mr S' Letter**), confirming that his Co-operative Group pension had been transferred to the Plan. Mr S' Letter was signed by Mr Cantwell, purportedly in his capacity as "Operation Manager", although it is not clear, from Mr S' Letter, which company Mr Cantwell represented.

A.3 Investments under the Plan

Mrs S

37. Mrs S' Letter said that 100% of her transferred funds (£22,500) had been invested in Store First storage units.

Mr A

38. In respect of Mr A, I have been provided with a statement addressed to "Positive Retirement PRP Potential, Kemp House", showing that, on 6 June 2014, the Plan purchased leases for seven parking spaces at Glasgow Airport. The investment was made through Park First Glasgow Rentals Limited.

39. On 6 June 2014, a further purchase of three parking spaces at Store First Northampton, for £21,750, was made. A second statement was sent to Mr Haribhai in his capacity as the Trustee. A third purchase of one parking space at Store First Northampton for £15,000, was made on 18 June 2014. A statement in respect of that parking space was sent to Mr Haribhai, again in his capacity as the Trustee.

40. Mr A commented, in a letter to Mr Polli of 4 December 2018, that despite having been informed by Mr Naseer that the investment in Park First was for six years, he had subsequently been provided with information that showed that the investment had only been for four years, from 6 June 2014 to 17 June 2018.

41. Mr A said, during the Oral Hearing, that he had received three payments from the Plan, a total amount of between £13,000 and £14,000. Mr A contacted Mr Naseer and enquired where that money had come from. Mr Naseer informed Mr A that he would come back to him, but he did not. Mr A has explained that these payments made no sense to him, as they did not reflect the rental income that the investment portfolio suggested he should have received, had the payment been due to him rather than to the Plan[7].

Mr S

42. Mr S' Letter (see paragraph 36 above) stated that £20,000, that is the full amount of his funds that had been transferred into the Plan, had been invested in Park First Glasgow Rental Limited.

A.4 The Applicants' attempts to access information about their pension funds under the Plan

[7] Mr A clarified, when I asked him at the Oral Hearing, that he had not expected to receive any rental income himself during the term of the investment; he had expected the investment to mature in 2020, at which point he had planned to use part of his pension fund to pay off his mortgage.

Mrs S

43. In or around early 2018, Mrs S began to be concerned, as she had only received one letter in relation to the Plan and had not received any annual benefit statements. She rang Store First, as this was where she had been told her money was invested. Store First informed Mrs S that it had no record of her. Store First mentioned Mr Polli, but Mrs S was not sure who this was. Mrs S thought she may have lost her pension to a scam, so she raised a complaint with TPO on 20 June 2018.

Mr A

44. On 31 May 2016, Mr A received a letter from PRP Limited. This confirmed that his pension fund was invested in seven car parking spaces at Glasgow International Airport, through Group Park First (**Park First**). Each space was valued at £20,000 making a total of £140,000. The letter confirmed also that four car parking spaces were held at Store First with the value of £36,750. This made a total value of £176,750. The letter explained that all assets were invested and were therefore not available in cash. It said PRP Limited was in the process of appointing a new administrator and that, when this was completed, they would provide a full statement, within the next 28 days.

45. Mr A explained, at the Oral Hearing, that he had been given a telephone number for PRP Limited, as the Scheme Administrator, and that he had tried to contact PRP Limited in that capacity via that telephone number. The person whom Mr A spoke to informed him that they could not help him or deal with his complaint concerning the Plan; they could only take his contact details and pass them on. Mr A left his details, but no one called him back. Mr A suspected that PRP Limited's 'office' might have been merely a "cyber office".

46. In 2017, having been unable to contact PRP Limited, Mr A contacted Mr Polli, to request that some of his pension fund be paid to him under a drawdown arrangement. Mr A needed this money, as he was going through a divorce and he had been ordered by the courts to pay £35,000 from his pension to his ex-wife. However, he was told no monies would be available until after November 2020, as the investment of his fund in Store First and Park First were for a six year period. Mr A said that, if he was unable to take money from the Plan, he would need to bring a complaint to TPO. Mr A also asked for a copy of the Policy Agreement. Copies of text messages that Mr A has provided to TPO show that Mr A had been liaising with Mr Naseer, in late 2017, in an attempt to arrange a transfer of part of his funds from the Plan to his ex-wife in compliance with the court order. In response to Mr A's text message, Mr Naseer informed Mr A that he would only be able to access his funds within the Plan once the 6 year term of the investment under the Plan had been completed. Mr A noted, in his response to Mr Naseer's text message, that this contradicted the documents that he had received direct from Store First[8], which provided the Trustee with various options, including a 'buy-back' option and an 'early redemption' option.

[8] When Mr A contacted Store First himself, Store First sent him copies of the three statements referred to in paragraphs 38 and 39 above.

47. At the Oral Hearing, Mr A said that, during a telephone conversation with Mr Polli in 2016 or 2017, far from providing any reassurance regarding his investment under the Plan, Mr Polli had informed him that he would not have invested in the Plan himself.

48. On 31 May 2018, Mr A emailed PRP Limited again. He said there were inaccuracies in the information that had been provided. He said:

    48.1. Mr Polli had said that he was given information about where his money was going to be invested but that this was not true. Mr Naseer had not given him any copies of the paperwork he signed and all that he was given was brochures which amounted to nothing. He was promised he would receive all documentation but had been given various reasons why the information had not been received, for example company moving office or being misplaced.

    48.2. Mr Polli suggested that Mr A would have been aware that the Plan had performance issues. Mr A did not agree with this as he had been advised by Mr Naseer that the Plan was the "best thing since sliced bread".

    48.3. He was concerned as Mr Polli had said that he personally would not have invested into the Plan.

    48.4. He was not made aware that PRP Limited had changed owners and that he had tried to contact Mr Naseer, who was avoiding him.

    48.5. He said he wanted to withdraw his investments, which is his legal right. He accepted that there may be penalties as a result of wanting to cash in his benefits early.

49. On 23 November 2018, Mr A telephoned PRP Limited to request complaint forms. However, PRP Limited did not send those to him.

50. On 4 December 2018, Mr A wrote a formal letter of complaint to PRP Limited. He said that he no longer had faith in PRP Limited and that he did not believe that his money was invested safely. Mr A said he thought that he had been mis-sold the pension and wanted to withdraw his money from the Plan. Mr A complained that his requests for Plan documentation had not been met, that Mr Naseer, who had been avoiding him, had repeatedly failed to provide contact details for PRP Limited and explained that his inability to access his funds under the Plan had had adverse financial consequences for him in his divorce proceedings. Mr A stated, in his letter, that, while Mr Naseer had told him that Park First would not release his funds, he had spoken to Park First himself and had been advised otherwise. He had not been receiving information from Park First that he had been informed he should have received via PRP Limited. Also, Park First held an incorrect address for him, which PRP Limited had failed to correct. Mr A received no response to this letter.

51. On 11 January 2019, Mr A submitted a complaint to TPO. He stated that he was unable to obtain any information in relation to the Plan and that he considered he may have been the victim of pension fraud.

52. In 2020, Mr A resumed his attempts to access his funds within the Plan, as his interest-only mortgage term was due to expire and he needed funds to pay off the capital. As these attempts were unsuccessful, Mr A had no option but to sell his house.

53. Mr A eventually contacted West Yorkshire Police in 2020 and made an online application regarding the Plan. The police did not ask Mr A for documentation in support of his application. However, the police informed Mr A that they could not take his application further, as there was no evidence that a crime had been committed. The police advised Mr A that he needed to try everything he could to contact PRP Limited and get his monies back from the Plan.

Mr S

54. Mr S made repeated attempts to contact the Trustee and Mr Polli, via PRP Limited's email address and telephone number. However, he received no Plan documentation and no reply to any of his calls or emails. On the couple of occasions when Mr S was able to speak to Mr Polli on the telephone, Mr Polli assured him that he would call him back, but he never did.

55. When Mr S brought his complaint to TPO, he did not know the balance of his pension fund within the Plan and he had heard that Park First had entered into administration although he had not been informed of this by the Trustee or PRP Limited.

A.5 Events that have occurred in relation to Park First and Store First

56. In 2017 the Financial Conduct Authority decided that Park First was operating a "Collective Investment Scheme", which should be regulated, and instructed Park First to offer investors either their money back or a different arrangement.

57. On 18 May 2018, the Secretary of State for Business, Energy and Industrial Strategy presented public interest petitions (the **Petitions**) against several respondent companies (the **Respondent Companies**), which included Store First.

58. Having considered the Petitions, the Court issued a Consent Order on 30 April 2019, against the Respondent Companies, for the Respondent Companies' winding up in the public interest.

59. Separately, four companies in the Park First group, including Park First Glasgow Rentals Limited, entered into administration on 4 July 2019. On 16 October 2019, the Financial Conduct Authority started court proceedings against Park First Limited[9].

A.6 Events that have occurred since the Applicants complained to TPO

60. At the Oral Hearing, Mr A informed me that Mr Polli had contacted him and had admitted that he would not receive any money from the Plan, but that someone called

[9] https://www.fca.org.uk/news/news-stories/park-first-limited-information-investors

"Paul Dingsdale" would contact him. I assume that Mr Dingsdale is the same individual referred to in paragraph 23 above.

61. Mr Dingsdale called Mr A in August 2020, offering his services to Mr A in attempting to claim back Mr A's pension fund by pursuing the LGPS, as the ceding scheme that had allowed Mr A to transfer out of the LGPS, for repayment of the transferred funds. Mr A refused that offer, as he did not trust Mr Dingsdale and had already tried that route himself.

62. On 8 September 2020, Mr A submitted an Action Fraud Report in relation to the Plan.

63. On 8 November 2020, Mr Nick Peterken, of Action Fraud, wrote to Mr Harris, in his capacity as the director of AC Management, on behalf of Mr A. In this letter, Mr Peterken explained that Mr A had lost all of his pension benefits as a result of Park First going into administration. The letter requested that Mr Harris provide an explanation of what had happened so that the matter could be unravelled. However, Mr Peterken received no response to that letter.

64. On 10 November 2020, AC Management was dissolved, having been struck off Companies House's register.

65. On 4 December 2020, Mr Naseer wrote to TPO. He said he was concerned to hear about Mr A's complaint, but that he did not hold records about PRP Limited. He said it would appear that Mr A's investments had fallen as the company had gone into administration. Mr Naseer said also that he understood Mr A was due to pay money out of the Plan to cover a divorce settlement. He said he did not know of any malpractice committed by him or by the Plan.

66. On 17 September 2021, Smith and Williamson LLP emailed Mr A in relation to Park First's liquidation. The letter stated that an offer of £56.4 million had been made, to save the companies listed in that letter, which included Park First Glasgow Rentals Limited, from going out of business. The letter explained further that it was unable to confirm what the outcome for the investors would be.

67. In its Administrator's Progress Report dated 1 August 2022, Evelyn Partners recorded that: the total value of claims received in respect of Park First Glasgow Rentals Limited was £37,335,207; and the number of claims amounted to 975. The report advised that it was anticipated that an interim dividend of 10 pence in the pound would be paid to investors and creditors by late August/September 2022. The report stated that it was expected that the total dividend following the conclusion of the Company Voluntary Arrangement would be approximately 16 pence in the pound.

68. On 8 December 2021, the Trustee was issued with a Magistrates Court Summons, stating that the Trustee was required to pay a total of £678.66. However, while the summons was addressed to the Trustee, it was sent to Mr A's personal address. It said that a complaint had been made on 8 December 2021, to the Magistrates Court by the charging authority for North Northamptonshire Council, and it explained that the Trustee, having been duly rated and assessed, had not paid the rates due. The Trustee

was therefore summoned to appear before the Magistrates' Court to show cause why he had not paid the sum. If he did not attend the hearing, he would be proceeded against as if he had appeared and dealt with according to the law. Mr A said, at the Oral Hearing, that he had contacted Northamptonshire Council regarding the summons and had been informed by them that other individuals had received similar correspondence. Northamptonshire Council advised Mr A to send them an email, setting out what he had told the Council over the telephone. The Council said that it had noted that the Trustee was not resident at Mr A's address.

A.7 Relevant provisions of the Scheme documents

A.7.1 Trust Deed and Rules

69. TPO has received a copy of the Trust Deed. However, despite repeated requests, neither the Trustee nor PRP Limited have been able to provide copies of the Plan Rules, which I assume were contained in the Schedules referred to in Clause 2 of the Trust Deed. Relevant extracts from the Trust Deed are set out in the Appendix to this Preliminary Decision.

A.7.2 Application forms

70. In order to join the Plan, each of the Applicants signed a declarations form, which contained the following statement:

> "I understand that it is in my best interests to seek advice from an appropriately qualified Financial Advisor regarding my future financial and retirement planning, however, I hereby confirm that I am comfortable in taking my own decisions and do not require advice in this respect."
>
> "I understand that "PR Potential Ltd" did not provide advice regarding the suitability of the Positive Retirement Potential Plan, for my circumstances and that they will establish the Pension on a "No Advice" Execution Only Basis."

71. Each of the Applicants also signed an application form to join the Plan, as set out in Section A.2 above. The client application personal information form includes the following:

> "I fully understand and agree that the Trustees of the Scheme are solely responsible for all decisions relating to the purchase, retention and sale of the investment forming part of the scheme. I agree to hold the Trustees fully indemnified against any claim in respect of such a decision."
>
> "I understand and agree that the funds will be included in appropriate arrangements, details of which are available on request."

72. The Pension Transfer Request form included the following declaration:

"I hereby declare that I Have Not Received and Do not Expect to Receive Any payment from the Positive Retirement Pension Plan in return for agreeing to transfer my pension to this Scheme. I Hereby Confirm that I am Not Attempting In Any Way To Release Monies Early From My Pension, Nor To Take Part In Any Pension Liberation, Loan or Cash Incentive Scheme [*sic*]."

B Summary of the Applicants' position

73. Those of the Applicants' submissions that have not been included in Section A above are set out below, within this Section B.

B.1 Summary of Mr A's position

74. Mr A believes that he was mis-sold the Plan in 2014.

75. He believes Mr Naseer had taken advantage of Mr A's ill health and his financial concerns. He was promised that he would receive more if he moved his LGPS pension into the Plan.

76. He does not believe any of the parties involved in the Plan has acted appropriately.

77. At the Oral Hearing, in addition to informing me of, or confirming, the facts that are set out in Section A above, Mr A added the following, in summary:

77.1. When Mr A did not receive any documentation for the Plan, he sent text messages to Mr Naseer but did not receive any responses. In 2019, when PRP Limited took over the administration of the Plan, he still tried to contact Mr Naseer but did not receive replies.

77.2. Mr A explained that his divorce was finalised in 2017. He had been unable to declare his assets to the courts for his divorce proceedings because PRP Limited would not provide a statement or any documentation, hence he was deemed an unreliable witness in those proceedings. However, contrary to a statement made by Mr Naseer, Mr A's ex-wife had been aware that Mr A had a pension, as they had both been members of the LGPS before Mr A transferred into the Plan.

77.3. Mr A said that the name Mr Mark Harris was familiar but that he had not come across him personally.

77.4. Mr A was unaware of the Trustee's responsibilities in relation to the Plan. Other than a couple of brochures concerning parking at Glasgow Airport, Mr A had never received any documentation concerning the Plan.

77.5. Mr A did not vote regarding the arrangements concerning Park First, even though this option was available to him. Mr A said he had received a letter to say the investment had not even been completed. This was sent from Park First several years ago when the company was put into administration.

77.6. Mr A said that, even if he was subject to charges, he would have accepted those charges in order to receive his money out of the Plan.

78. Mr Naseer claimed, untruthfully, that he did not know of any issues concerning Mr A's investment under the Plan. Mr A has provided copies of text messages, as evidence that Mr Naseer was aware that Mr A had concerns about the investments and that Mr A had wanted to withdraw his money out of the Plan even if there were penalties.

79. Mr Naseer's claims that Mr A's money was safe, despite Mr A having received correspondence from the administrators concerning Group First. Mr Naseer must have known about the troubles with his investment under the Plan, so his denial of that amounted to outright deceit.

80. Following up on what he had said at the Oral Hearing concerning his ex-wife's knowledge of his pension fund, Mr A later added, in a written submission to support his statement that his ex-wife had been aware of his pension fund and that he had not tried to conceal its existence from her as alleged by Mr Naseer, that he and his ex-wife had both: worked for the same employer, Bradford Metropolitan Council, simultaneously; and been named as beneficiaries in relation to each other's pensions. Mr A submitted that he had discussed, with Mr Naseer before he transferred his pension fund into the Plan, that he would need to change the details of the beneficiary under the Plan once his divorce had been finalised. Mr A has submitted that Mr Naseer's statement, in his letter to TPO of 4 December 2020, that Mr A's ex-wife had discovered Mr A's pension fund by accident, cannot have been truthful.

81. Even if Mr Polli's and Mr Naseer's statements that Mr A had hidden his pension fund from his ex-wife were truthful (which Mr A denies, as explained in paragraph 80 above), he questions how that would have given them the right to withhold from him: the Plan documents, which he has a right to have; and the value of his funds within the Plan, which he needed to provide to the court.

82. Mr A considered that Mr Polli's and Mr Naseer's inactivity and failings led to the judge in Mr A's divorce proceedings: drawing the conclusion that he was unreliable and was hiding his assets; and instructing him to pay a lump sum in settlement. Mr Polli was aware of this, as Mr A sent him a copy of that judgment.

83. Mr A has submitted a copy of a subject access request (**SAR**), dated 3 July 2020, which he says he sent to Mr Polli in exercise of his right under section 45 of the Data Protection Act 2018. Mr A received no response to the SAR.

84. He is unhappy that Mr Polli and Mr Naseer have questioned his credibility in order to justify and/or defend their own actions.

85. Mr A has submitted copies of various text messages between him and Mr Naseer and between a relative of his and Mr Naseer, from December 2017 to March 2018, in order to evidence his attempts to obtain information regarding his funds under the Plan and to document Mr Naseer's statement that the term of the investment was 6 years, when

in actual fact the information he received directly from Group First suggested otherwise (see paragraph 40 above).

B.2 Summary of Mrs S' position

86. Mrs S believes that she has been scammed out of her pension and would like the money back.

B.3 Summary of Mr S' position

87. The parties involved in the Plan had a duty to keep him updated and to reply to him and let him know what was happening with the Plan.

88. Park First is in the hands of an administrator. However, despite him making attempts to contact them, he had not received any information on the holdings and where things were with the Plan.

89. In response to the Trustee's and Mr Polli's submissions to the TPO for the Oral Hearing, Mr S commented, in respect of the documents provided, that it was "the first time I have seen them and is more correspondence than I have been sent in the last 8 years."

90. He is concerned that he could incur financial losses, as well as charges taken from the Plan.

91. He would like an update on his fund, and the ability to move it away from the Plan.

92. He requires redress for any charges taken and an apology for the lack of professionalism.

93. In response to the Trustee's and Mr Polli's submissions concerning Mr S' level of knowledge and experience and his alleged involvement with Group First (see paragraphs 120.1 and 121.1 below), Mr S has made the following submissions:

    93.1. It is clear that he was not a financial adviser being regulated to give pensions advice. This can be seen from the FCA website. Mr S had wished to pursue a further career in that field and had been helping individuals "with their bills", so he "can only assume I put FA on [the Plan's application form] as a precursor to this for ease.".

    93.2. "Apart from [Mr Campbell]…I never spoke to anyone else at the [Plan], including [the Trustee] or Mr Polli, to claim that I was a pensions adviser and competent to make my own decisions or was asked this question.".

    93.3. Mr S has expressed concern about the effect that having invested under the Plan might have on his career now as a financial adviser.

93.4. “I was not an introducer agent for Group First, or paid any commissions as they have intimated, nor did I introduce anyone to this scheme.”

C Summary of the Trustee’s position

94. The Trustee’s submissions, other than those already covered in Section A above, are set out below in this Section C.

95. His Trustee role ceased on 11 May 2021. Having done what he believed was his very best, he was disappointed to learn of the complaints, as he considers that he acted in accordance with the Trust Deed and Rules.

96. He said he has not benefited from the Plan as a lay trustee. He is not, and has never been, the Plan administrator.

97. He was informed, when undertaking his role as the Trustee, that the investments into Park First and Store First were approved and suitable. He said this supervision was provided by Mr Harris, who was a Lawyer, Professional Trustee and Administrator.

98. His understanding was that small schemes could safely mirror those approved within larger FCA Regulated Schemes approving the same contracts for investments and that they were/are legally permitted as per the Trust Deed.

99. In addition, he considered that all investments had to go through the scrutiny of potential members on the understanding that they were given the opportunity to seek advice on both the transfer and the discharge from the transferring scheme.

100. Having considered the complaint, the Trustee does not believe that he has ever acted inappropriately as a pension scheme trustee.

101. The investment companies Store First and Park First are both genuine companies and are held on trust on behalf of each member.

102. The investments made by the Trustee are diversified, ranging from individual parking spaces at Glasgow International Airport and individual storage pods across a range of UK national commercial sector business locations of which all continue to be operational, trading, saleable and transferable.

103. The marketing for Store First and Park First had convinced a diverse range of people including TV presenters, highly regulated legal and financial services companies and professionals both nationally and internationally. Collectively they invested hundreds of millions of personal and investors’ funds and the investments are continuing to operate, under the new Group First Administration firm. He believed this was now called Paystore Limited or Store First Freehold Limited. The closure of Park First led to untold difficulties for the Plan’s administrator and Trustee.

104. The Trustee said he would never do anything that he believed to be wrong. As a Trustee he put his faith in the lawyers operating the Plan and guiding him.

105. The Trustee said that he was sorry that Group First Administration had closed and that a new company had been set up. He said he hoped information would be provided to help the clients gain confidence in the new company and investments.

106. At the time, to the best of the Trustee's knowledge, the Group First portfolio was widely available to the members through the FCA and FSA regulated channels. Only in time did the regulators decide to act and change the position.

107. Mr Harris had assured the Trustee that he had full oversight as the Plan's administrator. Mr Harris said that all investments had been seen by 'legal' and approved as suitable for the Plan. As set out in the Trust Deed and Rules the sponsoring employer directors were not tasked in any way with administration and were not able to influence the Trustee.

108. In his opinion, he did all he could within his ability, believing he was always acting appropriately and any issue in relation to the Plan had been through lawyers.

109. The Trustee's motives for taking on the role were (in Mr Polli's opinion) that he was a "good kind upstanding man who had held trusteeship roles in the past and kindly saw this as an opportunity to improve his skills under the leadership of what appeared to be a dynamic Lawyer firm trustee and Administrator as his mentor.".

110. In Mr Polli's opinion, knowing the Trustee and the effect that his illness, and these complaints and the investigation into them, has had on him, the Trustee is "an upstanding kind and honest man who would never wilfully do wrong onto [*sic*] anyone". The Trustee authorised the investments "in the utmost good faith and belief and never in any sense was he being wilfully neglectful.".

111. The Trustee approved the investments with the understanding that they were completely legitimate.

112. The investments "continue to exist, are tradeable transferable and now operated by a newly appointed management company Paystore Ltd and Store First Holdings Ltd all ongoing under the watchful eye of the regulators, engaging with creditors again as required and supporting in the sale/ transfer / auction of assets ongoing [*sic*]. Please note the [Plan] will willingly transfer any client assets requested through appropriate discharge process.".

113. Given the regulator's determination on Park First, it would be unfair to expect a single Trustee or anyone in that position to be held liable. Decisions were made in good faith and the regulator only acted against Park First in 2019. The issues faced by the Trustee are the consequence of an impossible position that he was put in, by the absence of an administrator.

114. The Applicants wanted to invest in the asset and made declarations which provided industry warnings, they insisted on making the investments. Members had to make a 'robust' declaration if they were or were not receiving financial advice. They were also

required to have received informed guidance on the same basis by the transferring Scheme.

115. The Trustee hopes that "the duty on all transferring schemes being in place and the small single trustee non FCA regulated status of the [Plan] is fairly considered in conjunction with the client's applications and the circumstances of the case. A key question in consideration and unknown at present is that of whether the clients were discharged correctly by the transferring scheme and in line with the diligence required from their transferring schemes in accordance with regulation [*sic*].".

116. Members chose to invest under the Plan of their own free will and without coercion.

117. Mr A's credibility should be questioned; he insisted on "doing what he wanted to do, with his funds for his own reasons".

118. Mr S "clearly accepts he owns what he instructed for investment in his pension, and he is entitled to feel that way. He is rightfully demanding tangible communication which should be forthcoming. He felt like many others completing a [*sic*] case to invest his own personal pensions [*sic*] funds into the Group First Portfolio knowing the Group First Company himself for some years personally prior to submitting his applications to the administrators. He is an educated qualified person in financial services.".

119. In Mrs S' case, she consulted directly with representatives of Group First as a resident living in the town in which they were based and "knowing the Group First establishment". "Her case was so extraordinary since having been refused her transfer on the first occasion by Coats and subsequently being told that she would be required to raise funds of circa £300 to pay Coats to issue updated discharges and in line with transferring regulatory due diligence requirement [*sic*] and those of the scheme to join she proceeded in any case. The transfer took all of Eleven Months [*sic*] to complete, it would not at all be fair to consider that she nor any of these clients were anything but determined to make these investments, and in doing so had to comply with signing and recording [*sic*] their agreement insistence and wave to the most robust of systems that were required in order to ensure that their instructions were undertaken.".

120. Having had sight of my Preliminary Decision in relation to this case, the Trustee added further submissions concerning the Applicants:

    120.1. The Trustee considered that I had accepted evidence from Mr S that was "false and fabricated". Mr S had referred to himself as a 'financial advisor' in his Plan application form and the Trustee's knowledge of Mr S was that he was 'an introducer agent connected to a network of introducers, associated with the associate investment companies. He was directly a part of an introducer network pushing business to the administrator ACMA, as an intermediary to the failed investment companies." My acceptance, in my Preliminary Decision, of Mr S' suggestion that he lacked knowledge in relation to his investment under the Plan enabled 'an absolute injustice'.

120.2. Mr A was using the Plan to hide money, his ex-wife only becoming aware of the pension through misdirected correspondence. The Trustee has stated that, in my Preliminary Decision, I overlooked that and accepted Mr A's evidence 'with no impartiality'.

120.3. In the Preliminary Decision, I 'totally overlooked the autonomy of individuals, dismissing this, suggesting that they were not capable nor [*sic*] fit to make decisions for themselves in a process that took weeks and months to reach completion. There will be ample case law to support the protection of the [Trustee] in circumstances of this nature.' The Trustee has said that I have failed to 'use [my] impartiality in putting any such case law on balance forward in this regard.'.

120.4. The Trustee has no financial services training or banking expertise, or any qualification in pensions law. The Trustee considers himself to be in a similar position to that which I found applied to the Applicants in my Preliminary Decision. My dismissal of the fact that the Trustee had trusted in the guidance that he received from AC Management and its associates, including Mr Harris, was unfair. The Trustee is a victim in this situation and deserves "the protection within the [Trust Deed]" for that reason. I should take into account the fact that the Trustee undertook his position on a voluntary basis. The Trustee "genuinely was not equipped with the expertise to know [he] should have overridden the guidance [he] was being informally given and sought more professional guidance from lawyers and financial advisors. (The real issues here are the investment companies that have failed and been allowed to exist and fail)".

120.5. The outcome of my Preliminary Decision is not impartial and is, in fact, "biased, quoting case law throughout in opposition to the trust deed and trustee, to entirely support removal of protection against the trustee. [I] failed to quote any case law in support of trustees, working in a voluntary capacity with little experience in the field, and being left in a vulnerable exposed position as [the Trustee has] been and because of falling into the influence of people who are known in [my] circles.". The Trustee has said that I have dismissed the involvement in the Plan of Mr Harris, [ACMA] and "Registrars of the [Plan]", as they have "covered their tracks by not sharing engagement documents, but it's obvious that this was their tactic.".

120.6. "There is no doubt that there will be oceans of case law in support of people who have not had the expertise knowledge experience and/or fallen victim also to the tactics of underhanded characters / experts in occupational pension schemes / trusts and convincing a trustee that investments were safe balanced and acceptable and that the trustee was protected to have left them holding the can.".

120.7. "Had I been given guidance and if I had the intelligence / foresight to structure my position safely with insurance policies and limited liabilities over the

trusteeship, I would have demonstrated the aptitude for the role. I did not have this intelligence clearly and I did not have the intelligence to know I was being misled.".

120.8. The Trustee requested the opportunity to put forward psychiatric reports in support of his submissions that he lacked sufficient intelligence to have understood the situation that he allowed himself to be in when he took on the role of Trustee, and to demonstrate the demise of his mental health and that of his spouse, so that he could be given "a fair expert analysis, which could provide the evidence to give insight into the role that [he] mistakenly undertook.". The Trustee has stated that he cannot accept the suggestion, in my Preliminary Decision, that he was dishonest for his "lack of personal safeguarding".

121. Mr Polli has made further submissions on behalf of the Trustee, in addition to the Trustee's submissions set out in paragraph 120 above:

121.1. Regarding Mr S, Mr Polli has added to the Trustee's submissions concerning Mr S' status as a financial advisor and his alleged involvement with Group First as an introducer, stating that Mr S was paid a commission in that role and that TPO's investigation into Mr S' complaint had failed to establish "basic questions of truth, in this regard". Mr Polli has queried how compensating Mr S in those circumstances can be justified and how Mr S, in his position, can be considered not to have understood the implications of his actions when he invested under the Plan. Mr Polli has sent TPO a copy of Mr S' Plan Application Form, dated 15 July 2014. In that form, Mr S stated that his occupation was 'FA' and that his 'Employer / Trading Name' was 'LOB [*sic*] Financial Ltd'.

121.2. Mr Polli has queried my impartiality, in reaching my preliminary conclusion that the Trustee acted dishonestly without having requested "expert witness evidence in this regard", stating that "this is by the same account and process and act of negligence and cavalier bias, dishonest in its nature whilst bending the case law to suit the purpose.".

121.3. Mr Polli has stated that the Trustee "has likely been misled, lacking the personal skills, insight, and intelligence, to know that they were themselves [*sic*] being taken advantage of, and unwittingly putting themselves into a position of great danger, driven by the need for such introducer networks to chase investment marketing commissions one of whom has appeared in this case openly, undercover". Mr Polli has queried how this can be a reliable exercise of impartiality, stating that the preliminary conclusions, which I set out in the Preliminary Decision would be "sending a kind, vulnerable person, his wife, and family into utter despair creating yet another victim out of this truly heinous, unfortunate, misguided situation.".

D Summary of PRP Limited's position

122. PRP Limited's submissions, in addition to any set out in Section A above, are set out below in this Section D.

123. Mr Polli, as director of PRP Limited, has made the following submissions on PRP Limited's behalf:

    123.1. It was only when Mr Polli took over PRP Limited, in 2016, that he exercised his right to take over the role of administrator from Mr Harris. Since then, with the support of the Trustee, he has worked with great difficultly to claw back the supporting documents required to run the Plan.

    123.2. Since the Trustee's removal from office on 11 May 2021, Mr Polli has been standing as administrator and Trustee.

    123.3. Due to the issues facing the Plan and the fact that post had been going missing, "this matter has grown to these issues we now face head on. My thoughts are that if only there was a period of understanding I would happily be able to finally find my way back to the basic administration requirements of the [Plan] and a position whereby I can get back to management of the matters most important to hand in terms of client service establishing value for all clients concerned, responses to clients and issuing an updated statement to all clients explaining.".

124. Mr Polli has said that he wishes to follow up with the administrators or regulatory bodies regarding Park First and Store First, with a view to (broadly) making recoveries from them on behalf of the Members.

125. In response to the Preliminary Decision, in which I reached the preliminary conclusion that PRP Limited's failure to provide members with information concerning their Plan funds, or to properly carry out the Plan's administration, amounted to maladministration, Mr Polli has stated that he will "endeavour to carry on helping those remaining in the [Plan] to come to terms with their losses". Mr Polli has stated that he believes that he has provided TPO with all of the information it requires to date and that any such enquiries by TPO will be given his "utmost attention".

E. Conclusions

126. I will consider the Applicants' complaints under the following headings, to determine whether the Trustee has committed any breach of trust and whether each of the Trustee and PRP Limited has maladministered the Plan, after addressing a number of points that the Trustee has submitted:

E.1 The Plan's status

E.2 Investment of the Plan's funds

E.3 Administration of the Plan

E.4 Member consent / contributory negligence

E.5 The Trustee's liability

Procedure followed during this investigation:

127. Having had sight of the Preliminary Decision, the Trustee requested that he be allowed to submit a psychiatric report to TPO, in support of his submissions that he had been misled by others in his role as trustee of the Plan. Mr Polli has submitted, on the Trustee's behalf, that my reaching the decisions set out in the Preliminary Decision without any 'licensed psychological evidence…raised significant concerns about the fairness and justice of the process.' Mr Polli has stated that my 'denial of a psychiatric report at this advanced stage raises serious concerns about the potential for a miscarriage of justice.' and that there has been a 'persistent bias and lack of cooperation in [TPO's] approach'. I shall address these statements in paragraphs 128 to 133 below.

128. As I have explained in paragraph 8 above, the Trustee chose not to attend the Oral Hearing. The Trustee made this decision despite having been made aware of the matters that were to be considered at the Oral Hearing, which included whether the Trustee should be held to be personally liable for the Plan members' (**Members**) loss of their pension funds and whether the Trustee might be granted relief under Section 61 of the Trustee Act 1925 (**Section 61**). It was open to the Trustee to send Mr Polli, as his representative, to attend the Oral Hearing on his behalf, but he chose not to.

129. The Trustee informed TPO, in a statement that he provided on 19 January 2022 in response to the notice of the Oral Hearing that TPO had sent to him on 11 January 2022, that the investigation into the Applicants' complaints was causing him stress and upset and that Mr Polli would be representing him in the investigation. However, the Trustee did not mention, at that point, that he considered that his mental health during his time in office, as trustee of the Plan, should be taken into account. The Trustee's statement of 19 January 2022, was the first proper response that TPO had received from the Trustee in relation to the Applicants' complaints, despite having made repeated requests for a response since 25 February 2020 (see paragraph 135 below for further details of TPO's attempts to obtain a response from the Trustee).

130. The Preliminary Decision was issued on 5 December 2022. All parties were given a deadline of 3 January 2023, to respond with any further submissions. TPO extended this deadline to 24 January 2023, for the Trustee and for PRP Limited, taking into account the bank holidays over the Christmas period. Mr Polli sent TPO the Trustee's response to the Preliminary Decision on 24 January 2023, and it was only at that point that the Trustee made any submission concerning his mental health during his time as Trustee of the Plan. It was open to the Trustee, or to Mr Polli on the Trustee's behalf, to submit any evidence with his new submission that this should be taken into account. However, the Trustee did not include any such evidence.

131. TPO emailed Mr Polli on 28 April 2023, to inform him that, if the Trustee wished to submit any evidence in support of his submission concerning his mental health during

his time as trustee of the Plan, TPO would allow him one month to do so. Having received no response to that email, TPO's Adjudicator emailed Mr Polli again on 10 May 2023 and, as Mr Polli did not reply to the 10 May 2023 email, telephoned Mr Polli on the same day. During that telephone conversation, Mr Polli confirmed that he had received TPO's email of 28 April 2023, but did not inform the Adjudicator that he was having any difficulty in liaising with the Trustee with regard to obtaining evidence of the Trustee's mental health.

132. It was not until the afternoon of Friday 26 May 2023, the last working day before the deadline for the Trustee to submit any evidence to support his submission concerning his mental health, that Mr Polli responded to TPO's email of 28 April 2023, stating that he had been unable to communicate with the Trustee during the previous month, owing to the Trustee's ill health. Mr Polli informed TPO that the Trustee: had requested an appointment with a Consultant Psychiatrist; would receive an appointment within the following two weeks; and would then be able to provide TPO with a report on his mental health. Mr Polli submitted no evidence that such an appointment had been requested or that the Trustee had received confirmation that he would not need to wait longer than two weeks. Given the many opportunities that the Trustee had, during the course of this investigation, to make submissions and provide evidence concerning his mental health (see paragraphs 128 to 130 above), I did not consider it appropriate to grant the Trustee any further extension.

133. Mr Polli responded to TPO's refusal to grant an extension, on 5 June 2023, with a copy of a letter, which had been dictated on 5 April 2023, to the Trustee from a Consultant Cardiologist. While the letter referred to the Trustee having visited A&E the previous month, it did not indicate that the Trustee had been in continued ill health sufficient to have prevented the Trustee and Mr Polli from communicating with one another. I do not consider that the letter is sufficient to support Mr Polli's statement that he was unable to liaise with the Trustee between 28 April 2023 and 26 May 2023.

134. Mr Polli has also pointed out that the Trustee has had to respond to the Applicants' complaints without the benefit of legal representation, as the solicitors whom Mr Polli and the Trustee approached were "unable to work within the given time frame", owing to the complexity of the matters addressed in the complaints. Mr Polli has referred to the timescales provided to the Trustee throughout the course of TPO's investigation as 'unreasonable' and has stated that the Trustee has had 'minimal time to provide thorough and adequate responses'. I shall address those comments in paragraphs 135 to 137 below.

135. TPO first contacted the Trustee on 25 February 2020, to request his formal response to the Applicants' complaints. As the Trustee had not responded, TPO sent a further email to the Trustee on 30 March 2020. On 25 November 2020, TPO sent a further email to the Trustee, to inform him that failing to respond to the complaints made against him could constitute a contempt of court offence, which TPO could certify to the court. TPO requested the Trustee's formal response to the complaint again on 14 December 2021 and informed him that I would be holding the Oral Hearing. As I have mentioned in paragraph 128 above, details of: the material facts of the complaints; the

breaches of trust that I had provisionally found the Trustee to have committed; and further matters to be explored at the Oral Hearing, such as whether the Trustee should be afforded any relief from personal liability under Section 61 of the Trustee Act 1925, were set out in the documents that accompanied the Notice of Hearing that was sent to the Trustee and PRP Limited on 11 January 2022. The applicable legislation and case law concerning the Trustee's breaches of his investment duties in relation to the Plan were set out in the Appendix to the Material Facts document that accompanied the Notice of Hearing.

136. Despite having received this information, the Trustee chose not to instruct legal advisors until approximately one year later, after I had issued the Preliminary Decision. Mr Polli emailed TPO on 16 December 2022, nearly two weeks after I had issued the Preliminary Decision, to request an extension for making submissions in response to the Preliminary Decision. Mr Polli asked that the Trustee be allowed until the first week of February 2023 to respond to the Preliminary Decision, as he and the Trustee needed to seek legal advice but were finding it difficult to schedule appointments due to the Christmas period. I granted the Respondents an extension until 24 January 2023.

137. It was not until 20 January 2023 that a law firm made contact with TPO on the Respondents' behalf, requesting a further extension of six weeks, to enable them to review the papers, seek Counsel's advice and provide a comprehensive response. Owing to the considerable period of time that had passed since the Trustee was first made aware of the matters that were being investigated and the potential outcome (see paragraph 135 above), I did not consider it reasonable to grant any further extension to the Trustee. TPO has heard nothing further from the law firm. However, the Trustee sent his submissions to TPO on 24 January 2023 and, as I have explained in paragraphs 130 to 133 above, the Trustee was then given further opportunity over the months leading up to my Determination today to evidence his submissions concerning his mental health, although he did not produce any such evidence.

138. I do not accept the Trustee's submissions that I have acted in a biased manner in carrying out my investigation into the Applicants' complaints. As I have explained in paragraphs 128 to 137 above, Mr Polli and the Trustee have had more than sufficient time, throughout the course of this investigation and since being first informed of its nature and potential outcome, to have instructed any professionals they deemed necessary to assist them in responding to the Applicants' complaints. The fact that they have not appeared to have instructed anyone is not a matter within TPO's control.

E.1 <u>The Plan's status</u>

E.1.1 The Plan's status as an occupational pension scheme

139. It is not in dispute that the Plan is an occupational pension scheme. I shall proceed on that basis.

E.1.2 Structure of the Plan's funds

140. Clause 3.3 of the Trust Deed and Rules states that the funds are held on trust. The Trustee will hold the Fund on a trust to provide benefits under the Plan subject as provided in the Deed. No beneficiary is entitled to any specific part of the Fund and any notional allocation of assets to a particular Member's account is for benefit calculation purposes only.

141. I shall proceed on the basis that the Plan's assets were pooled amongst its members, in accordance with the requirements of Clause 3.3 of the Trust Deed.

E.2 Investment of the Plan's funds

142. I shall consider, in this section: to what extent the investment of the Plan's funds in Park First and Store First satisfies the statutory and common law requirements in relation to investing pension scheme funds; and the extent to which the Trustee has committed maladministration in connection with his investment acts and/or omissions.

E.2.1 Investment powers and duties

143. 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 Pensions Act 1995 (the **1995 Act**); and case law, as set out below.

E.2.2 Investment powers / duties under the Trust Deed and Rules

144. The relevant provisions of the Trust Deed, which govern the Plan's trustee investment powers, are contained in Clause 11 of the Trust Deed, extracts of which are set out in Appendix[10]. This clause was in force when the Applicants transferred their funds into the Plan.

145. The power of investment under Clause 11.1 of the Trust Deed is broad, allowing the Plan's trustees to invest the Plan's fund (the **Fund**) "in accordance with section 34(1) of the 1995 Act (power of investment and delegation), as if they were the sole absolute and beneficial owner of the Fund" and to "realise, vary, transpose or retain any such investment as they from time to time determine".

146. I note that, under Clause 11.4(a), the Trustee had the ability to make available to Members a choice of investment funds and that, under Clause 11.4(b), Members were able to "select and deselect by written notice to the Trustees, one or more investment funds in which his Member's Account is deemed to be invested in accordance with the terms and conditions specified from time to time by the Trustees for this purpose.".

[10] As I have explained in paragraph 69 above, I have not seen a copy of the Rules governing the Scheme, so I have had to work on the basis that no further provisions governing the Trustee's investment powers were contained in those Rules.

147. Clause 11.4(g) states that, while Clause 11.4(b) "confers a power to make investment decisions on the Member in respect of the investment funds selected by him for the investment of his Member's Account", this does not amount to any delegation by the Plan's trustees of their power of investment.

148. I have seen nothing to suggest that the Trustee offered Members or prospective Members any choice between investment funds under the Plan, or that any proper choice existed. It seems, from the evidence available to me, that the only investments made, or available, under the Plan were in Store First or in one of the Park First Group companies.

149. It is clear, from Clause 11.4, that, while the Member may make decisions as to how the funds are invested, it is up to the Plan's trustee to select the range of investments available to the Members to choose from and it is the decision of the Plan's trustee whether or not to allow himself to be directed by a member as to their investment decisions. That approach is consistent with the wider investment duties, which apply to pension scheme trustees and which I shall discuss below in Sections E.2.3 to E.2.5.

150. Clause 11.6 provides that the Plan's trustee shall exercise his powers of investment in accordance with sections 36 and 36A of the 1995 Act (choosing investments and restriction on borrowing by trustees) and the Occupational Pension Schemes (Investment) Regulations 2005. I shall consider the requirements of section 36 of the 1995 Act in Section E.2.3.2 below.

E.2.3 Statutory investment duties under the 1995 Act

151. Section 34(1) of the 1995 Act provides the Trustee with a wide-ranging power "to make an investment of any kind as if [he was] absolutely entitled to the assets of the scheme", subject to: section 36(1) of the 1995 Act; and any restrictions imposed by the Plan.

152. Section 36(1) of the 1995 Act requires the Trustee to exercise his 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 have not delegated the exercise of such powers to a fund manager in accordance with section 34 of the 1995 Act".

E.2.3.1 The Investment Regulations

153. The Investment Regulations, which set out specific requirements in relation to pension scheme trustees' exercise of their investment powers under Section 36(1) of the 1995 Act, are restricted in their application to the Plan, by virtue of Regulations 6(1) and 7(1), on the basis that the Plan has fewer than one hundred members.

154. However, despite the above restrictions, Regulation 7(2) of the Investment Regulations still requires trustees of schemes with fewer than 100 members to "have regard to the

need for diversification of investments, in so far as appropriate to the circumstances of the scheme".

155. The Trustee has not claimed to have invested any Plan funds anywhere other than in Store First and Park First. It does not appear that the Trustee considered the requirement to have regard to the need for diversification of the Schemes' investments, in accordance with Regulation 7(2) of the Investment Regulations, at any point leading up to his purported investment of the Schemes' funds in Park First and Store First.

156. The Trustee has said that the funds invested in Park First and Store First were diversified as they included individual parking spaces and individual storage pods across a range of UK commercial business sector locations. However, despite the range of geographical locations in which these parking spaces and storage pods were located, the investments were all essentially of the same kind, in a relatively new and untested market, and were all, clearly, high-risk. There was no proper diversification provided for the Plan by those investments.

157. The investments in Store First and Park First were high-risk in nature and I have seen no evidence that the Trustee carried out any meaningful due diligence in relation to those investments. Instead, it seems that the Trustee relied upon the fact that other individuals and companies had invested in Store First and Park First and that, according to Mr Harris, all investments had been seen by 'legal' and approved as being suitable for the Plan. In any event, the fact that an investment might be considered suitable as part of a wider pension portfolio does not make it suitable as the sole investment in a particular scheme or member's pension plan. Moreover, as I shall explain in Section E.2.4 below, other than in very narrowly defined circumstances, pension scheme trustees are not permitted to delegate any of their investment duties.

158. On that basis, taking into account all of the circumstances of the Plan, I find that the Trustee acted in breach of the requirements of Regulation 7(2), by failing to have regard to the need to diversify investments.

E.2.3.2 Section 36(3) and (4) (Choosing investments: requirement to obtain and consider proper advice)

159. The relevant parts of Section 36 of the 1995 Act, 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 –
>
> (a) 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

(b) obtain and consider such advice accordingly."

160. "Proper advice" is defined by Section 36(6) of the 1995 Act 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".

161. Under subsection (7) of Section 36 of the 1995 Act, 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.

162. The Trustee has explained that he believed that legal advice had been taken in relation to the Plan and that Mr Harris had assured him that all investments had been approved as suitable for the Plan, having been seen by 'legal'. However, I have not seen any evidence of this, so the requirement to obtain advice in writing (clearly for the purposes of demonstrating, if necessary then or later, compliance) has not been met. In any case, I have seen no evidence that the Trustee made any enquiries into any lawyer's qualifications or practical experience regarding financial matters or the management of the investments of trust schemes to satisfy himself that any advice from any lawyer constituted 'proper advice' in accordance with Section 36(6) of the 1995 Act. There is also no evidence of financial advice having been received.

163. It seems that the Trustee invested Members' funds in Park First and Store First without having taken any written investment advice whatsoever. In his submissions, the Trustee has indicated that he relied on the assurances of AC Management and the fact that the investments safely mirrored those of larger pension schemes. I cannot see that any larger pension scheme, the assets of which were properly invested in accordance with the Investment Regulations, could have had an investment portfolio which mirrored that of the Plan's. Given the statutory requirement, imposed by Regulation 7(2), to diversify Scheme investments, it seems more likely than not that, had the Trustee obtained "proper advice" in accordance with Section 36 of the 1995 Act, he would have been advised against investing the Scheme's assets solely in Park First and Store First.

164. I find that the Trustee has acted in breach of the requirement to obtain proper advice under subsections 36(3) and (4) section 36 of the 1995 Act. As I mentioned in paragraph 129 above, it was also a requirement of Clause 11.6 of the Trust Deed that the Trustee complied with section 36 of the 1995 Act. It follows that the Trustee has committed a further breach of trust by acting in breach of that requirement under Clause 11.6 of the Trust Deed.

E.2.4 Delegation of the Trustee's power of investment

165. I have also considered section 34(2) of the 1995 Act, under which trustees are permitted to delegate their discretion to make investment decisions to a fund manager who is authorised by the FCA to take the necessary decisions.

166. Section 34(4) of the 1995 Act, provides that trustees would not be responsible for the acts or defaults of a fund manager in the exercise of any discretion delegated to him under section 34(2), if the trustees had taken all reasonable steps to satisfy themselves: "(a) that the fund manager has the appropriate knowledge and experience for managing the investments of the scheme; and (b) that he is carrying out the work competently and complying with section 36 [of the 1995 Act]".

167. The Trustee has submitted that Mr Harris[11] had overseen the Plan's investments including ensuring that the investments had been "approved as suitable for the Plan". However, I have seen no evidence that Mr Harris had any FCA authorisation or that the Trustee fulfilled the requirements of section 34(4) by taking reasonable steps to satisfy himself of Mr Harris' knowledge or experience in relation to managing investments, or that the Trustee carried out any review of Mr Harris' work or compliance with section 36 of the 1995 Act.

168. On that basis, I find that the Trustee did not delegate his investment decision-making discretion to a fund manager in accordance with section 34 of the 1995 Act. Therefore, the Trustee remains liable for any breach of his obligation to take care or exercise skill in the performance of any of his investment functions.

E.2.5 Duties under case law

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

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

170. 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

[11] PRP Limited has submitted, on the Trustee's behalf, that Mr Harris did so in his role as Plan Administrator, although I note that it was AC Management, not Mr Harris himself, that was the Administrator when the investments were made.

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."

171. 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...".

172. The Trustee has submitted that he relied upon AC Management and that he was assured by Mr Harris' qualifications and experience as a lawyer, professional trustee and administrator and so acted on Mr Harris' judgment in making the investments under the Plan. As I have explained in Section E.2.4 above, pension scheme trustees' investment duties can be delegated only in very limited circumstances and I have concluded in Section E.2.4 that the Trustee had not delegated his investment duties to Mr Harris in accordance with those requirements.

173. I find that, by investing the entirety of the Plan's assets in Park First and Store First without having taken investment advice and relying solely on the oversight of AC Management, the Trustee cannot be considered to have met the above requirements. I consider that the Trustee failed in his equitable duty to exercise due care in the performance of his investment functions. Attempting to invest all of the Plan's assets in Park First and Store First was high-risk in nature and there was a complete lack of diversification of investment, showing a lack of regard 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*.

E.3 Administration of the Plan

174. I shall consider below the acts and omissions of PRP Limited and the Trustee in relation to the Plan's administration.

E.3.1 PRP Limited

175. Mr Polli has described himself, in his submissions given on behalf of PRP Limited, as "an experienced person" who had taken on the role of Plan administrator as a "commercial challenge". Mr Polli has submitted that PRP Limited was appointed as the

Plan administrator to sort out the running of the Plan following AC Management's disappearance and a sustained period in which the Trustee had been unable to ensure the Plan's proper administration owing to his severe ill health.

176. Despite PRP Limited's appointment as the Plan administrator in 2016, the Applicants remained unable to obtain any meaningful information about their benefits under the Plan and were compelled to contact Store First or Park First, as applicable, in the hope of tracing their pension funds.

177. While Mr Polli has submitted that PRP Limited had worked to "claw back the supporting documents required to run the Plan", I have seen no evidence of any proper system of Plan administration being operated. For example, when Mr A spoke to an individual at PRP Limited's office and enquired about making a complaint, no one was able to advise him of the procedure that he should follow, despite the statutory requirement, under section 50 of the 1995 Act, for dispute resolution procedures to be in place in relation to an occupational pension scheme.

178. It is not in dispute that no meaningful information or annual benefit statements were provided to the Applicants, despite their requests for such information. In particular, when Mr A was trying to obtain information for legal proceedings, this was not made available to him. This caused Mr A significant problems as the court believed he was trying to hide assets from his ex-wife and it has caused him a great deal of distress and inconvenience.

179. I consider that, by taking on the role of Plan administrator, PRP Limited was required to carry out that administration with the necessary skill and care to ensure that the Plan was administered properly. It was maladministration for PRP Limited not to have done so.

180. PRP Limited's maladministration has taken place over a prolonged period, since its appointment as administrator in 2016, materially affecting the Applicants whose distress and inconvenience in losing their pension funds has been exacerbated by their inability to contact PRP Limited or obtain information concerning their funds.

E.3.2 The Trustee

181. The Trustee was required, under section 249A of the Pensions Act 2004, to "establish and operate an effective system of governance including internal controls". "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."

182. I have seen no evidence that the Trustee had in place, or operated, internal controls in relation to the Plan's administration. It is clear, from the Trustee's submissions, that he relied upon AC Management to administer the Plan and I have seen no suggestion that he took any steps during his office as Trustee to assure himself that AC Management or, later on, PRP Limited, were fulfilling their administrative duties adequately.

183. It is clear, under TPR's Code of Practice No. 13 (**Code 13**), that pension scheme trustees are required to take an active role in engaging with and managing any service providers whom they have appointed in relation to their pension scheme. For example, in the November 2013 edition of Code 13, which was in place when AC Management was the Plan's administrator, paragraph 214 provided that:

"Where services are outsourced, trustees need to establish and operate internal controls to manage these services and the integrity of financial information. Trustees should ask their service providers to demonstrate how their arrangements ensure that the scheme meets the relevant legal requirements in relation to the services provided.".

Similarly, paragraph 56 of the 2016 edition of Code 13 states that

"Trustee boards need to be confident that any service providers they appoint are operating in accordance with the legal obligations that trustee boards are required to meet".

184. It seems, that the Trustee had either failed to inform himself of the requirements under section 249A of the Pensions Act 2004, and the expectations placed on pension scheme trustees under the 2013 Code, or he disregarded those requirements and expectations.

185. The Trustee has submitted that his illness had seriously diminished his ability to fulfil his role and it seems that there was no administration carried out at all between AC Management's 'disappearance' and PRP Limited's appointment. I have seen no evidence that, during that time, the Trustee sought a replacement administrator for the Plan. In fact, given the Trustee's ill health and his inability to fulfil his role as Plan trustee or administrator, I cannot understand why he did not seek a replacement for himself or, as a last resort, inform TPR of the situation so that TPR could appoint an independent trustee to replace him. I consider that, by failing to carry out his duties in relation to the Plan and by taking no action to seek a replacement trustee, the Trustee was in breach of his equitable duty of care. Additionally, the Trustee acted in breach of section 249A of the Pensions Act 2004, and I find that the Trustee's failure to have regard to Code 13 amounts to maladministration.

E.4 Member consent / Contributory negligence

E.4.1 Member consent

186. The Trustee has submitted that the Applicants acted autonomously in choosing to transfer their funds to the Plan to be invested in Group First, and that I should consider the "ample case law to support the protection of the [Trustee] in circumstances of this nature". The Trustee has not referred to any specific case law himself. It is, however, 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). I shall consider this principle, and to what extent (if any) the Trustee might benefit from it, in paragraphs 187 to 210 below.

187. 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*."*

188. 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.*"*

189. Underhill and Hayton: Law of Trusts and Trustees[12] [13]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[14]"; "had full knowledge of the facts and knew what he was doing[15] and the legal effect thereof[16], 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

[12] Paragraph 1 of Article 95 of the 19th edition.
[13] 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).
[14] *Lord Montford v Lord Cadogan (1816) 19 Ves 635; Overton v Banister (1844) 3 Hare 503 at 506.*
[15] *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
[16] *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.

or acquiescing in) and it is not necessary (though it is significant[17]) that he should himself have directly benefited by the breach of trust[18]"; and "no undue influence was brought to bear upon him to extort the assent or release."

190. 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:

> *"*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*."*

191. The Trustee has submitted, essentially, that it was the Members' choice to invest under the Plan and that it was up to Members to take their own financial advice, or to take full responsibility themselves for their decision to transfer their pension funds into the Plan.

192. I note that there are statements, in the Plan's documents, which might suggest that the Members were informed of the facts, if those statements were to be taken at face value.

193. The declarations form (see Section A.7.2 above) contained the statement that, "I understand that it is in my best interests to seek advice from an appropriately qualified Financial Advisor regarding my future financial and retirement planning, however, I hereby confirm that I am comfortable in taking my own decisions and do not require advice in this respect.", as well as a statement that PRP Limited had provided the Member with no advice and that it would "establish the Pension on a "No Advice" Execution Only Basis [*sic*].".

194. On signing the client application personal information form (the **Client Information Form**), while the Applicants accepted that "the Trustees of the Scheme are solely responsible for all decisions relating to the purchase, retention and sale of the investments forming part of the Scheme", they agreed "to hold the Trustees fully indemnified against any claims in respect of such decisions.".

195. The Client Information Form also contained the statement that the Member understood and agreed that the funds were to be included in "appropriate arrangements, details of which were available on request". I have seen nothing to suggest that any Applicant was provided with any meaningful details of the Plan before they signed the application form. As each Applicant signed all of the Plan's paperwork on the same day, it would not have been possible for them to have requested and obtained details of the "appropriate arrangements", within which their funds were to be held before they signed the application form.

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[17] *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].

[18] *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.

196. The wording of the application form places all of the responsibility for all decisions relating to investments in the hands of the Trustee on the understanding that he will choose “appropriate arrangements”.

197. The Trustee has also submitted that individuals who wished to join the Plan were required to have “informed guidance [which it seems PRP Limited considered should amount to financial advice]…by the transferring Scheme.”. This is not the case. While the Applicants’ respective ceding schemes would have been required to identify certain ‘red flags’ in relation to the Plan[19] and to warn the Applicants of those, the respective ceding schemes were under no requirement to provide financial advice to the Applicants. This submission does not therefore assist the Trustee.

198. I have also considered the circumstances in which each of the Applicants joined the Plan and whether they were subject to any influence, at or before the time of joining the Plan.

199. Mr A stated at the Oral Hearing that he was introduced to the Plan by Mr Naseer, a relative who was living with him and his family, at a time when Mr A was in extremely poor health and attempting to make plans for his family’s financial security should he not survive his illness. Mr A submitted, under oath at the Oral Hearing, that Mr Naseer gave him personal assurances that the Plan was one of the “best schemes on the market” and, for this reason, he did not seek financial advice. Mr A has submitted that he was unaware that Mr Naseer was a director, and not merely an agent, of PRP Limited. Mr A, who had no investment experience himself, spoke of having been pressured by Mr Naseer to sign the paperwork to join the Plan and of not having had the chance to read through that paperwork before Mr Naseer took the signed copies away from him without leaving him with his own copy. It is clear that Mr Naseer’s behaviour influenced Mr A to sign the paperwork to join the Plan, without having had the opportunity to consider and understand how his money would be invested.

200. Mrs S was persuaded to join the Plan during a visit by Mr Dingsdale, a representative of the company that owned Park First and Store First, to Mrs S’ home. Mrs S had no background in pensions or investments and, by her own admission, she knew very little about pensions. Mrs S has submitted that Mr Dingsdale had informed her that she would be able to withdraw her entire fund from the Plan after one year, should she wish to do so.

201. In Mr S’ case, he was introduced to the anticipated benefits of the Plan investments, in this instance by Mr Gordon Campbell, a former Director of PRP Limited. Mr S was told that he would receive a guaranteed 8% return on his investment in both year one and year two, increasing to 10% in years three and four “with the first two years paid up front”, and that after five years he would have the option of selling his investment back to Parkfirst / Storefirst at its actual value rather than a discounted value.

[19] in line with the requirements of the guidance published in February 2013 by TPR under its Scorpion campaign.

202. PRP Limited and the Trustee have made submissions, alleging that each of the Applicants had sufficient knowledge of the investments under the Plan to allow them to give their informed consent to the investments. It should be noted that the Trustee was entitled to attend the Oral Hearing to provide evidence of this and to question the Applicants in relation to their level of knowledge. However, the Trustee chose not to do so.

203. Looking first at Mr S, PRP Limited and the Trustee have submitted that he had sufficient financial knowledge prior to joining the Plan to have enabled him to give his informed consent. I note that Mr S was employed in the financial services sector and that, (as the Trustee has pointed out) in his Application Form, he referred to his occupation as 'FA'. Companies House records show that Mr S established LDB Financial Limited on 30 May 2014 and his occupation is recorded as 'Financial Advisor'.

204. Mr S has explained that, when he completed his Application Form, he was not a financial advisor regulated to give pensions advice. LDB Financial was not set up to provide financial advice and has never been financially regulated. The nature of LDB Financial Limited's business as stated in those records[20] appears consistent with that submission. Having reviewed the accounts for this business that have been submitted to Companies House, it appears that this company has not functioned as a commercial activity. Mr S has informed TPO that, while he has been regulated by the FCA to provide pension and investment advice since April 2016, he did not consider himself sufficiently knowledgeable to make his own decisions before April 2016 and certainly not in early 2014 when he joined the Plan. TPO has found no record on the FCA's website of Mr S' having carried out any role with activities regulated by the FCA and/or the Prudential Regulation Authority before 11 April 2016. Mr S has informed TPO that he had worked in retail banking prior to transferring his pension fund to the Plan and had had no investment planning experience himself.

205. According to the Applicants, each of them was introduced to the Plan by individuals who had a clear interest in each Applicant joining the Plan. In respect of Mr A and Mr S, they were introduced to the Plan by a director and a former director respectively of the Principal Employer of the Plan. In Mrs S' case, her introducer, Mr Dingsdale, represented the very companies in which Mrs S' funds would be invested under the Plan. The fact that, in both Mr A's and Mrs S' cases, the meetings took place face to face, so precisely what was discussed went undocumented, concerns me.

206. The Trustee has alleged, in his defence, that Mr S was an 'introducer agent', with connections to the failed investment companies (see paragraphs 120.1 and 121.1 above). Mr S has denied that allegation, so it is up to the Trustee to meet the requisite standard of proof by persuading me that his allegation against Mr S is more likely than not to be true. The Trustee has submitted no evidence to substantiate his allegation against Mr S, or provided any explanation as to why any such evidence is unavailable.

[20] The nature of the business is described in Companies House's records as '66190 - Activities auxiliary to financial intermediation not elsewhere classified'.

I have seen no evidence to assist the Trustee, so I find that the Trustee has not met the civil standard of standard of proof.

207. Similarly, I do not accept the Trustee's allegation against Mr A, that Mr A was using the Plan to 'hide' money from his ex-wife. The Trustee has provided no evidence to support that allegation and it does not accord with Mr A's own account, which he gave at the Oral Hearing, of why he transferred his pension fund into the Plan (see paragraphs 28 to 30 above). Mr A has denied the Trustee's allegation and I have seen nothing to enable me to find that the Trustee's allegation is more likely than not to be true. Even if I were to accept the Trustee's allegation that Mr A's motives for joining the Plan had anything to do with his ex-wife, I do not consider that that would assist the Trustee in establishing any defence of member consent against Mr A. As I have set out in paragraph 199 above, Mr A received misleading and limited information concerning his investment under the Plan and cannot be said to have 'freely consented' to the Trustee's various breaches of trust that I have set out in Sections E.2 and E.3 above.

208. In *Re Pauling's Settlement Trusts* it was found that, due to the complicated action in question in that case, 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 made by a pension scheme, and the raft of legislation which governs those investments and the Trustee, who possessed the power to make them, are a complicated matter. None of the Applicants had any investment experience and none of them was a pensions professional. Instead, the Applicants placed their trust in the Trustee to invest their respective funds on their behalf and to do so safely, within the requirements imposed on pension scheme trustees, which I have set out in Section E.2 above. I question how any of the Applicants could have been expected to understand: that their pension fund would be invested in high-risk investments; or that the Trustee would do so without carrying out due diligence or taking investment advice.

209. I find, on the balance of probabilities, that: each of the Applicants lacked the full knowledge of the facts of the investment of their funds under the Plan; and they were unduly influenced by the respective individuals who introduced them to the Plan when they made their respective decisions to transfer their pension funds into the Plan.

210. On that basis, I find that none of the Applicants gave their free informed consent to the Trustee's multiple breaches of trust, so they are not prevented from taking action against the Trustee in respect of those breaches of trust.

E.4.2 Contributory negligence

211. I have found the Trustee to have committed multiple breaches of trust, as set out in Sections E.2 and E.3 above.

212. 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'" [21] .

213. As I have explained above in section D.3.6, duties imposed on the Trustee by case law required him to invest Members' funds prudently and with regard to Members' best interests. The Trustee has breached those duties and the breaches have caused the Members to lose their pension funds. As has been established in the case of *Target Holdings v Redfern* (see paragraph 6 above),

> "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."

214. On that basis, the Trustee is not entitled to rely upon any defence of contributory negligence against his liability for the consequences of his many breaches of trust.

E.5 The Trustee's liability

215. I have found the Trustee to have committed various breaches of trust by:

215.1. failing to act in accordance with the investment requirements and duties imposed on him by Part 1 of the 1995 Act, the Investment Regulations and case law (Section E.2); and

215.2. failing to comply with the requirements of section 249A of the Pensions Act 2004, and breach of his equitable duty of care (Section E.3).

216. I have also found that there was maladministration on the part of the Trustee, in failing to have due regard for the 2013 Code.

217. I shall now consider the effect of the statutory provisions under Section 33 of the 1995 Act (**Section 33**), and also, to the extent that Section 33 might not apply, for example in relation to the Trustee's administration breaches, the extent to which the Trustee might be able to rely on the exoneration provisions under the Trust Deed. Finally, I shall consider Section 61 of the Trustee Act 1925 (assuming it applies), and the extent to which the Trustee should be afforded relief under its provisions.

E.5.1 Section 33:

[21] 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]*.

218. 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".

219. The Trust Deed contained an exoneration clause and an indemnity for the Trustee, which I have set out in the Appendix to this Preliminary Decision. On joining the Plan, members signed an application form which contained the indemnity set out at paragraph 71 above.

220. 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*).

221. 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.

222. 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, 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.

223. I consider that the application form to join the Plan containing the indemnity in this case can properly be regarded as forming part of the documents comprising the Schemes. "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".

224. So, I consider that Section 33 applies to both the exoneration clauses under the Trust Deed and Rules and the indemnity given by members on joining the Plan[22].

225. This renders both the exoneration clauses and the indemnity ineffective in preventing the Trustee from being held personally liable for any loss suffered by members in relation to the Trustee's breach of his investment duties, imposed by statute (see Section E.2.3 above) and/or common law (see Section E.2.5 above) by having invested the Plan's assets in Park First and Store First.

226. However, for completeness, I shall consider also whether, or the extent to which, the Trustee might rely upon the exoneration clauses under the Trust Deed, in case any loss, other than that incurred by the Plan's members because of the Trustee's breach of his investment duties, has been caused by the Trustee's shortcomings.

E.5.2 Exoneration Clauses under the Trust Deed

227. The exoneration and indemnity clauses in the Trust Deed are as follows:

"8 Protection of Trustees

8.1 Liability of Trustees

a) Subject to section 33 of the Pensions Act (investment powers: duty of care), no Trustee shall be responsible, chargeable or liable in relation to the Scheme except in respect of:

i. an act or omission which the Trustee knew to be a breach of trust and which the Trustee knowingly and wilfully committed or omitted as the case may be; or

ii. (if the Trustee is engaged in the business of providing a professional trustee service for payment) his own negligence."

…

8.2 Indemnities

a) Without prejudice to the right to indemnity given to the trustees by law, each. Trustee is hereby indemnified by the Participating Employers (in

[22] It has also been acknowledged, in the Court of Appeal judgment of Robert Sofer v SwissIndependent 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).

such proportions as shall be determined by the Principal Employer after considering the advice of an Actuary) against all and any liabilities incurred in the execution, or professed execution, of the trusts of the Scheme and in the administration, management and winding-up of the Scheme except in respect of:

i. an act or omission which the Trustee knew to be a breach of trust and which he knowingly and wilfully committed or omitted as the case may be; or

ii. (If the Trustee is engaged in the business of providing a professional trustee service for payment) his own negligence.

228. Regarding the carve out from the exoneration and indemnity clauses above in relation to acts or omissions, "knowingly and wilfully committed or omitted", the leading case on the meaning of wilful default is *Re Vickery* [1931] 1 Ch 572 where Maugham J construed the words as meaning a "consciousness of negligence or breach of duty, or a recklessness in the performance of a duty". In *Armitage v Nurse* [1997] (**Armitage**), Millet LJ said that wilful default meant "a deliberate breach of trust" and that to establish wilful default "nothing less than conscious and wilful misconduct is sufficient". Referring to *Re Vickery*, he said:

> "The trustee must be conscious that, in doing the act which is complained of or in omitting to do the act which it said he ought to have done, he is committing a breach of duty or is recklessly careless whether or not it is a breach of his duty or not…A trustee who is guilty of such conduct either consciously takes a risk that loss will result, or is recklessly indifferent whether it will or not. If the risk eventuates he is personally liable. But if he consciously takes the risk in good faith and with the best intentions, honestly believing that the risk is one which ought to be taken in the interests of the beneficiaries, there is no reason why he should not be protected by an exemption clause which excludes liability for wilful default." [320]

229. 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." [322]

230. 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." [323]

231. 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".

232. 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.

233. 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…".

234. 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.

235. In the later case of *Fattal v Walbrook Trustees (Jersey) Limited* [2010] EWHC 2767 (Ch)[23], 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[24]. In *Fattal v Walbrook* 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.

236. 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.

237. Per paragraph 74 of *Ivey v Genting*:

> *"The test of dishonesty is as set out by Lord Nicholls in Royal Brunei Airlines Sdn Bhd v Tan and by Lord Hoffmann in Barlow Clowes: see para 62 above. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."*

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[23] 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, Barlow Clowes v Eurotrust International Ltd [2006] 1 WLR 1476 and Abou-Rahmah v Abacha [2006] EWCA Civ 1492.

[24] This was 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.

238. I have considered whether the Trustee's position should be regarded as analogous to that of a professional trustee and I have concluded that it should. The Trustee submitted, earlier in my investigation into the Applicants' complaints, that he had long-running experience as a trustee and he took on this role as sole trustee in relation to the Plan as a career development opportunity, referring to Mr Harris as his "mentor". While the Trustee has submitted that he was not paid for this role, it was clear, from his initial submissions, that he took it on for professional reasons, having previously held positions as a trustee in respect of a community organisation and a charitable trust (see paragraph 16 above).

239. Having had sight of the Preliminary Decision, the Trustee then changed the emphasis in his further submissions concerning his experience prior to taking on the role of Trustee, downplaying his previous trustee experience and stating that he had no financial services training, banking expertise or qualification in pensions law. The Trustee also submitted that he could produce psychiatric reports to show that he lacked sufficient intelligence to understand the situation that he was in, having been appointed as trustee of the Plan but, despite having had ample opportunity to do so, has failed to provide any evidence to support that submission (see paragraphs 127 to 133 above).

240. I note that both the Trustee and Mr Polli have stated that the Trustee took on the role for altruistic reasons. I have not seen direct evidence of the Trustee having been paid any fees, although I find it difficult to comprehend that he would have taken on the role of Trustee without receiving any financial award, given the responsibilities and risk involved in such a role. The absence of any evidence that the Trustee was paid any fees is not determinative in any case, carrying out a role with good intentions and acting in a professional capacity are not mutually exclusive. On that basis, I am satisfied that the Trustee is to be regarded as having been a quasi-professional trustee while in office as trustee of the Plan, so the test for dishonesty set out in *Fattal v Walbrook* and confirmed in *Ivey v Genting* applies here.

241. As I have explained, the applicable test, which has been developed by case law since *Armitage*, is partly objective. Here, the Trustee's honesty is called into question because he failed to: ask questions concerning his duties and necessary level of knowledge as a pension scheme trustee; and take independent advice before investing Members' pension funds in Park First and Store First. As an experienced trustee, it cannot have escaped the Trustee's notice that he was subject to fiduciary duties or that certain, specific, duties might have applied to him in his role as trustee of the Plan.

242. Although the nature of the objective test in *Walker v Stones*, which was accepted in *Fattal v Walbrook Trustees* is in some respects unclear (and where the court did not have the benefit of the Supreme Court's decision in *Ivey*), 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, which is supported by the test set out in *Ivey*[25]. For the

[25] Referring to the decisions in *Twinsectra* and *Barlow Clowes*, the Court of Appeal *in Group Seven & Anor v Notable Services LLP & Ors* [2019] EWCA Civ 614, stated that "any room for doubt on this point… has now been dispelled by the most recent high level case [of] *Ivey v Genting Casinos*"

reasons set out below in this Section E.5.2, I find that the Trustee's perception of the interests of the Plan's beneficiaries and his belief that he could rely entirely upon the Plan's administrator, without supervision, to carry out the Plan's investments and administration: failed to meet the objective standards of an ordinary, decent person in the Trustee's position; and was so unreasonable that no reasonable trustee could have held such a belief.

243. The subject of scrutiny is the investment of Plan funds in Park First and Store First which, as I have explained in Section E.2 above, did not accord with the Trustee's investment duties. The Trustee himself carried out no independent due diligence, instead taking AC Management's word that the investments were suitable. The Trustee has submitted that he was in a vulnerable and exposed position, having fallen under the influence of Mr Harris and other associates of AC Management and that he lacked the intelligence to realise that he was being misled. However, the Trustee, by his own admission, had ten years' prior experience as a trustee, so I cannot see how the existence, or at least the possibility of the existence, of a duty of care in relation to the handling of Members' funds can have escaped his notice. The Trustee has not submitted any evidence to support his submission that he was unduly influenced by Mr Harris or anyone else.

244. I have already found that the Trustee acted in breach of trust by: investing all of the Plan's assets in Store First and Park First (see Section E.2); and acting in breach of section 249A of the Pensions Act 2004 and of his equitable duty of care in failing to establish and operate an effective system of governance (see Section E.3). I have found also that the Trustee committed maladministration by failing to have due regard to the relevant provisions of Code 13, as explained in Section E.3.2 above. All of these breaches of trust or duty and maladministration are intertwined and have led, directly or indirectly, to the loss of Plan funds. Therefore while, for the reasons set out in Section E.5.1 above, the Trustee cannot benefit from the exoneration or indemnity under the Trust Deed in relation to his breaches of trust that concern the performance of his investment functions, I have considered together the Trustee's liability in relation to all of these breaches of trust or duty and finding of maladministration.

245. The Trustee has given only written submissions, having decided not to attend the Oral Hearing. He has submitted, or Mr Polli has submitted on his behalf, that he relied heavily on Mr Harris' professional experience and that he would not have taken on the role of Trustee had AC Management not been in place as the Plan's administrator. The Trustee's submissions regarding his level of understanding of his duties as trustee of the Plan and his attempts to gain the knowledge necessary to fulfil his duties as a pension scheme trustee have been inconsistent and call into question the honesty with which he made them, as I shall explain in paragraphs 246 to 250 below.

246. The Trustee initially submitted that he did his best to stay up to date with the requirements placed on him as a pension scheme trustee, although I have seen no evidence that the Trustee had taken any proper steps to inform himself of the raft of legislative and common law requirements that applied to him as a pension scheme trustee. The Trustee did not elaborate on this submission, providing no detail of the

steps that he took to so inform himself. By contrast, in his later submissions, which he sent to TPO once he had seen the Preliminary Decision, the Trustee stated that he lacked the expertise and intelligence to know that he should have sought his own independent guidance with regard to the fulfilment of his duties as trustee of the Plan.

247. Had the Trustee carried out any research at all into his role as trustee of the Plan, I do not consider that it could have escaped his notice that he, not Mr Harris, held the legal title to the Plan's funds and that the duties and requirements in relation to the handling of those funds applied to him alone, as the sole trustee of the Plan. For example, a simple internet search in relation to a pension scheme trustee's duty would have brought up TPR's trustee guidance. If the Trustee's later submissions that he genuinely could not see the need to seek independent guidance himself are to be believed, then I cannot accept that he had taken any steps to educate himself in relation to the duties and requirements that applied to him as a pension scheme trustee as he originally claimed he had done. The inconsistencies in the Trustee's submissions call into question the credibility of those submissions.

248. As explained in Sections E.2 and E.3 above, the Trustee chose to take Mr Harris' word that Park First and Store First would be profitable investments. The Trustee's perception of Mr Harris, as trustworthy, experienced and qualified, does not appear to have been based upon any due diligence carried out by the Trustee whatsoever. In fact, searches that my office has conducted in relation to Mr Harris and AC Management have not brought up any indication that that individual or his company had any FCA authorisation or qualifications relevant to investing pension funds.

249. The Trustee has submitted that he knew so little of the requirements of his role as trustee of the Plan that he did not even realise that he was required to act in the Members' best financial interests in investing their funds, believing instead that it was the Members' own responsibility to make such investment decisions. I consider that the Trustee could only possibly have sustained such a belief by turning a blind eye and refraining from asking obvious questions. He closed his eyes and ears for fear of learning information he would rather not know, that is, he was under certain fiduciary and statutory duties which, if fulfilled, would have forced him to conclude that the investments under the Plan were not in Members' best financial interests, so that investing in that manner would have amounted to acting in breach of his fiduciary duties.

250. A reasonable and honest trustee in the Trustee's position would have raised questions to assure himself that the investments in Park First and Store First were in Members' financial interests and that those actions accorded with his duties and obligations as Trustee. The failure to ask those questions was dishonest, not because it was negligent not to ask, but because any honest, reasonable trustee would have asked them. The Trustee's submissions that I should take into account the fact that he was working as a volunteer and that his lack of experience left him vulnerable and exposed do not therefore assist him.

251. I have found that the Trustee failed to take proper investment advice concerning the investments in Park First and Store First. Any advice that the Trustee may have received in that regard came from Mr Harris. Without any proper professional advice, I cannot see how the Trustee could reasonably have believed or been confident that these transactions were in Members' interests. I do not consider that any reasonable and honest trustee, acting in the Members' interests, would have made a decision concerning the investment of the Members' pension funds on that basis.

252. Further, the Trustee has submitted that his ill health actually prevented him from fulfilling his role as Trustee, but it is apparent that he took no steps to recruit a replacement trustee or to inform TPR of the situation, which was, essentially, that there was no active trustee in place in relation to the Plan.

253. I conclude, on the balance of probabilities, having regard to the evidence and submissions received, that the Trustee's purported belief that paying Members' funds solely to Store First and Park First was in the Members' best financial interests, and his failure to: take proper advice on the matter; inform himself of his responsibilities and duties as a pension scheme trustee; and take any action at all to ensure that the Plan was administered effectively, or to appoint a replacement trustee when he became unable to carry out his duties, failed to meet the objective standards of an ordinary, decent person in the Trustee's position. Such a person would have made enquiries himself, independently of Mr Harris, into the duties that applied to him as a pension scheme trustee and, having made those enquiries, could not have concluded that investing Plan funds as he did or leaving the Plan's administration in the hands of AC Management, without conducting any checks himself to ensure that the Plan was being administered properly, was fulfilling those duties. Therefore, applying the test for honesty as set out in *Ivey v Genting* (see paragraph 237 above), I find that the Trustee committed the breaches of trust and acts of maladministration, set out in this Determination and summarised in paragraph 244 above, dishonestly. Looking at the test as expressed in *Fattal* (see paragraph 235 above), I find that the Trustee's belief that his acts and omissions were in the Members' best financial interests was 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 the Trustee was recklessly indifferent as to whether his various breaches of trust and his maladministration were contrary to the interests of the beneficiaries.

254. I have also considered the subjective test set out in *Armitage*, which would apply if the Trustee were not to be regarded as a quasi-professional trustee. As I have explained, the Trustee's failure to make even basic enquiries as to the existence of any duties or obligations imposed on him as Trustee, or to take any steps to put in place a capable trustee when he became unable to fulfil that role himself, clearly amounts to reckless indifference regarding his duties and obligations as Trustee, such that he is unable to rely on clause 8 of the Trust Deed and Rules in respect of any of my findings of breach of trust, breach of his equitable duty of care or maladministration.

255. It is also established, in *Armitage*, 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". As I have already found, having undertaken no meaningful due diligence in respect of Store First and Park First, the Trustee cannot be said to have acted in good faith, as he had no knowledge of the level of risk to which he was exposing the Members.

256. Even if the Trustee's role, as trustee of the Plan, were not to be considered analogous to that of a professional trustee, meaning that the test for honesty had to be entirely subjective, I find that the Trustee would still be unable to rely on the exoneration clauses under the Trust Deed, for relief from liability resulting from any of the breaches of trust, or from the maladministration, that I have found the Trustee to have committed.

E.5.3 Section 61

257. Under Section 61 I may direct relief, wholly or partly, of a trustee's personal liability if it appears to me that: (1) the trustee acted honestly and reasonably; and (2) it would be fair to excuse the trustee from personal liability, having regard to all the circumstances of the case.

258. I had intended to consider any evidence, or representation, that the Trustee might have put forward in support of the application of Section 61 at the Oral Hearing, but I was unable to do so as the Trustee did not attend the Oral Hearing. Assuming that Section 61 could still apply, despite my finding that the Trustee is prevented from relying upon the exoneration provisions under the Trust Deed and/or any indemnity given under the Trust Deed and in the Members' application forms, I have, however, taken into account the Trustee's written submissions received from him and from his representative.

259. I shall address here the Trustee's submission that, in citing and following the case law set out above in Section E.5.2 and in failing to refer to any case law in support of trustees in his position, I have acted in a biased manner. The Trustee has not referred to any specific case law, either by name or by description. In the Trustee's view, his position was that of an inexperienced trustee who had fallen under the influence of people known to him and was therefore exposed and vulnerable. The Trustee has likened his position to that which I have found applied to the Applicants (see Section E.4 above).

260. The Trustee's position, as trustee of the Plan, was far removed from that of the Applicants, as Members. Whether or not he was paid for his services, the Trustee chose to take on the role with his wider and further career in mind. As trustee of the Plan, the Trustee was entrusted by the Members, including the Applicants, with investing and safeguarding their pension funds. The applicable case law, when considering whether the Trustee acted dishonestly, is that set out in Section E.5.2 above and, having applied the applicable case law, I have found the Trustee to have acted dishonestly.

261. Commentary on Section 61[26] states that Section 61 was designed to protect honest trustees. While case law exists as authority that Section 61 ought not to be construed in a narrow sense[27], all of the requirements set out in Section 61, as stated in paragraph 257 above, must be met in order for it to apply.

262. Having already found, in Section E.5.2 above, that the Trustee failed to act honestly or reasonably, I cannot see that the criteria set out in Section 61 can apply to the Trustee's acts or omissions. In addition, even if I had not found the Trustee to have acted dishonestly, I could not have found that the Trustee's acts or omissions were reasonable.

263. I find that the Trustee is unable to rely on Section 61 for any relief from personal liability for the various breaches of trust that I have found him to have committed.

Decision

264. I find that the Trustee has breached his investment duties under common law and statute, including the requirement to have regard to the need for diversification of investments under Regulation 7(2) of the Investment Regulations, and the requirement to obtain proper advice in writing before investing scheme assets, under section 36 of the 1995 Act (see Section E.2 above). In failing to fulfil the requirements of section 36 of the 1995 Act, the Trustee acted in breach of Clause 11.6 of the Trust Deed (see Section E.2.2 above).

265. The Trustee failed to have in place the necessary internal controls to ensure the sound administration of the Plan, despite being required to do so under section 249A of the Pensions Act 2004 (see Section E.3 above). I find that this amounts to breach of trust on the Trustee's part.

266. In failing to take any steps to seek or appoint a replacement for himself as Trustee when he became too ill to carry out that role, and in failing to alert TPR of the fact that no active trustee was in place in relation to the Plan, the Trustee failed to fulfil his equitable duty of care (see Section E.3 above).

267. I have found that the Trustee's actions and omissions were neither honest nor reasonable and it would not be fair to excuse him for the breaches of trust that he has committed. The Trustee, having acted dishonestly and unreasonably, is not entitled to any relief from personal liability for the financial consequences of his breaches of trust.

268. PRP Limited failed to provide the Applicants with Plan information when requested to do so and I have found that this, as well as PRP Limited's failure to administer the Plan properly, amounts to maladministration.

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[26] 'Underhill and Hayton: Law of Trusts and Trustees', 20th edition, at paragraph 97.2.

[27] *Re Allsop [1914] 1 Ch 1* at 11; *Re Grindey [1898] 2 Ch 593* at 601.

269. My power to award redress, including those to recognise distress and inconvenience, comes from s151(2) Pension Schemes Act 1993:

> "Where the Pensions Ombudsman makes a determination under this Part or under any corresponding legislation having effect in Northern Ireland, he may direct the trustees or managers of the scheme concerned to take, or refrain from taking, such steps as he may specify…"

270. A number of appeals have considered the exercise of this power in relation to non-financial injustice, commenting that the effect of inflation should be reflected in the level of the awards made in respect of distress and inconvenience. In the High Court case of *Baugniet v Capita Employee Benefits Ltd* [2017] EWHC 501 (Ch), HHJ Simon Barker QC suggested an increase from £1,000 to £1,600 as being broadly in line with inflation. In *Smith v Sheffield Teaching Hospitals NHS Foundation Trust* [2017] EWHC 2545 (Ch), Norris J made similar comments in relation to the effect of inflation, adopting £1,600 as the upper limit and going on to increase the award made by the Deputy Ombudsman from £500 to £2,750. The judge highlighted several instances of maladministration, occurring over a long period, which was material to the likely level of distress.

271. In the Smith judgment, Norris J specifically discussed (at para 31) the Ombudsman's then current Factsheet 'Guidance on redress for Non-Financial Injustice' and considered that the levels referred to therein warranted updating for inflation. He then awarded £2,750 to reflect the severity of the maladministration (that it fell above the 'non-exceptional' level).

272. It was as a direct result of the judges' comments in the *Smith* and *Baugniet* cases that I decided to increase the limit in the various Non-Financial Injustice categories and my office published a new Factsheet (the **Factsheet**) in September 2018. This adjusted the upper limit for non-exceptional awards to £2,000. Both sets of guidance, and indeed the judgment in Smith too, commented on the fact that the Ombudsman had occasionally awarded more than £2,000 in the past (that is for 'Exceptional' cases). See, for example, *Lambden* (74315/3) and *Foster* (82418/1) where awards of £5,000 and £4,000 respectively were made for non-financial injustice, or more recently, *Ms R* (PO-18157) where £3,000 was awarded.

273. A review of the Factsheet and the Determination clearly shows that a high number of 'severe' and 'aggravating' factors are present in this case. By any standard, this is an 'Exceptional' case even without or before considering the specific individual circumstances of the Members affected by the Respondents' actions over a number of years. Moreover, Mr A, who attended the Oral Hearing, gave persuasive and unchallenged testimony about the impact on his life of the Respondents' actions, which had included the loss of his house.

274. The circumstances of the complaints, including the Trustee's and PRP Limited's maladministration, have clearly caused the Applicants an exceptional level of distress and inconvenience over a prolonged period. They were significantly misled as to the

nature and security of the investments into which they were entering. In addition, they were unable to obtain information concerning their pension funds and have lost significant sums, which has affected their quality of life detrimentally. I consider that Mr A's particular circumstances warrant the level of his award for non-financial injustice being higher than that of the other two Applicants and this is reflected in my Directions in paragraph 278 below.

Directions

275. Within 28 days of the date of the Determination, the Trustee shall, subject to the conditions set out in paragraphs 276 and 277 below:

275.1. pay into the Plan:

275.1.1. £200,163.09, being the total amount of the funds transferred into the Plan by the Applicants, respectively; less

275.1.2. £14,000, being the total amount of the payments made to Mr A from Group First (see paragraph 42 above); plus

275.1.3. interest at the rate of 8% per annum simple to the date of payment; and

275.2. calculate the total amount transferred into the Plan by the Members other than the Applicants and pay that amount into the Plan.

276. In the event that the Trustee does not comply fully or at all with any of the directions in paragraph 275 above, the Trustee will account to the Plan, or to any independent trustee appointed by TPR, for any amount outstanding.

277. It is my hope that TPR will appoint an independent trustee to take over as trustee of the Plan as soon as practicable. In the meantime, any amount paid into the Plan in accordance with paragraphs 275 and 276 above is to be held within the Plan on trust for the benefit of all of the Members until any independent trustee appointed by TPR is able to pay those funds to the Members.

278. For the exceptional maladministration causing injustice, within 28 days of the date of my Determination:

278.1. The Trustee shall pay:

278.1.1. £10,000 to Mr A; and

278.1.2. £7,000 to each of Mr S and Mrs S; and

278.2. PRP Limited shall pay £3,000 to each of the Applicants.

279. Following the Trustee's full compliance with the directions under paragraphs 275 to 278 above, should any Member subsequently receive financial recompense from the Store First and Park First investments, the Trustee will be entitled to recover that amount.

Reporting to TPR

280. On issuing this Determination, I intend to pass a copy of it to TPR in relation to: the Trustee; PRP Limited; and Mr Polli, in his capacity as current trustee of the Plan.

Anthony Arter CBE

Deputy Pensions Ombudsman
7 August 2023

Appendix

Relevant extracts from the Trust Deed

Clause 3 Establishment:

"3.1 Purpose of the Scheme is to:

a) Provide benefits as described in section 150(1) of the Finance Act 2004 for and in respect of Members; and

b) Undertake retirement benefits activities as defined in section 255 of the Pensions Act 2004"

Clause 5 Appointment and removal of Trustees:

"5.3 Retirement of resignation of trustees

A trustee may retire or resign subject to the written consent of the Principal Employer. On the receipt of consent from the Principal Employer, the trustee will cease to hold office and be removed from the trusts of the Scheme. The remaining trustees may act notwithstanding a vacancy in their number.

Clause 6 Trustees' proceedings:

"6.3 Trustees' meetings

The Trustees will meet together not less than once in each Scheme Year.

…

6.7 Exercise of powers by individual Trustees

Where the Trustees are or include individuals, their powers, duties, authorities and directions will be exercised:

a) By resolution passed at a meeting of the Trustees; or

b) By written resolution signed by all the Trustees provided that due notice shall have been given to the all the Trustees individually. Any such resolution may consist of one or more documents in similar form each signed by one or more of the Trustees.

…

6.10 Records of Trustee proceedings

a) The Trustees shall keep minutes of all Trustees [*sic*] meetings (including meetings of any of their numbers), and they will keep such records as shall comply with section 49 of the Pension Act 1995 and the Occupational Pension Schemes (Scheme Administration) Regulations 1996 or any other relevant legislative requirements at the time.

b) The Trustees may require any Participating Employer, Member of other Beneficiary to supply any information as to salaries benefit entitlements (including those arising under any other Registered Pension Scheme) and other relevant information, dates of joining or leaving any employment, births, deaths, marriages, civil partnership, divorces, dissolutions of civil partnerships, adoptions and court orders, evidence of a Beneficiary's continued existence and such other information as is required by the 1995 Act or the Finance Act 2004. The Trustees may make the supply of appropriate certificates or other evidence a condition of payment of any benefits.

Clause 7 Trustees' Duties and Powers

"7.3 Administration of the Scheme

The administration and management of the Scheme shall be vested in the Trustees. AC Management and Administration Limited (company registration number 08049180) whose registered office is situated at 4 Alexandra Road, Gorseinon, Swansea, SA4 4NW will continue to act as the Administrator for the purpose of section 270 of the Finance Act 2004 unless another person of body is appointed by the Trustees to act as Administrator in their place (or the Trustees select to [*sic*] as Administrator in their place).

Clause 8 Protection of Trustees

8.1 Liability of Trustees

a) Subject to section 33 of the Pensions Act (investment powers: duty of care), no Trustee shall be responsible, chargeable or liable in relation to the Scheme except in respect of:

i. an act or omission which the Trustee knew to be a breach of trust and which the Trustee knowingly and wilfully committed or omitted as the case may be; or
ii. (if the Trustee is engaged in the business of providing a professional trustee service for payment) his own negligence.

b) Subject to section 33 of the Pensions Act (investment powers: duty of care), no director. officer or other employee of a corporate trustee shall be responsible, chargeable or liable in relation to the Scheme except in respect of:

i. an act or omission which the Trustee knew to be a breach of trust and which the Trustee knowingly and wilfully committed or omitted as the case may be; or

ii. an act or omission which the director, officer or employee of the corporate trustee knew to be a breach of trust and which he knowingly and wilfully committed or omitted as the case may be; or

iii. if the director, officer or employee of the corporate trustee is engaged in the business of providing a professional trustee service for payment) his own negligence;

PROVIDED THAT in either case, to the extent that it is prohibited by section 232 of the Companies Act 2006 (provisions protecting directors from liability), no director of a corporate trustee shall he exempted from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust by him in relation to the corporate trustee.

c) For the avoidance of doubt, each of sub-clause 8.1 a) and b) is to be regarded as a separate provision for the purposes of sections 232 to 235 of the Companies Act 2006, and if all or any part of sub-clause 8.1 a) and 8.1 b) shall be found to be void or otherwise invalid or unenforceable, this shall not affect the legality, validity or enforceability of the remainder of the sub-clause, provision or other elements of the provision (as the case may be).

d) Sub-clause 8.1 a) applies to current and former trustees and sub-clause 8.1 b) applies to current and former directors, officers or other employees of a current or former corporate trustee.

e) This clause 8.1 shall be interpreted in relation to any professional trustee (including corporate body) to have effect only where such trustee acts in accordance with the reasonable care and skill typically expected of a professional acting as an independent trustee.

8.2 Indemnities

a) Without prejudice to the right to indemnity given to the trustees by law, each Trustee is hereby indemnified by the Participating Employers (in such proportions as shall be determined by the Principal Employer after considering the advice of an Actuary) against all and any liabilities incurred in the execution, or professed execution, of the trusts of the Scheme and in the administration, management and winding-up of the Scheme except in respect of:

i. an act or omission which the Trustee knew to be a breach of trust and which he knowingly and wilfully committed or omitted as the ease may be; or

ii. (If the Trustee is engaged in the business of providing a professional trustee service for payment) his own negligence.

b) Without prejudice to the right to indemnity given to trustees by law, each director, officer or other employee of a corporate trustee is hereby indemnified by the Participating Employers (in such proportions as shall be determined by the Principal Employer after considering the advice of an Actuary) against all and any liabilities incurred in the execution, or professed execution, of the trusts of the Scheme and in the administration, management and winding-up of the Scheme except in respect of:

i. an act or omission which the director, officer or other employee of a corporate trustee knew to be a breach of trust and which he knowingly and wilfully committed or omitted as the case may be; or
ii. (if the director, officer or other employee of a corporate trustee is engaged in the business of providing a professional trustee service for payment) his own negligence; or
iii. Any liability set out in sections 235(3) to (6) inclusive of the Companies Act 2006.

c) Sub-clause 8.2 a) applies to current and former trustees and sub-clause (b) applies to current and former directors, officers or other employees of a current or former corporate trustee.

d) The indemnities set out in 8.2 a) and b) above will not extend to any liability if that liability is covered by a policy of insurance effected under clause 7.5.

e) For the avoidance of doubt, each of sub clause 8.2 a) and b) is to be regarded as a separate provision for the purposes of sections 232 to 235 of the Companies Act 2006, and if all or any part of sub-clauses 8.2 a) or b) shall be found to be void or otherwise invalid or unenforceable, this shall not affect the legality, validity or enforceability of the remainder of the sub-clause, provision or other elements of the provision (as the case may be).

8.3 Legal proceedings

The Trustees may (but will not be obliged to) bring, pursue or defend any legal proceedings in relation to the Scheme.

9. Trustees [*sic*] Remuneration

9.1 A Trustee who is engaged in the business of providing a professional trustee service for payment may charge and be paid for his services or those of his firm provided in connection with the Scheme, on a basis agreed with the Principal Employer. These charges will be paid from the Fund or if the Principal Employer so decides by the Principal Employer.

9.2 Any trustee not engaged in the business of providing a professional trustee service may be paid such expenses and remuneration for his services provided in connection with the Scheme as may be agreed by the Principal Employer.

Clause 11 Investment of the fund

"11.1 General power of investment

Subject to clause 11.4 and clause 11.6, the Trustees may invest the fund in accordance with section 34(1) of the 1995 Act (power of investment and delegation) as if they were the sole absolute and beneficial owner of the Fund and may realise, vary, transpose or retain any such investment as they from time to time determine. Investments may be made within or outside the United Kingdom whether or not they involve liability on the Fund, or produce income or are expressly authorised by law for the investment of trust monies.

11.2 Particular powers of investments

Without prejudice to the Trustees' general power of investment at clause 11.1 and subject to action 35 of the Pension Act 1995 (investment principles) and to clause 11.4 and clause 11.6, the Trustees may invest or apply all of part of the Fund in:

…

k) Pooling assets with those of other investors, but only with the consent of the Principal employer if the pool is not one which is available generally for investment by such schemes."

…

11.4 Members' powers of Investment

a) The Trustees shall make available such choice of investment funds (if any) for the investment of Members' Accounts as they see fit from time to time and may withdraw or alter such choice entirely at their discretion and without the consent of the Members.

b) Each Member may select and deselect by written notice to the Trustees, one or more investment funds in which his Member's Account is deemed to be invested in accordance with the terms and conditions specified from time to time by the Trustees for this purpose.

c) If a Member does not select an investment fund under clause 11.4 b) in respect of all or part of his Member's Account, all or the balance of his Member's Account shall be deemed to be invested in the appropriate Default Fund.

d) The Trustees shall not be required to advise on the performance of the investment fund or funds selected by any Member or any Default Fund or Funds or which apply in accordance with clause 61 [*sic*]) and shall not be liable for any loss suffered as a result of the investment performance of any investment fund.

e) The Trustees may at any time, without the consent of the Member, change the investment fund or funds, or the Default Fund or Funds, in which a Member's Account (or any part of it) is deemed to be invested or in which any future contributions will be deemed to be invested to an investment fund or funds, or a Default Fund or Funds, of the Trustees' choice if such a change applies generally in relation to all Members or any category of Members, or the Trustees consider that it is inappropriate in the particular circumstances applicable to a Member to continue to act upon the Member's previous selection or de-selection.

f) The Trustees shall not be bound to give effect, or continue to give effect, to the exercise of any such selection or de-selection if they are notified of the Member's death. The Trustees may first require sight of the Member's death certificate for this purpose but will not be obliged to do so.

g) For the avoidance of doubt, clause 11.4 b) confers a power to make investment decisions on the Member in respect of the investment funds selected by him for the investment of his Member's Account, and is not a delegation of the Trustees' power of investment to the Member. Subject to the remainder of this clause 11.4, the Member shall have sole discretion as to his choice of investment funds pursuant to clause 1 [sic1.4 b), and the Trustees shall not be responsible or liable in respect of such choice.

…

11.6 Restrictions on investments

The Trustees will exercise the powers of investment in this clause O [*sic*] in accordance with sections 36 and 36A of the 5 Act (choosing investments and restriction on borrowing by trustees) and the Occupational Pension Schemes (Investment) Regulations 2005.

a) The Trustees will comply with section 40 of the 1995 Act (restriction on employer-related investments), and any regulations made under that section.

b) No loan may be made to any of the Participating Employers.

c) The Trustees must not engage in any trading activity which may prejudice the Scheme's Registered Status.