CAS-39170-Y5Q0

Ombudsman's Determination

Applicant	Mr S
Scheme	Plumbing & Mechanical Services (UK) Industry Pension Scheme (**the Scheme**)
Respondents	Plumbing Pensions (UK) Limited as trustee of the Plumbing and Mechanical Services (UK) Industry Pension Scheme (**the Trustee**), and Plumbing Pensions (UK) Administration Limited (**the Administration Company**)

Complaint Summary

1. Mr S' complaint concerns a proportionate share of the Scheme's funding deficit, estimated to be £283,000 (the **sum**), which the Trustee is seeking from him after an employer debt was triggered under section 75 and 75A of the Pensions Act 1995 (**a** "**section 75 debt**"). In particular:-

    1.1. The sum is not recoverable by the Trustee, as recovery is time barred under the Limitation Act 1980 (**the Limitation Act**) or the Prescription and Limitation (Scotland) Act 1973 (**the 1973 Act**).

    1.2. The sum is unactionable, irrespective of whether or not Prescription/Limitation applies, and cannot be pursued because of the conduct of the Trustee since 2005. In particular, it pursued a policy of ignoring its legal obligations under the debt regulations and attempting to convince Parliament to change the relevant legislation. Participating employers were not made aware of this and were deliberately misinformed. He would not have taken action to trigger a section 75 debt by virtue of incorporation of his business but for this "unilateral policy" on the part of the Trustee.

    1.3. The sum is unactionable, irrespective of whether or not Prescription/Limitation applies, and cannot be pursued because the Trustee provided his wife, (**Mrs S**), with misleading and incorrect information concerning the impact of the incorporation of his business from sole trader to a limited company.

1.4. The situation, he now finds himself in, is the result of the Trustee's failure to properly manage conflicts of interests on the Trustee Board (**the Board**).

Summary of the Ombudsman's Determination and reasons

2. The complaint is partly upheld against the Trustee because:-

2.1. The seven-year delay in notifying Mr S that a section 75 liability had been triggered as a result of an employment cessation event, and in commencing the process of determining the amount in accordance with the legislation relating to employer debts, constitutes maladministration. This has resulted in Mr S sustaining non-financial injustice (distress and inconvenience). Mr S was deprived of the opportunity to order his financial affairs and take steps to address the section 75 debt at an earlier date as a consequence of these failures.

2.2. The Administration Company, as agent of and on behalf of the Trustee, assumed a duty of care to Mr S. There was a breach of that duty of care. It was reasonable in the circumstances of this case for Mr S to rely on the information (without taking further specialist advice or seeking further confirmation in writing). The inaccurate information was relied on by Mr S to his financial detriment.

Detailed Determination

3. Where a reference is made to submissions being made by or on behalf of the Trustee it should be assumed, unless the contrary is stated, that the same submissions are being made on behalf of the Administration Company.

Jurisdictional Issues

4. As Pensions Ombudsman my core jurisdiction comprises broadly investigation and determination of:

4.1. complaints by actual or potential beneficiaries that they have sustained injustice as a consequence of maladministration in connection with an act or omission of trustees, managers and administrators of occupational or personal pension schemes (section 146(1)(a) Pension Schemes Act 1993, as amended (**the 1993 Act**); and

4.2. disputes of fact or law between actual or potential beneficiaries and trustees and managers and employers of occupational or personal pension schemes (section 146(1)(c) 1993 Act).

5. The expression 'maladministration' is a wide-ranging term and can include breaches of law. However, the courts have confirmed that the expressions are neither

synonymous nor coterminous. There can be breaches of law which do not amount to maladministration (and vice versa).

6. Existing case law has established that, in relation to complaints of maladministration involving an infringement of a legal right or disputes of law, I should determine these in accordance with established legal principles. Broadly, I should not come to a different decision to that which a court would reach in relation to the same decision, and the directions I make should also be substantially the same as the remedies a court would make in the same circumstances.

7. I also have jurisdiction to make reasonable awards for non-financial injustice sustained as a consequence of pure maladministration in circumstances where a court would not have similar powers.

8. Given that the Scheme in this case is established under Scottish trusts and governed by Scottish law I have had to consider a number of principles of Scottish law and also Scottish statute law to determine this case.

9. There is also very extensive case law relating to my jurisdiction where my decisions have been appealed to the courts in England and Wales, Scotland, and Northern Ireland. To the extent that the decisions are not made by the Court of Session but by the High Court or Court of Appeal in England or Wales, or the Court of Appeal in Northern Ireland, these cases are persuasive authority on appeal to the Court of Session.

10. The law of negligence is a sub-category of the law of delict under Scottish law. My understanding is that broadly, the principles of negligence and negligent misstatement are the same in English and Scottish law. Many of the key cases in this area are Supreme Court and House of Lords decisions which apply in both England and Scotland. To the extent that I refer to other English authorities, I recognise that they are only persuasive authority to which I can have regard in determining Mr S' case.

Employer Debt Requirements – History

11. The employer debt requirements, now found in the Pensions Act 1995, as amended (**the 1995 Act**) (and equivalent provisions in Northern Ireland), are part of an integrated UK wide regime (covering England & Wales, Scotland and Northern Ireland) introduced from 6 April 2005.

12. Further employer debt requirements were introduced by the Government from 11 June 2003. On a scheme wind up with a solvent employer, the employer had to meet the scheme liabilities on an annuity buy-out basis. Following a further change in law, all employer cessation debts on or after 2 September 2005, were calculated on a full annuity buy-out basis. Consequently, when an employer of a multi-employer occupational pension scheme ceased to participate in a scheme, an employer debt was triggered equal to the employer's share of the debt on an annuity buy-out basis.

13. In the case of a centralised non-segregated scheme for non-associated employers, such as the Scheme, there are many "orphan liabilities" which do not relate to particular employers. Broadly, the remaining employers, who continued to participate after the method of calculating liability was changed to an annuity buy-out basis, remain potentially liable to fund these orphan liabilities.

Employer Debt Requirements – Current Law

14. The Occupational Pension Schemes (Employer Debt) Regulations 2005 (**the Employer Debt Regulations**), as amended, currently set out the circumstances in which an employer debt under section 75 (as modified by section 75A) of the 1995 Act, (**Section 75**), is to be treated as due from an employer (or former employer) in relation to a multi-employer scheme.

15. The employer debt regime under Section 75 applies, on a UK wide basis, to trust-based occupational pension schemes. The Employer Debt Regulations are complicated and use multiple definitions which determine when an employer is liable for a section 75 debt and the extent of the employer's liability.

16. An "employment cessation event" occurs where an employer has ceased to employ at least one person who is an active member of the multi-employer scheme and at least one other employer, who is not a defined contribution employer, continues to employ at least one active member of the scheme.

17. Where the value of the assets of the scheme is less than the value of the scheme liabilities at that time, an amount equal to the employer's "share of the difference" is treated as a debt due from the employer. Broadly, the share of the difference is equal to the "liability share." It is a fraction equal to the proportion of the liabilities of the scheme, attributable to the employer, over the total liabilities of the scheme, calculated by reference to the cost of purchasing annuities to secure those liabilities outside the scheme. As it includes a share of the orphan liabilities, the remaining employers are liable for a share of the liabilities relating to former employees of other employers.

18. The High Court in England and Wales ruled in the case of Phoenix Venture Holdings Ltd v Independent Trustee Services Ltd [2005] EWHC 1379 (Ch) (20 May 2005) (**the Phoenix case**), that the section 75 debt cannot be claimed, or enforced, until it has been calculated.

19. Regulation 5(18) of the Employer Debt Regulations provides that the amount of the liabilities of a scheme which are to be taken into account for the purposes of section 75(2) and (4) of the 1995 Act, must be certified by the actuary in the form set out in Schedule 1 to the Employer Debt Regulations.

20. Under the Employer Debt Regulations, the term "employer" includes former employers. Regulation 9 (3)(c)(iii), broadly provides that an employer shall not be treated as a former employer liable for its share of the section 75 debt if an employer cessation event has occurred and one of the "conditions A-K" is met.

21. Regulation 9 (14) of the Employer Debt Regulations states:

> "Condition I is that a debt was treated as becoming due from him under section 75(2) or (4) of the 1995 Act but at the applicable time it is excluded from the value of the assets of the scheme because it is unlikely to be recovered without disproportionate cost or within a reasonable time."

22. The Pension Protection Fund (**PPF**) was set up with effect from 6 April 2005 to provide a minimum level of compensation where an employer becomes insolvent and is unable to fund the cost of securing the liabilities of a defined benefit (**DB**) pension scheme on wind up. The Pensions Act 2004 includes a provision designed to prevent employers compromising pension scheme liabilities. Regulation 2 of The Pension Protection Fund (Entry Rules) Regulations 2005 (**the PPF Entry Rules**), provides:

> "Schemes which are not eligible schemes
>
> …
>
> 2 (2) Except as otherwise provided in paragraphs (4) and (5) of this regulation, an occupational pension scheme which would be an eligible scheme but for this paragraph is not an eligible scheme where, at any time, the trustees or managers of the scheme enter into a legally enforceable agreement with an employer in relation to the scheme the effect of which is to reduce the amount of any debt due to the scheme from that employer under section 75 of the 1995 Act which may be recovered by, or on behalf of, those trustees or managers."

23. The PPF Entry Rules can make it difficult for trustees to enter into compromises in relation to the recovery of a section 75 debt. Other than where a specific exception applies in the legislation, any such compromise may prevent PPF entry. The Trustee does however have a limited ability to decide not to pursue a debt if Condition I is satisfied and the debt is unlikely to be recovered without disproportionate cost or within a reasonable time. Otherwise the Trustee will generally be required to pursue any section 75 debts, given its fiduciary duties to the members.

Material facts

24. The Scheme is a centralised multi-employer non-segregated DB arrangement governed by Scottish law which was established in 1975 and is a registered pension scheme under the Finance Act 2004. It provides career average benefits on retirement and death to employees in the plumbing and mechanical services industry in the United Kingdom. As at November 2020, it had assets of approximately £2.3 billion, 350 participating employers and approximately 34,000 members.

25. The Scheme is managed and administered by the Trustee on behalf of its members and in accordance with the terms of the relevant legislation. The Trustee is a not-for-

profit organisation. It does not pay dividends and it only incurs and recharges costs associated with the day to day running of the Scheme.[1]

26. The administration of the Scheme is undertaken in-house on behalf of the Trustee by the Administration Company, which is wholly owned by the Trustee.

27. The Trustee has delegated responsibility for performing various tasks relating to the administration of the Scheme to the Administration Company. The staff, including the Trustee Secretary, are employed by the Administration Company. The Scheme bears all costs associated with running the Administration Company.[2] The costs are charged via the Administration Company and recharged to the Trustee which reimburses the Administration Company.

28. However, the Trustee ultimately remains responsible for the management of the Scheme. This includes putting in place appropriate oversight structures to ensure that benefits are paid in accordance with the Scheme rules and that the Scheme is administered in accordance with the law, including the section 75 debt requirements.

29. Mr S originally ran a plumbing business (**the Business**) as a partnership and was admitted to the Scheme as a participating employer on that basis. As the business was unincorporated, Mr S was personally liable to comply with the Scheme rules and any statutory obligations falling on employers under the 1995 Act, or otherwise.

30. In the case of companies or other incorporated entities participating in occupational pension schemes, the individual directors will not be personally liable for the debts of the employer if the employer is made insolvent.

31. The Scheme is also unusual as it was set up and marketed to plumbers to provide pension benefits for their employees on a defined benefit basis. There are many small plumbing businesses including many individual plumbers (with a few employees) who participate in the Scheme on an unincorporated basis.

32. Mr S' representative (**the Representative**) has said that at some point before 1 July 2010, Mrs S had a telephone conversation with the Scheme's Administration Manager (**the Administration Manager**) concerning the change in the legal status of the Business from sole trader to a limited company with effect from 1 July 2010 (see Appendix A for a summary of Mrs S' recollection of the conversation). The Administration Manager was employed by the Administration Company and under general negligence principles the Administration Company is vicariously liable for any negligent acts or omissions by the Administration Manager.

33. The Representative has explained that Mr S was age 66 at the time and was looking to plan his retirement. The Representative said that Mr S had no children or family members to take over the Business. One of his employees expressed interest in taking a more managerial role with a view to buying the Business on Mr S' retirement.

[1] See Report and Financial Statements for Plumbing & Mechanical Services (UK) Industry Pension Scheme for year ended 5 April 2022
[2] See Report and Financial Statements – page 7

Changing the legal status of the Business to a limited company, was the best solution to achieve this outcome and allowed Mr S to wind down his business affairs while the employee took on more responsibility.

34. The Trustee is aware, based on correspondence the Administration Manager sent to Mrs S (**the April Letter**), that a telephone conversation took place between the parties. The April Letter, dated 28 April 2010, says:

> "**Change of Status**
>
> We refer to your telephone call on 28 April 2010 concerning your change from a sole trader to a limited company.
>
> If my understanding of the situation is correct, the whole of the business and its employees are being transferred to the new company.
>
> In these circumstances, we require you to complete a new Deed of Adherence, which is enclosed and should be completed where indicated and returned.
>
> …if the new company accepts the previous employer's responsibility in relation to the scheme a replacement contracting-out certificate can be obtained under the continuity provisions without surrendering the existing certificate and making a further election for a new certificate.
>
> To do this we require your confirmation…We also require you to sign page 7 of the attached APSS105..." (See Appendix B for the full contents of the April Letter).

35. The Representative has said that:-

35.1. Mr S took advice from a professional accountant in 2010, on the incorporation of the Business.

35.2. Mrs S sought guidance from the Administration Manager on the financial and practical implications of the change in legal status of the Business. Mrs S made the telephone call to the Administration Manager before 1 July 2010, specifically to ask about the ramifications of converting the Business into a limited company. Also, what impact, if any, this would have on their participation in the Scheme.

35.3. The Administration Manager said that "nothing would change", except the name on the "paperwork", which would change from A. [S] & Son to A. [S] & Son Ltd from 1 July 2010, the date the Business would cease to participate in the Scheme. The Administration Manager indicated that no further action was necessary. She did not inform Mrs S that, by making the change, Mr S would be triggering a section 75 debt. Moreover, Mr S was not given any indication at the time that the Trustee would seek to enforce the section 75 debt at a later date. In this case, after a period of more than 10 years had elapsed.

35.4. As the legal name of the Business was changing, Mrs S expected that they would be assigned a new scheme reference number. However, the Administration Manager assured her that the scheme reference number would remain the same.

35.5. Mrs S reasonably relied on the assurances that were provided to her at the time: since the Administration Manager represented the Administration Company and also the Trustee. At no point did the Administration Manager indicate that the Business would trigger a section 75 debt by changing its legal status.

35.6. Mrs S recalls the telephone conversation, in particular, because her telephone calls to the Administration Manager were usually about issues relating to running the payroll or "end of year problems".

35.7. A lot of organisation and preparation was required to implement the change from sole trader to limited company. Consequently, Mrs S paid "particular attention to detail to facilitate the change on 01 July 2010". Her telephone call to the Administration Manager was a crucial part of that preparation.

35.8. Mrs S then relayed the information to Mr S. They considered the matter closed, as they were not asked to take any further action in connection with the change in legal status.

35.9. On 30 June 2010, Mr S restructured the Business from a sole trader to a private limited company (**the Company**). He continued in the Company as Managing Director and held 50% of the shares in the Company.

35.10. The Trustee and the Administration Company continued to deal with the Company on the same basis as the Business; no further communication was sent by the Trustee to Mr S concerning the matter.

35.11. Mrs S is unable to provide a contemporaneous record of what she discussed with the Administration Manager. Mr S does not have access to any documents held at the Company's registered address.

35.12. Several of the sponsoring employers have subsequently wound-up, without the Trustee ever attempting to enforce the Section 75 liability. This indicates that the Trustee adopted a deliberate strategy of remaining silent on the issue, pending intervention by the Pensions Regulator (**tPR**); or that it misinformed employers.

36. In 2014, following discussions with tPR, the Trustee said that it decided to take steps to calculate and recover section 75 debts.

37. The Pensions Ombudsman (**TPO**) is aware, from a previous investigation concerning the Scheme, that from 23 September 2014 onwards, the Trustee agreed to the use of Flexible Apportionment Arrangements (**FAAs**) in other cases where employers had changed their legal status. TPO is also aware that the Trustee agreed to give the

Administration Company delegated authority to deal with requests of this nature between Board meetings.

38. In October 2015, Mrs S resigned from her role as a director of the Company. Mr S subsequently resigned from his position as Managing Director in May 2016.

39. The Representative has advised that the Company currently has one sole director, who was initially appointed as a director in June 2011; he purchased Mr S' shares in the Company for £35,638. Neither Mr S nor Mrs S have any further involvement in the Company and did not retain any shares.

40. On 10 November 2017, the Trustee notified Mr S that the Company had incurred a section 75 debt (**the November Letter**).

41. Following advice from Counsel, the Scheme Actuary prepared a proposed methodology for the calculation of the section 75 debt.

42. In February 2018, the Trustee consulted employers on the proposed calculation methodology. The consultation document explained that it was "extremely difficult" for the Scheme to extract membership data for individual employers, as the data held was "member-centric." It warned that the cost of undertaking the section 75 debt calculations and pursuing payment each time an employer triggered an event, was likely to "exceed the recovery level in most cases".

43. The Trustee said that it had been in contact with its professional advisors, tPR, and the Department for Work and Pensions (**the DWP**), since 2005 regarding the challenges in applying the Employer Debt Regulations.

44. The Trustee explained that it had lobbied for a change in the law; or failing that, a special exemption from the Employer Debt Regulations for the Scheme given that it was an industry wide non-sectionalised scheme for non-associated employers. If this exemption had been granted it would have avoided problems like the current case and many other very unfortunate cases where employers, who are individuals, can potentially be made bankrupt by a section 75 debt which is inadvertently triggered on incorporation or otherwise.

45. In the updates the Trustee issued to the remaining participating employers, the Trustee included a summary (**the Summary**) of the advice it had obtained on various issues relating to the calculation of section 75 debts. The updates acknowledged that the Trustee was keen to clarify the issues, so that past debts could be pursued or disregarded because of the "disproportionate expense in seeking recovery."

46. The Summary indicated that, following earlier advice from Counsel, the Scheme Actuary had prepared a proposed methodology for the calculation of section 75 debts, which was discussed in consultation with Counsel.

47. On 26 November 2018, the Trustee notified Mr S that it must seek payment of section 75 debts (**the November 2018 Letter**). It explained that it was requesting information from Mr S so that it could assess the worth of the individuals that make

up the Company. It also explained that this would enable the Trustee to identify and inform employers, where applicable, that the Scheme was not going to pursue a section 75 debt in respect of the event(s) that triggered it.

48. On 20 December 2018, Mr S complained to the Trustee under stage one of the Internal Dispute Resolution Procedure (**the December 2018 Letter**). He asserted that:-

48.1. The Trustee was made aware that the Business had ceased to participate in the Scheme in July 2010. Consequently, it would have been aware that a section 75 debt had been triggered. However, it failed to take any action at the time.

48.2. His wife contacted the Administration Manager before 1 July 2010, to enquire about the possible consequences of changing the Business to a limited company.

48.3. "The Administration Manager, on behalf of the Trustee, categorically informed [his] wife that there were no practical consequences as no material change would occur and that [they] did not need to do anything further". She said that "everything would 'carry on as normal' and even the same employer pension reference number would continue to be used".

48.4. Although the Trustee would have been aware at the time that a section 75 debt triggers in these circumstances, an assurance to the contrary was provided to Mrs S. This amounts to a clear misrepresentation on the part of the Trustee.

48.5. Given this misrepresentation, which he relied on, it would be inequitable for the Trustee to now pursue any liability against him.

48.6. If it were not for the misrepresentation, he would have made different decisions concerning his participation in the Scheme. Consequently, he would not have triggered any section 75 debt.

48.7. The Trustee did not alert him to the fact that it would seek to apply a "historic" section 75 debt. He may have been able to make provision for this while he was still in work and had a business.

49. On 20 February 2019, the Administration Company issued a response on behalf of the Trustee but did not uphold Mr S' complaint. In summary, it confirmed that:-

49.1. The Business had triggered a section 75 employer debt on 30 June 2010, the last day the Business had employed contributing members in the Scheme.

49.2. Its records indicated that Mr S participated in the Scheme as a partnership until 6 April 1998. The change from a partnership to sole trader, from 7 April 1998, would have triggered an employer debt on the partnership. However, at the time, the employer debt was calculated on a different basis. Consequently, there was no employer debt to pay.

49.3. The period of participation for which there is an employer debt due was from 7 April 1998 to 30 June 2010.

49.4. The Trustee and its representatives did not have any obligation to advise an employer about the legal consequences of exiting the Scheme, and nor could they provide this. Any failure on the part of an employer to seek appropriate professional advice was a matter for the employer and not the responsibility of the Trustee.

49.5. It was not reasonable for Mr S to rely on informal information that may have been provided to his wife over the telephone. Had he sought advice in writing in respect of his own particular circumstances, the Trustee would have responded to him in full, based on the information provided.

49.6. It is not the Trustee's responsibility to be the source of information on legislative changes or statutory obligations for employers.

50. The Administration Company acknowledged that the November Letter was addressed to the wrong employer and apologised for this.

51. On 27 April 2019, Mr S appealed the decision under stage two of the IDRP. He argued that:-

51.1. The Trustee was happy at the time to deal with most enquiries by telephone. At no point had it expressed a view that any information provided could not be relied on by an employer. Nor had it placed an obligation on employers to obtain confirmation of information in writing.

51.2. In other communication regarding the Scheme, the Trustee was very much "alive" to the issue of section 75 debts being triggered by employers.

52. On 19 June 2019, Mr S was provided with an estimate of the section 75 debt. It explained that the Employer Debt Regulations had "easements" which may assist the Business. Mr S was asked to contact the Administration Company if he disagreed with the amounts due, membership data, or would have difficulty making a lump sum payment. Mr S was warned that this would be followed up with a certified debt if he did not do so within six weeks of the date of the letter.

53. The notes accompanying the letter (**the Notes**) explained that legislation allowed the Trustee to decide not to pursue a section 75 employer debt if it is disproportionately expensive to do so. However, the Trustee would need to consider the realisable value of the business versus the cost of calculating, certifying, and collecting the employer debt from the business concerned.

54. The Notes also explained that there were "two key options" available to employers: FAA and a Deferred Debt Arrangement.

55. On 20 June 2019, the Trustee Chairman (**the Chairman**) issued a response on behalf of the Trustee sub-committee and upheld the decision. Briefly, he stated that:-

55.1. The Trustee owes fiduciary duties to the Scheme beneficiaries only and not to the employers participating in the Scheme.

55.2. Neither the Trustee nor the Administration Company were responsible for advising employers on their statutory obligations. The administrators worked on the practical running of the Scheme; they were not responsible for advising employers regarding Section 75 employer debts.

55.3. To enable participating employers to benefit from more technical support, the Administration Company employed a new member of staff in early 2017.

55.4. “Historically”, any information provided by the Administration Company would have reflected the administrator’s understanding of the “practicalities as the administrator understood it”. It should not, and could not, be taken as definitive advice on the statutory obligations brought about by an employer ceasing to participate in the Scheme.

55.5. Any information is issued in good faith. It is often reviewed professionally to ensure that it is factually correct. However, information issued as a result of an ad hoc telephone call may not take into account every consideration that a stakeholder may have.

55.6. An employer will often have different considerations to those of a Scheme member and should always take independent advice. The communications targeted at employers regularly encourage participating employers to seek independent advice.

56. **Summary of Mr S’ position**

The Representative made the following additional submissions on behalf of Mr S:-

Prescription/Limitation defence

56.1. It is a matter of public policy that a trustee should not be able to hold a debt over a debtor for an indeterminable, and potentially indefinite, period of time. This is what the Trustee appears to have done in the current case.

56.2. Mr S is [77] years of age; he has not been involved in the Company or the Business since his retirement in May 2016. Under the relevant legislation, he triggered a section 75 debt when he restructured the Business. The section 75 debt estimated by the Trustee is a significant sum; Mr S is unable to pay this as he has limited financial resources.

56.3. The section 75 debt was triggered on 30 June 2010, when Mr S restructured the Business. The Trustee did not inform him that it intended to pursue the section 75 debt until 10 November 2017. So the claim was made outside the five and six year Prescription and Limitation periods for debt collection set out in Scottish and English law respectively.

56.4. Mr S is willing to have the matter considered under Scottish Law. Prescription has the same effect as Limitation, albeit under Scottish Law. Under Prescription, the Trustee must make a claim within five, rather than six years.

56.5. Although there are some exceptions to these time limits under both Scottish and English legislation, none of those exceptions apply in the current circumstances.

56.6. Time starts running from the date the section 75 debt was triggered. The ruling in Central Electrical Generating Board v Halifax Corporation [1962] 3 All ER 915, supports this. It established that the date of the period of limitation for sums recoverable by statute begins from the date the action was accrued. So, the section 75 debt cannot be claimed by the Trustee as the time limit has elapsed from the date that it was triggered.

56.7. A particularly relevant case is that of Gordon Trustees v Campbell Riddell Breeze Paterson LLP (Scotland) [2017] (**the Gordon case**). It was held that under the 1973 Act, the defence of prescription is five years from the date the trustees knew of the loss or could have discovered it using reasonable diligence.

56.8. By the Trustee's own admission, it was aware that it was unable to calculate a section 75 debt because the methodology it adopted to record and store Scheme data was not fit for purpose. The Gordon case should be considered together with the Halifax case and the Phoenix case. The Phoenix case can be distinguished from the factual circumstances of Mr S' complaint for the following reasons:-

56.8.1. The deliberate failure to calculate the section 75 debt within the Prescription period distinguishes the Trustee's actions from the facts in the Phoenix case. The Trustee's inability to calculate section 75 debts, over a period of 13 years after the legislation was introduced, is an indication of maladministration on the part of the Trustee rather than a valid legal reason to avoid Prescription periods.

56.8.2. The Phoenix case concerned a scheme where the section 75 debt could not be certified until after the scheme had been wound up.

56.8.3. The Trustee could have calculated the section 75 debt. Its explanation for its inability to calculate it indicates it was the result of its maladministration. The Phoenix case, while "superficially appealing", is not the correct authority on the legal position.

56.9. The Trustee deliberately chose not to undertake the calculation or to inform sponsoring employers of its actions. It then attempted to enforce the section 75 debt after the Prescription period had ended. In these circumstances, Mr S considers that a Scottish court would apply the principles of the Gordon case because of the failures on the part of the Trustee.

56.10. “The issue of limitation and why the courts insist that it should apply (except in very limited circumstances) is that to allow debts to be enforced for an indefinite period of time creates real prejudice to the debtor and also third-parties”.

56.11. The Trustee’s attempt to enforce debts on employers, several years after the debts were triggered, means that many employers will face insolvency: either on a corporate or personal basis. Any transactions they carried out to sell or dispose of their respective businesses would have been carried out incorrectly. This leaves sponsoring employers open to warranty, tax and indemnity claims.

56.12. If the Trustee is allowed to enforce the section 75 debt, notwithstanding the laws of Prescription, any trustee of a scheme is able to “circumnavigate both pensions and general legal obligations without consequence”.

56.13. The Trustee did not alert any of the employers to the fact that it was unable to undertake the calculation when they had triggered a section 75 debt. Had this been the case, and the Trustee had written to Mr S in 2010, he “could have made some provision to meet the liability that the Trustee is now seeking to recover”.

Failure to comply with the debt legislation and alleged breach of trust

56.14. This issue is further compounded by the Trustee’s own failings. Had it not deliberately failed to comply with legislation, then it would have had a legitimate claim against Mr S. As a result of the Trustee’s non-compliance with the law it has allowed the limitation period to expire.

56.15. The Trustee should not be allowed to pursue a policy of “picking and choosing” when to enforce a section 75 debt which it was legally obliged to claim several years ago.

56.16. Despite the Employer Debt Regulations being in place since September 2005, the Trustee failed to adhere to them. The “non-compliance policy” lasted for 12 years until employers, who had been unaware of it, were contacted by the Trustee and informed that it would now be pursuing a policy of calculating and certifying section 75 debts.

56.17. “It is clear that the Trustee’s data retention and consideration of the legislation has been poor, with the Trustee itself not appearing to understand the critical difference between legal entities”.

56.18. The Trustee wrote to the Company, rather than Mr S, and correspondence was initially sent to the registered address of the Company. It seems to have mistaken the Company for Mr S. This is one of the “consequences of delaying implementation of a regulatory obligation for more than 6 years.”

56.19. The calculation in Mr S’ case was completed nine years after the Trustee became aware that a section 75 debt had been triggered.

56.20. The Trustee's rationale for its failure to comply with its obligations under Section 75, and provide relevant information to participating employers, is not based on trust law, legal precedence, or legislation. Furthermore, it is a clear failure of good administration.

56.21. The Trustee's intended outcome has not materialised and the risk taken by the Trustee, without the knowledge of participating employers, has failed. This has potentially devastating consequences for Mr S and increased liabilities in respect of all participating employers.

56.22. The Trustee advised that the DWP and tPR were aware of "the non-compliance" on the part of the Trustee and that the tPR had agreed to this. However, it has not provided any corroborating evidence to support its position.

56.23. The Trustee has accepted that it failed to inform Mr S of the section 75 debt and previously made no attempts to estimate or certify the debt. The information published on the Scheme's website was the only explanation provided to participating employers.

56.24. The Trustee has had the benefit of legal advice from international law firms with specialist pension departments. The Scheme Actuary works for a leading global pensions benefits consultancy. The Trustee's explanation is difficult to comprehend; other multi-employer schemes in the same position have been able to comply with the legislation.

56.25. Although the Scheme data may not have been suitable for the purposes of "the 2005 regulations", this was not a reason to delay the process of collecting the data, as necessary, or amending records for a period of over 12 years.

56.26. The conduct of the Trustee, and that of the Administration Company, to the extent that it was complicit in the matter, amount to maladministration and breach of trust.

Misinformation/failure to provide information

56.27. Mr S accepts that the Trustee is not responsible for informing employers on the effect of the law. However, the Trustee overlooked the fact that it is responsible for misinformation/failure to provide information.

56.28. "The Trustee and its administrators have always set themselves out as experts on the arrangement and their ability to advise small businesses such as [Mr S] in respect of any and all pension queries".

56.29. It is clear that the Trustee had previous knowledge of these issues and that it was aware of the legal requirement to collect section 75 debts. It deliberately ignored this. Furthermore, it misled employers.

56.30. Neither the Trustee, nor the Administration Company, consulted with the employers concerned at any time. Moreover, they did not advise employers that the “overriding pensions legislation” would not be adhered to.

56.31. Mr S, along with thousands of other sponsoring employers, were encouraged to seek advice and information directly from the Trustee in respect of issues concerning the Scheme. Consequently, Mr S did not seek advice from his accountant as the Scheme was managed in-house.

Change in legal status of the Business: the alleged negligent representation

56.32. The Administration Manager indicated that no further consequence would arise as a result of Mr S ceasing to be a participating employer in the Scheme.

56.33. He would not have gone ahead with the change in legal status if the Trustee had made him aware of the correct position. Consequently, an FAA could have been entered into at a later stage.

56.34. Mr S was entitled to rely on the representations made to Mrs S, which were made on behalf of the Trustee. It was not the basis of Mrs S’ previous dealings with the Administration Manager, or a legal requirement, that information or requests must be in writing.

56.35. The administration of the Scheme was deliberately tailored to small business owners, who are more familiar with plumbing matters than pensions law, so that they could make telephone enquiries to the Scheme and rely on them.

56.36. The Administration Manager was Mr S’ “point of contact”; she was specifically allocated to him due to her knowledge of the Scheme.

56.37. Mrs S and the Administration Manager spoke on the telephone over a period of several years. She was informed and under the impression that at all times the Administration Manager represented both the Trustee and the Administration Company. Mrs S asked whether the change of status would have any material impact. It is clear that the information the Administration Manager provided was incorrect.

56.38. The Administration Manager is listed in the Scottish and Northern Ireland Plumbing Employers’ Federation (**SNIPEF**) member booklet as the primary point of contact for enquiries concerning an employer’s membership in the Scheme. It is not unreasonable to expect the Administration Manager to have a basic understanding of how, and in what circumstances, a section 75 debt may be triggered.

56.39. “The Trustee’s assertion that it is not reasonable to rely on telephone advice is only credible if the provider of that advice also states or alerts a party to the fact that it should take its own advice on the matter, rather than making statements without such warning that are clearly incorrect in law”. This is a further example of maladministration on the part of the Trustee.

56.40. The April Letter is headed “change of status”. It would be “bizarre” for a Trustee to be writing in this respect and ignore the section 75 debt. In reality, the Trustee had chosen not to enforce any section 75 debts. This amounts to negligent representations on the part of the Trustee.

56.41. The Trustee had a duty to inform Mr S of the correct position. If the Trustee was being transparent and honest concerning its policy, it would have notified Mr S that he may be liable for a section 75 debt. However, the Trustee was choosing not to enforce these at present.

56.42. It is clear from the Trustee’s knowledge of the issues surrounding Section 75, that the Trustee was aware that it was legally required to collect any section 75 debts that may arise. It deliberately ignored this; and in particular, misled employers.

Conflict of interests

56.43. The Chairman’s role as a board supervisor of tPR, and the “baffling” acceptance by tPR of the Trustee’s non-compliance with the legislation, has made Mr S question how this conflict was dealt with by the Trustee.

56.44. The previous Secretary of the Scheme was also the Chief Executive Officer (**the CEO**) of SNIPEF at the time. He decided not to make employers aware of the issue surrounding the section 75 debts. It is not known how his relationship with the Chairman, “who it appears jointly created this strategy,” worked so that ultimately neither SNIPEF nor the Trustee informed participating employers of the situation.

56.45. The Trustee had a mistaken belief that it was capable of avoiding the relevant regulations because of the ability of the Chairman to convince government to amend legislation. This also highlights the conflict of interests, which were not dealt with appropriately by the Trustee.

57. Summary of the Trustee’s and the Administration Company’s position

Prescription and Limitation

57.1. The Trustee has accepted that the November Letter was addressed to the Company rather than Mr S and has apologised for this.

57.2. Mr S considers that the section 75 debt has prescribed, by virtue of the ruling in Central Electrical Generating Board v Halifax Corp.

57.3. The correct legal approach, regarding time limits, is covered in Phoenix Venture Holdings v Independent Trustee Service [2005] EWHC 1379 (Ch). It establishes that section 75 debts are not due until calculated and certified. Consequently, prescription does not start to run until the date on which the debt certificate is issued.

57.4. The Trustee is registered and domiciled in Scotland. Furthermore, the Rules provide that the Scheme is to be governed by Scottish law. It follows that the law of prescription under Scottish law would apply here.

57.5. Mr S asserts that it is a matter of public policy that a trustee "should not be able to hold a debt over a debtor for an indeterminable, and potentially indefinite, period of time." The Trustee has a statutory obligation to collect section 75 debts. These cannot be erased by "public policy" considerations.

Failure to comply with the debt legislation and alleged breach of trust

57.6. The Trustee denies that it deliberately failed to comply with the Employer Debt Regulations. Due to several factors, it has been unable to calculate section 75 debts until more recently.

57.7. In order to calculate a section 75 debt, the Scheme Actuary must be able to determine the liabilities of a particular employer. The data held by the pension administration system was split by member.

57.8. This "member-centric" system allowed plumbers to easily see the combined value of their different periods of service with different plumbing employers throughout their career. Once the section 75 debt legislation changed in 2005, the Trustee was advised that it was not possible to extract the information from the data held by the pension administration system.

57.9. At 5 April 2023, the Scheme had approximately 31,000 members. Several of those members have been employed by multiple employers. 562 employers ceased to participate in the Scheme between 6 April 2005 and 5 April 2014.

57.10. The Trustee's advisers considered that it would be an impossible task to determine the liabilities of a particular employer. It was only following the appointment of a new Scheme Actuary in 2013 that the Trustee became aware that it would be possible to re-arrange the Scheme data.

57.11. The Trustee sought advice from two leading Queen's Counsel (**QC**) (as they were then known) on how to carry out the calculation of the section 75 debt. The Trustee then commenced the exceptionally lengthy and time-consuming process of re-arranging the data.

57.12. Following submission of the 2012 actuarial valuation to tPR, the Trustee acknowledged that meaningful change to the Employer Debt Regulations was unlikely to be forthcoming. The Trustee has since taken professional advice from two leading law firms and two leading QCs, which has been a costly and time-consuming process.

Misinformation/failure to provide information

57.13. The Trustee must act in the best interests of the Scheme members. It is not the Trustee's duty to advise individual employers on the specific implications of

joining, participating in, or leaving the Scheme. Employers should always seek advice from their employer representative body: for example, SNIPEF.

57.14. The Trustee was under no duty or obligation to inform employers that it was unable to carry out section 75 debt calculations. Employers should take independent advice regarding their own position.

57.15. The Trustee informed all relevant employers once it was in a position to calculate section 75 debts.

Change in legal status of the Business: the alleged negligent representation

57.16. The Trustee accepts that the April Letter refers to the change in status from a sole trader to a limited company. It does not refer to Section 75 debt-related matters.

57.17. The Trustee does not have a contemporaneous note of the telephone conversation that took place between the parties. Consequently, it is unable to confirm or deny the allegation that Mrs S was informed that “nothing would change as a result of the change in legal status ... other than the name change on the paperwork”.

57.18. The Trustee and administrators of the Scheme have a fiduciary duty to act in the best interests of the beneficiaries of the Scheme only. The Trustee’s position is supported by relevant caselaw. Specifically, Keymed (Medical and Industrial Equipment) Ltd v Hillman and another [2019] EWHC 485 (Ch).

57.19. “The Trustee has no legal obligation to inform and advise employers in relation to their obligations on joining, participating in and leaving the Scheme. If anyone has such an obligation it is the employers’ representative bodies”. Where there is no employer representative, in respect of any particular employer, the employer should seek its own independent advice.

57.20. The Scheme’s administrators are employed by the Trustee. It is not their responsibility, or that of the Trustee, to advise employers on the legal consequences of employer events. For example, the employer’s statutory obligations under Section 75.

57.21. The Administration Company was set up to carry out the practical running of the Scheme. While the administrators may have provided certain employers with information on an ad hoc basis, this was not their primary purpose.

57.22. Any information which may have been provided, or informal view which may have been expressed during an ad hoc telephone call, cannot take into account every consideration that a stakeholder may have.

57.23. Employers will often have different considerations to a Scheme member; they should always take independent advice. The communications targeted at

employers, regularly encouraged participating employers to seek independent advice.

57.24. The Trustee refutes the allegation that it was negligent in relation to any information that was provided to Mrs S at the time of the incorporation of the Business.

57.25. The Trustee has not seen corroborating evidence that the Administration Manager was named in SNIPEF's member booklet as the primary point of contact. The Trustee does not agree with this statement if it is in fact the case.

57.26. The Administration Manager is no longer an employee of the Administration Company and has recently suffered the loss of family members. Involving her in this dispute would cause her unnecessary distress.

57.27. It would only have been possible to enter into an FAA from 27 January 2012. So, this would not have been an option for Mr S when the Business was incorporated on 1 July 2010. Provided the legislative requirements are met, for example, the "funding test", there is currently nothing to prevent the Company from entering into an FAA.

57.28. The Trustee understands that the Company is not prepared to enter into an FAA. Consequently, the Trustee is under a statutory duty to collect the section 75 debt from Mr S.

57.29. The Scheme has so far agreed to 53 individual employer requests to enter into an FAA and transfer the liabilities to a new company. 31 of these were in respect of unincorporated businesses.

57.30. The Trustee is open to considering all requests to enter into an FAA. Should the Business now wish to enter into an FAA, the Trustee would consider the request.

57.31. The Trustee considers all the statutory requirements before allowing an employer to enter into an FAA. It also has to be satisfied that it is in the best interests of Scheme members more generally.

57.32. The Trustee obtains covenant advice and discusses each request at a Board or committee meeting. In cases where the funding test has not been met, the Trustee has required additional security from the employer in order for the test to be met.

Conflict of interests

57.33. The primary duty of a pension scheme is to look after members' interests. The Trustee aims to identify, monitor, and manage any conflicts of interest that may arise.

57.34. Trustee Directors have a fundamental duty to act on behalf of the Scheme and its members. Conflicts of interest cannot be completely avoided and may arise from time to time when an individual has a duty to a different body.

57.35. The Trustee cannot comment on any alleged conflict in relation to other roles Board members may hold.

57.36. The Chairman at that time, was a non-voting independent Trustee Director. His appointment with the tPR was to oversee and agree its strategic direction; he was not involved in matters affecting individual pension schemes. The role was not considered a conflict with his Chairmanship of the Board. Furthermore, his trustee roles on individual pension schemes would not have influenced actions taken by tPR's case teams.

57.37. It is open to Mr S to take up any perceived conflict of interests, in respect of the CEO at that time, with SNIPEF.

The First Preliminary Decision

58. In the Preliminary Decision I issued in April 2022, I concluded, among other things that:-

58.1. Mr S does not have a limitation/prescription defence to recovery of the section 75 debt.

58.2. The Administration Manager's response, to Mrs S' request for information, on the consequences of the Business ceasing to participate in the Scheme, amounted to a negligent misstatement.

58.3. The Administration Manager had assumed a duty of care in relation to the accuracy of the information provided at the time. There was a sufficiently proximate relationship for such a duty to arise.

58.4. It was reasonable for Mr S to rely on the negligent misstatement. Mr S did in fact rely on the misstatement and has sustained loss as a result.

58.5. The failure on the part of the Trustee/Administration Company to notify Mr S in good time that a debt had been triggered amounted to maladministration.

Further submissions on behalf of the Trustee and the Administration Company

59. The Trustee and the Administration Company did not accept the Preliminary Decision. The additional submissions made on behalf of the Trustee and the Administration Company can broadly be broken down as follows:-

59.1. The initial submissions in response to the Preliminary Decision on the issue of whether there was a negligent misstatement and whether the Trustee and the Administration Company owe a duty of care. If so, whether it was reasonable for Mr S to have relied on the alleged misstatement.

59.2. Supplementary submissions on the issue of whether Mr S has sustained any loss (assuming a duty of care is owed, which is denied by the Trustee and the Administration Company).

60. The Trustee's additional submissions in relation to the alleged negligent misstatement fall under the following headings:-

60.1. The Trustee's position that there has been no factual misstatement on the part of the Administration Company in this case. Consequently, there has been no negligent misstatement.

60.2. The Trustee's position that there was no duty of care on the part of the Trustee or the Administration Company. Specifically, there was no duty of care from the nature of the relationship.

60.3. The Trustee's position that there is no specific assumption of responsibility in this case. Notwithstanding, if the Ombudsman finds there is a duty of care, it was not reasonable for Mrs S and Mr S to rely on the information provided by the Administration Manager.

The Trustee's position – 'no factual misstatement'

60.4. The alleged statements by the Administration Manager did not misstate any factual matters. Consequently, there can be no negligent misstatement on the part of the Administration Manager. Whether or not there has been a misstatement must be assessed objectively and in context.

60.5. The Administration Manager was not a pensions advisor or other qualified person. The role involved the practical running of the Scheme. It did not involve offering legal or financial advice to employers: this is apparent from the job title.

60.6. Mrs S' recollection of the events, as set out in the Preliminary Decision, supports the view that the interactions between Mrs S and the Administration Manager were in relation to matters that concerned the administration of the Scheme. Mrs S' recollection does not suggest she made it clear to the Administration Manager that her enquiry went beyond this. Furthermore, there is no evidence that the Administration Manager stepped outside of her normal role at the time.

60.7. If Mrs S was seeking more than guidance on administration matters, for example, formal advice on the financial or legal consequences of a change in status of the Business, she ought to have made this clear to the Administration Manager. Any request of this nature should have been made in writing, so that it could be considered by the party with the appropriate expertise.

No duty of care arising from the nature of the relationship

60.8. The Trustee argues that TPO has misdirected itself in assessing whether a duty of care arises by reference to a "sufficiently proximate relationship" or the "clear mismatch between the parties' knowledge".

60.9. The Trustee submits this was the law before the Supreme Court decision in Robinson v Chief Constable of West Yorkshire Police [2018] UKSC 4 (**Robinson**)

60.10. The Trustee draws from this judgment:

60.10.1. It must first be asked whether the relationship is of a type in which a duty of care has been found to arise. For example, the relationship between doctor and patient, or solicitor and client. If a relationship of this nature exists, then there is no need to embark on further analysis; a duty of care arises.

60.10.2. If the relationship is "novel", in that the Courts have not previously ruled whether a duty of care arises, then the courts will assess whether there is a duty of care "by analogy with established authority", moving not in great leaps but only on an "incremental" basis (Robinson at [27]). In drawing analogy, the courts will "identify […] the legally significant features of the situations with which the earlier authorities were concerned".

60.11. The Trustee considers that any relationship that exists in this "case is a novel one".

60.12. The Trustee refers to Outram v Academy Plastics Ltd [2001] ICR 367 (**Outram**), and notes that the Court of Appeal held that there was no duty of care for an employer, who was also a trustee, to give advice to an employee, who was also a beneficiary, regarding the consequences of changes he proposed to make to his pension.

No specific assumption of responsibility

60.13. The Trustee agrees that a duty of care may arise where one party specifically assumes responsibility for the correctness of information provided to another party. However, it argues that the Administration Manager did not assume such responsibility and in particular that the Administration Manager did not profess to exercise a special skill in favour of Mrs S, reiterating that her role was administrative. If she had been asked to provide financial or legal advice regarding the consequences of leaving the Scheme, it would be reasonable to assume that she would have sought guidance from senior colleagues.

60.14. No evidence has been provided to show that the Administration Manager thought she was providing advice/information on the legal consequences of Mr S exiting the Scheme (regarding Section 75), much less specifically assuming

responsibility. Given the adverse impact of the alleged statements made by the Administration Manager on the funding integrity of the Scheme and all the other employers, it is inconceivable that the Administration Manager would have intended such consequence without deferring to the Trustee.

60.15. The Trustee says that in the case of Steele v NRAM Ltd [2018] UKSC 13 (**the Steele case**), the court was very careful to point out that in circumstances where a duty of care would not otherwise exist, there needs to be an analysis as to how such an assumption of responsibility would arise.

60.16. In the case of Mutual Life and Citizens' Assurance Co. Ltd. & Another v Clive Raleigh Evatt [1971] AC 793 (**the Mutual Life case**), the Privy Council said that it was a necessary component of negligent misstatement that the individual being relied upon must either have (or claim to have) a special skill and competence or carry on a business with the purpose of giving the advice sought by the enquirer. Furthermore, the individual must have agreed to apply that skill for the benefit of the inquirer. The Privy Council noted in the judgment that it was irrelevant whether Mutual Life was in a better position than the complainant to obtain financial information about the financial affairs of the firm in question. The Privy Council also noted it was irrelevant whether Mutual Life had officers in their employment with the necessary skills and competence to form a reliable judgment if the company had chosen to use their services to do so.

60.17. The Trustee considers that the Mutual Life case is directly comparable to the interaction between Mrs S and the Administration Manager. In particular:-

60.17.1. The Trustee does not offer financial or legal advice to employers;

60.17.2. The Trustee does not profess to have a special skill in providing financial or legal advice to employers;

60.17.3. The Trustee did not agree to apply any skill for the benefit of Mrs S;

60.17.4. It is irrelevant that the Trustee was in a better position than Mrs S to understand the impact of incorporation or had officers who may have been able to advise;

60.17.5. Even if the Trustee was found to have a special skill, it is clear that an administrative assistant employed by the Trustee would not. Consequently, no duty of care arises in these circumstances.

60.17.6. If the Ombudsman finds there is a duty of care, it was not reasonable for Mrs S and Mr S to rely on the information provided by the Administration Manager.

The Trustee's position - reliance on the alleged misstatement

60.18. Taking into account the Administration Manager's position, and the nature of the communication, Mrs S, and consequently Mr S, could not reasonably have relied on the information the Administration Manager provided during the telephone call to the extent that they have claimed.

60.19. The Administration Manager could not have reasonably foreseen that Mr and Mrs S would rely on the statements as confirmation that there were no financial or legal consequences arising from the change of legal status by an employer. The Steele case supports the Trustee's position.

60.20. The Administration Manager's interactions with Mrs S were primarily conducted in the context of her role as the Administration Manager of the Scheme. If Mrs S had made her enquiry in writing at the time, rather than by telephone, then the matter would have been referred to the relevant contact to provide a response, together with the appropriate caveats.

60.21. When taking a formal step, for example the incorporation of a company, it would be reasonable for Mr S to have taken independent legal and financial advice rather than seek to rely on a telephone discussion between his wife and an Administration Manager acting on behalf of the Trustee. Mr S chose not to seek independent financial or legal advice. If he obtained advice at the time, he has not disclosed the content of that advice to the Trustee.

60.22. The Trustee questioned the basis for the conclusion that Mr S might have postponed incorporating the Business and been able to enter into an FAA in 2016. There was no certainty that the Trustee would have entered into an FAA.

60.23. It was speculation to say that any money received from the sale of the Business would have been paid to the Trustee in return for agreeing to enter into an FAA. There has been only one case where the Trustee has agreed to an FAA and payment made to the Scheme. In some cases, the Trustee has required a guarantee or security to be put in place.

60.24. FAAs became available in 2012; Mr S could not have known in 2010 that they would subsequently become available.

60.25. Furthermore, the Company has confirmed that it is not prepared to enter into an FAA and there is no information or evidence that would support a view that the position would have been materially any different in 2016.

60.26. The Trustee accepts that it is possible that, if Mr S had known in 2010 that a section 75 debt would arise on incorporation, he might have decided not to proceed with incorporation at that time. However, the Trustee does not agree with the analysis of what the consequences of non-incorporation in 2010 would have been.

60.27. Even if Mr S had not incorporated the Business in 2010, there is a high probability that a section 75 debt would have been triggered at some point in time. For example, when he ceased to carry on the Business, or on the Scheme closing to future accrual. Triggering the section 75 debt in 2010, would simply have accelerated a debt that was bound to become payable in any case. Moreover, the amount of the section 75 debt, triggered in 2010, might be lower than it would have been if the debt had been triggered at a later date.

60.28. Notwithstanding the additional submissions made on behalf of Mr S (summarised in sub paragraphs 56.1 to 56.45 above) there was no basis to conclude that Mr S could have unilaterally avoided a section 75 debt by use of an FAA as this would have required the agreement of the Trustee.

60.29. The Trustee disagrees with the additional points made on behalf of Mr S. In particular, there was no basis to conclude that Mr S could have unilaterally avoided a section 75 debt by use of an FAA as this would have required the agreement of the Trustee.

60.30. The Trustee maintains that if the section 75 debt had been triggered in 2016, it would have been in the region of £750,000.

60.31. A negligent misstatement has not given rise to a damages entitlement in this case. The Trustee considers that the section 75 debt was very likely to arise in any event or was incapable of being eliminated through an FAA.

60.32. Regarding the Directions proposed by the Ombudsman in the First Preliminary Decision, the Trustee should not be ordered to pay the “Damages Award” in advance of Mr S paying the section 75 debt. This would mean that the Trustee would be paying Mr S redress before he had actually incurred the loss in respect of which the Ombudsman had awarded the redress. The practical solution to this is that, if there is an award of redress, the Trustee can offset the award against the amount of the section 75 debt at the time it is paid.

60.33. Furthermore, the Trustee considers that it would not be appropriate for an award of damages to be made against the Trustee in circumstances where no section 75 debt has actually been paid. Without prejudice to its right of appeal, the Trustee would be content with an outcome which resulted in the section 75 debt being paid, subject to a set-off of the amount of any damages awarded by the Ombudsman.

61. The Representative’s comments on the Trustee’s additional submissions

61.1. The Trustee has failed to set out the actual factual context in its additional submissions. Instead, it has relied on semantics.

61.2. There has been a negligent misstatement on the part of the Administration Manager and the Trustee should take responsibility for this.

61.3. There was a duty of care arising from the relationship, and/or an assumption of responsibility, as a consequence of the Administration Manager answering the question Mrs S raised at the time.

61.4. It was entirely reasonable for Mrs S to rely on the Administration Manager's misstatement. It is unreasonable for the Trustee to suggest that the Administration Manager could not have reasonably foreseen that Mrs S would rely on the statements as confirmation that there were no financial or legal consequences arising from the change of legal status of the Business.

61.5. The natural meaning of administration and practical running of the Scheme must include disclosing that there would be a statutory debt to be paid. If the Administration Manager dealt with 'administration,' as described, then it raises the question of who the nominated Scheme contact was for the administration of statutory employer debts. Moreover, why the individual in question did not correct the negligent misstatement?

61.6. The Administration Manager was in effect the employer contact for Mr S and it is not reasonable to expect an employer to question her competence.

61.7. The Administration Manager should have been aware of the consequences of an employer leaving the Scheme. If she was unable to respond to Mrs S' enquiry, she should have informed Mrs S and referred the matter internally for a response to be issued by the appropriate contact.

61.8. Mrs S did not ask the Administration Manager for advice on section 75 debts. The enquiry she made at the time was a broader, simple question concerning the actions the Scheme would need to take and what the consequences would be of transferring the Business from a sole trader to a limited company.

61.9. As the enquiry was straightforward, it is not reasonable for the Trustee to expect Mrs S to have made the enquiry in writing. The fact that there is a written record of the outcome of the telephone call in question is sufficient evidence that both parties did not expect or require the enquiry to be made in writing.

61.10. The Trustee has failed to acknowledge that in Robinson the court confirmed that in a novel case the test established in Caparo Industries plc v Dickman and others [1990] 2 AC 605 (**Caparo**) still applied.

61.11. The Ombudsman's analysis in the First Preliminary Decision was not in error. Mr S disputes the Trustee's view that there is no duty of care in this case. There was a sufficiently proximate relationship, as the Administration Manager was the sole point of contact available, and the harm arising from the misstatement was reasonably foreseeable.

61.12. In contrast to the Outram case, the Trustee, through the Administration Manager, provided a negligently misleading response. Mrs S asked a

straightforward question; in response the Trustee's representative provided an unambiguous answer that nothing would change save the name on the paperwork. This was neither an omission nor a failure to provide advice but "a negligent and potentially deliberate response which was wholly untrue and misleading".

61.13. There is clearly a duty of care when the Trustee, through its agents, has specifically allocated the Administration Manager to provide information to participating employers on the operation of the Scheme. Mr S has not claimed at any time that he asked the Administration Manager for advice on Section 75.

61.14. Furthermore, Mr S has not asked for the Administration Manager's conduct to be judged by the standard expected of a financial advisor or lawyer employed by the Trustee. In Mr S' view, it should be considered by the standard expected of an individual employed to be the designated point of contact for employers in respect of all queries concerning the pension scheme. Mrs S did not ask about the legal consequences of leaving the Scheme, but the consequences more broadly.

61.15. Mr S rejects the Trustee's characterisation of the interaction between Mrs S and the Administration Manager. The job description of the Administration Manager, her qualifications and stated role are irrelevant and the focus on the word "administration" is misguided.

61.16. Mrs S was not asked to make her enquiry in writing. Furthermore, the accuracy of the answer should not depend on how the enquiry was made. It would have been open to the Administration Manager to refer the matter internally. The answer given by the Administration Manager that "nothing would change save the name on the paperwork" was not qualified. There was no suggestion that the Administration Manager would be seeking further input from the appropriate contact, or that her response was limited to a very narrowly defined administrative context.

61.17. The Administration Manager had been the sole point of contact between Mr and Mrs S and the Scheme for a number of years. At no point was there a disclaimer that the information provided during their telephone conversations with the Administration Manager could not be relied on. Mr S presumes that the Administration Manager was allocated to this role because of her knowledge of the Scheme.

61.18. Mr S sought advice from an accountant concerning the incorporation of the Business. However, it would be unreasonable not to expect Mr S to also rely on a statement made by the Trustee or its agents as a result of queries that he was asked to raise by his accountant.

61.19. In its additional submissions, the Trustee did not address Mr S' point that the section 75 debt would not have been triggered if the negligent misstatement

had not been made. Without the negligent misstatement, Mr S would not have triggered the section 75 debt. Even if he had chosen to incorporate the Business, he could have done so in a manner which could have allowed him to satisfy the criteria for an FAA at that time.

61.20. Page two of an information bulletin issued by the Trustee in June 2017, deals with the possibility of an FAA being entered into, if the funding test and other requirements for making an FAA are met.

61.21. Mr S has confirmed that he has no objection to the Trustee setting-off any award made by the Ombudsman for redress against the section 75 debt.

Conclusions

Limitation Period/Prescription

62. Mr S' position is that the Trustee's claim, treated as falling due in July 2010, is time barred under both English and Scottish law.

63. Section 9 of the Limitation Act, provides for a limitation period of six years for sums recoverable by statute. As the trusts of the Scheme are established under Scottish law, I am satisfied the Limitation Act has no relevance to Mr S' case. Consequently, a defence under Section 9 does not apply; the issue here is whether the section 75 debt is recoverable under the 1973 Act.

64. Mr S' complaint that any claim to recover the section 75 debt is prevented by the Limitation Act must therefore fail since the Scheme is governed by Scottish law. The question for me to answer is whether the prescription requirements under Scottish law mean that the section 75 debt cannot be pursued.

65. The 1973 Act applies to occupational pension scheme trusts subject to Scottish law such as the Scheme. Unlike the Limitation Act, prescription is a substantive rule of law which extinguishes certain rights and obligations after the applicable period. This means that after that period has expired, the right or obligation ceases to exist and does not, like the Limitation Act, simply render the obligation unenforceable.

66. For the purposes of subsections (2) and (4) of section 75 of the 1995 Act, the liabilities and assets to be taken into account, and their amount or value, "must be determined, calculated and verified by a prescribed person and in the prescribed manner".

67. The section 75 debt is treated as falling due immediately before the employer ceases to participate in the scheme. However, the debt is not payable until the Scheme Actuary has certified it. Until such time, it has yet to become enforceable for the purposes of the 1973 Act.

68. Section 7(1) of the 1973 Act, stipulates a prescription period of 20 years from the date the obligation becomes enforceable. Mr S has submitted that the debt became enforceable from the date the employer cessation event occurred.

69. I note that Mr S considers that the court ruling in Central Electrical Generating Board v Halifax Corporation supports his position. On reviewing the evidence, I agree with the Trustee that the relevant case is the Phoenix case. In that case, the High Court determined that the section 75 debt cannot be claimed, or enforced, until it has been calculated and certified. The Scottish Courts are able to have regard to this case as persuasive authority when determining the date a debt is enforceable (to the extent that the expression enforceable is used in the 1973 Act).

70. In this case, the 20 year period runs from the date the section 75 debt is certified.

71. The estimated section 75 debt was not notified to Mr S until November 2018. Even if it had been certified on that date, which it was not, any action on the part of the Trustee to recover the debt would not be time barred under Section 7(1) until a period of 20 years has elapsed. Consequently, the Trustee is not time barred from seeking recovery.

72. I am also satisfied that the prescriptive periods of five years under Section 6 of the 1973 Act, do not apply in this case. The obligations to which section 6 applies are set out in Schedule 1 to the 1973 Act, and the obligation to pay a section 75 debt does not fall within any of the categories set out in Schedule 1.

Delays in certifying the debt under the employer debt requirements

73. Under the employer debt requirements, the Trustee is under a statutory requirement to certify the debt once it has been triggered. As part of the certification process, this will necessarily require the employer to be informed that a debt is due and to be notified of the amount of the debt. However, in practice the notification will occur after the employer cessation event.

74. I appreciate that the Trustee initially received actuarial advice that it was not possible to calculate the debt because of the way the Scheme data was held. I also recognise that for a number of years the Trustee was hoping that the Government would change the law.

75. However, by 2012 the Trustee had acknowledged that meaningful change in the employer debt requirements was unlikely to be forthcoming. By 2013, the new Scheme Actuary had advised that it was possible to analyse the Scheme data and calculate the section 75 debts, even if the precise method of allocating orphan liabilities had not yet been determined.

76. The Trustee should have taken steps from 23 September 2014, to certify the section 75 debt to comply with its obligations under the employer debt requirements. At the very minimum, the Trustee should have notified Mr S that a section 75 debt had been triggered. Furthermore, the Trustee should have explained the process it was going

to undertake to calculate the debt and the steps that the Trustee was taking to clarify the legal position with regard to the treatment of orphan liabilities.

77. On reviewing the evidence, I find that there was a failure on the part of the Trustee to comply with the employer debt requirements between 23 September 2014 and 10 November 2017, the date Mr S was first notified of the section 75 debt.

78. However, a breach of the employer debt requirements on the part of the Trustee does not give Mr S an entitlement to be compensated for any financial loss arising from that breach, unless there is also a concurrent duty of care in negligence.

79. Furthermore, even if it had given rise to a concurrent duty of care in negligence, any requirement, as part of the process of calculating the debt to notify an employer that a debt was due, would not have occurred until after the employer cessation event had occurred.

80. However, on reviewing the evidence, I find that the delays were in breach of the employer debt requirements and potentially amount to maladministration on behalf of the Trustee (see paragraphs 173 to 184 below for a further analysis of the position).

Failure to notify Mr S in advance that a section 75 debt might be triggered on incorporation of the Business

81. It is unfortunate that neither the Administration Company nor the Trustee took any steps to notify Mr S during the period from April 2005, and June 2010, when he restructured the Business, that:

81.1. the law had changed so that on the incorporation of a business a debt would be triggered on an annuity buy-out basis; and

81.2. the Trustee was lobbying the Government to see if the law could be changed to obtain an exemption for the Scheme or another method of managing section 75 debts.

82. I am satisfied that neither the Trustee nor the Administration Company owed an active duty under the employer debt requirements, or the Disclosure of Information Regulations, either to notify an employer in advance of the possibility of a section 75 debt being triggered or that the trustees were making representations to the Government for a change in the law.

83. Leaving aside momentarily the question of whether the Administration Company or the Trustee are in a sufficiently proximate relationship for a duty of care in negligence to arise. No duty of care is owed to actively warn or advise an employer of the risk of a section 75 debt being triggered. Generally, individuals are only responsible for their acts which harm others, not an omission to act. The act/omissions distinction, is referred to in the Robinson case, on which the Trustee relies, as subsequently interpreted by the Supreme Court in Poole Borough Council v GN and another [2019] UKSC 25 at 64 (**Poole**). These cases are considered further in paragraphs 90 to 102 below.

84. However, this does not mean that the Administration Company could not assume a duty of care if it gives inaccurate information concerning the implications of ceasing to participate in the Scheme. In the recent case of Corsham and others v Police and Crime Commissioner for Essex and others [2019] EWHC 1776 (Ch) (**Corsham**) the High Court held that the Police Commissioner had assumed a duty of care in relation to information provided to members concerning the tax implications of re-employment following termination of employment. There are several other cases where administrators and trustees have been held to assume a duty of care to members by the courts.

Did the Administration Company assume a duty of care in negligence in relation to the information supplied to Mrs S in 2010?

85. A critical legal issue in dispute between the parties is whether it was possible for the Administration Company to have assumed a duty of care in negligence to Mr S. Specifically, in relation to the information the Administration Manager provided to Mrs S.

86. The Administration Manager was an employee of the Administration Company. Consequently, the Administration Company will be vicariously liable for any negligent misstatements made on its behalf. Furthermore, the Administration Company is acting as agent for the Trustee in performing any administration tasks delegated to it by the Trustee. The Trustee has overall responsibility for supervising the acts of the Administration Company: the Trustee has acknowledged this in the Trustee reports and accounts.

87. In the First Preliminary Decision, I concluded that there was a sufficiently proximate relationship for a duty of care to be assumed by the Administration Company in relation to any inaccurate information provided to an employer concerning the consequences of ceasing to participate in the Scheme. This is by virtue of the fact that the Administration Company has specialist knowledge of the Scheme and the statutory obligations the Trustee was subject to, including the section 75 debt requirements.

88. The Trustee disputes on various grounds that a duty of care can be owed in negligence or that a duty of care was assumed. The Representative has put forward extensive submissions on behalf of Mr S, in response to the Trustee's submissions, asserting that a duty of care is owed and can be assumed in these circumstances.

89. Given the extent and range of these submissions, it may be helpful if I go back to first principles and examine the relevant case law in greater depth. I have set out in paragraphs 115 to 140 below how I have applied the law to the facts arising in this case.

When does a duty of care in negligence arise? General principles

90. The Trustee has submitted that I misdirected myself in law in the First Preliminary Decision by finding a duty of care should arise by virtue of the proximity or special

relationship between the Administration Company and Mr S. This was the position before Robinson and is no longer the position.

91. I agree with the Trustee/Administration Company that the three stage Caparo test, including looking at the proximity of the relationship, should not be applied in negligence cases following the Supreme Court decision in Robinson if there is already authority that a duty of care can be owed in similar circumstances.

92. Broadly, the position we have now reached on the law of negligence (after various recent Supreme Court decisions including Robinson as clarified in Poole at [64]) is that the law favours an incremental approach to analysing allegedly negligent conduct in most factual situations. Namely, one which builds on and proceeds from, past decisions.[i] To the extent that a decision is required in a novel or borderline case, where the duty in question is not covered by authority, the traditional threefold Caparo may still be relevant and the courts, and the Ombudsman, should consider whether:

92.1. the parties were at the material time in a relationship of proximity or neighbourhood;

92.2. the harm was foreseeable; and

92.3. it is fair, just and reasonable, taking into account relevant policy concerns, that a duty of care should be recognised in all the circumstances of the case.

93. In cases where the question of whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions (Robinson judgment at [35]).

94. In Poole it was confirmed at [64] among other things that:

> "Robinson did not lay down any new principle of law, but three matters in particular were clarified. First, the decision explained, as Michael had previously done, that Caparo did not impose a universal tripartite test for the existence of a duty of care, but recommended an incremental approach to novel situations, based on the use of established categories of liability as guides, by analogy, to the existence and scope of a duty of care in cases which fall outside them. The question whether the imposition of a duty of care would be fair, just and reasonable forms part of the assessment of whether such an incremental step ought to be taken. It follows that, in the ordinary run of cases, courts should apply established principles of law, rather than basing their decisions on their assessment of the requirements of public policy."

95. There is a line of authorities in cases relating to negligent misstatement, from Hedley Byrne and Partners v Heller & Partners [1964] AC 465 (**Hedley Byrne**), onwards, in which a duty of care has been held to arise. These authorities establish that there

can be liability in negligent misstatement if the speaker assumes responsibility for what he or she says.

96. The speeches of their Lordships in Hedley Byrne laid down the basic proposition. Broadly, if a person seeks advice or information in the normal course of business from another party, who is not under any contractual or fiduciary duty to provide it, a duty of care may still arise. This occurs in circumstances where a reasonable man, if so asked, would know that he was being trusted or his skill or judgment was being relied upon by the person making the enquiry. If the other party then proceeds to give the information sought, without clearly disclaiming responsibility for it, he accepts a legal duty to exercise such care as the circumstances require in making his reply. If he fails to exercise care, an action in negligence will lie if it is foreseeable that loss or damage will result.

97. However, it is not always clear what amounts to an assumption of responsibility following the Hedley Byrne case.[3] Lord Slynn said in Phelps v London Borough of Hillingdon [2001] 2 AC 619 at page 654:

> "It is sometimes said that there has to be an assumption of responsibility by the person concerned. That phrase can be misleading in that it can suggest that the professional person must knowingly and deliberately accept responsibility. It is however clear that the test is an objective one… the phrase means simply that the law recognises a duty of care. It is not so much the responsibility is assumed as that it is recognised or imposed by the law."

98. Lord Mance also noted in Customs and Excise Commissioners v Barclays Bank [2006] UKHL 28 (**Barclays Bank**) at [93] that determining whether an individual has assumed responsibility for a statement may sometimes subsume elements of the Caparo inquiry.

99. I am mindful that the courts have not always taken an entirely consistent approach in subsequent cases. The learned editors of Charlesworth & Percy on Negligence (fifteenth edition) note at 2-216 that Barclays Bank at [4]-[8] their Lordships agreed that the notion of a voluntary assumption of responsibility was, or could be, of some help in a Hedley Byrne action where the claimant sued in respect of their reliance on a negligent misstatement but the concept could not be used as a general touchstone for liability in negligence for financial loss.[4]

---

[3] See discussion in Charlesworth & Percy on Negligence at paragraphs 2-213 to 2-217

[4] Customs and Excise Commissioners v Barclays Bank [2006] UKHL 28 at [4]. In this case, which predates Robinson and Poole, Lord Bingham referred to the three different approaches which the courts had used in deciding whether a defendant owed him a duty of care in tort. The three methods could be described as (1) whether the defendant assumed (or is to be treated as having assumed) responsibility for the statement;(2) whether the facts satisfied a threefold test of reasonable foreseeability, of proximity and the imposition of the liability being fair just and reasonable; and (3) whether a finding of liability involved an incremental development of the law from the earlier cases establishing liability for negligence. Lord Bingham also recommended at [8] that the court should concentrate its attention to the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole.

100. By contrast in Steele (relied on by the Trustee) Lord Wilson maintained that the concept of assumption of responsibility by a representor to a representee was the foundation of liability in tort for negligent misstatement. However, even in a Hedley Byrne context it is difficult to pin down what exactly an assumption of responsibility means beyond the fact that the defendant has actually provided a service or has chosen to make the statement in question. Lord Bingham in Barclays Bank at [5] said it was clear that the test was to be applied objectively: it was not to be answered by consideration of what the defendant thought or intended. Yet he recognised that the further the test was removed from the actions and intentions of the actual defendant, the more notional the assumption of responsibility became and the less difference there was from the threefold test of Caparo.

101. The learned editors in Charlesworth & Percy, with whom I respectfully agree, conclude that the speeches in Barclays Bank suggest that the law deems a defendant to have assumed responsibility where there is a proximate or special relationship between the parties, and policy supports a duty of care. Furthermore, in Poole, Lord Reed recognised that the Hedley Byrne assumption of responsibility did not stand apart from other iterations of the assumption principle. Accordingly, it being one way of giving expression to the duty of care inquiry, the cases show a duty being denied in the ordinary way on grounds of lack of proximity or of relevant considerations of policy.

102. Consequently, I do not agree with the Trustee that the issue of proximity and other elements of the threefold Caparo test has no relevance to the issue of whether a duty of care has been assumed in what the Trustee consider to be a novel situation. It is precisely in a novel situation where the Caparo threefold test could still have relevance. I will seek to analyse whether a duty of care is owed by applying traditional Caparo principles and an assumption of a duty of care analysis. I will also consider other cases where the courts have held a duty of care has been assumed in similar circumstances (an incremental approach).

Proximity

103. The fact that loss is foreseeable for an individual to rely on a statement and reasonable reliance on the statement is not enough on its own to establish an assumption of a duty of care. There needs to be a degree of closeness between the parties. In relation to the proximity test, generally the kind of case where a duty of care is likely to be recognised is where a knowledgeable or skilled person, acting in a strictly business capacity, gives misleading information or advice directly to another person, knowing the specific purpose for which the information is required. Moreover, the other party attaches importance to, and will rely on, what he or she hears or reads. The relationship has to be very close and proximate: not contractual in nature but something akin to a contractual relationship.

Level of special knowledge or skill

104. In the Privy Council judgment in the Mutual Life case which the Trustee has relied on in its additional submissions, it was held that it was a necessary component of imposing liability for negligent misstatement that the party making the statement must either have (or claim to have) a special skill and competence or carry on a business with the purpose of giving the advice sought by the enquirer. Furthermore, the party in question must have agreed to apply that skill for the benefit of the party making the enquiry. The Privy Council held that it was irrelevant whether Mutual Life was in a better position than the complainant to obtain financial information concerning the financial affairs of the firm in question, or that Mutual Life employed officers with the necessary skills and competence to form a reliable judgment in circumstances where Mutual Life had chosen to use its services to do so.

105. In the dissenting judgment in the Mutual Life case, Lords Reid and Morris said that:

> "Much of the argument was directed to establishing that a person giving advice cannot be under any duty to take care unless he has some special skill, competence, qualification or information with regard to the matter on which his advice is sought. But then how much skill or competence must he have?
>
> …We can see no ground for the distinction that a specially skilled man must exercise care but a less skilled man need not do so. We are unable to accept the argument that a duty to take care is the same as a duty to conform to a particular standard of skill. One must assume a reasonable man who has that degree of knowledge and skill which facts known to the enquirer (including statements made by the adviser) entitled him to expect of the adviser, and then enquire whether such a reasonable man could have given the advice which was in fact given if he had exercised reasonable care.
>
> We can see no virtue in a previous holding out…In our judgment when an enquirer consults a businessman in the course of his business and makes it plain to him that he is seeking considered advice and intends to act on it in a particular way, any reasonable businessman would realise that, if he chooses to give advice without any warning or qualification, he is putting himself under a moral obligation to take some care. It appears to us to be well within the principles established by the Hedley Byrne case to regard his action in giving such advice as creating a special relationship between him and the enquirer and to translate his moral obligation into a legal obligation to take such care as is reasonable in the whole circumstances…"

106. The majority view in Mutual Life was rejected in the High Court of Australia and the Supreme Court of Canada. It is not binding within the UK, and the Court of Appeal in England and Wales has preferred the minority approach (Esso Petroleum v Mardon [1976] QB at 827 and Howard Marine Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd [1978] at 591 and 600).

107. In the House of Lords, it has been observed that Hedley Byrne itself shows that the concept of “special skill” must be understood broadly to include special knowledge (Henderson v Merrett Syndicates Ltd [1995] 2 AC 145 at 180).

108. For example, this is illustrated by the fact a duty of care was imposed where the defendant, at the request of the claimant, advised her in buying a used car. The defendant was not in the used car business but he knew that the claimant would be relying on his skill and judgment as someone who knew a great deal more about used cars than she did (Chaudhry v Prabhakar [1989] 1 WLR 29 CA).

109. The House of Lords decision in Spring v Guardian Assurance [1994] 3 All ER 129, which concerned a reference given by Guardian Assurance in its capacity as Mr Spring’s former employer, is a further example. In this case, the court referred to the criticism of the decision in Mutual Life. The court also considered the question of “special skill”.

110. Lord Goff commented at 145 and 146 of his judgment on the reference by Lord Morris to special skill in the Hedley Byrne judgment, stating:

> “For present purposes, I wish also to refer to the nature of the 'special skill' to which Lord Morris referred in his statement of principle. It is, I consider, clear from the facts of Hedley Byrne itself that the expression 'special skill' is to be understood in a broad sense, certainly broad enough to embrace special knowledge. Furthermore Lord Morris himself, when speaking of the provision of a statement in the form of information or advice, referred to the defendant's judgment or skill or ability to make careful inquiry, from which it appears that the principle may apply in a case in which the defendant has access to information and fails to exercise due care (and skill, to the extent that this is relevant) in drawing on that source of information for the purposes of communicating it to another.”

Reasonable reliance

111. The defendant must be able to reasonably foresee harm to the claimant. It follows that it must be reasonable for the defendant to rely on what the courts have said.

112. In the Steele case, relied on by the Trustee, a solicitor sent an email to a client that misrepresented the nature of the transaction between the client and the finance company, in circumstances where the nature and terms of the transaction were wholly within the knowledge of the company. Lord Wilson accepted (to the extent that officers of the company saw and acted on the email) that a commercial lender about to implement an agreement with a borrower, referable to its security, did not act reasonably if it proceeded on no more of a description of the terms put forward on behalf of the borrower. Specifically, it was not reasonable to rely on the statement without checking its accuracy.

113. In other cases, a statement made on a social or informal occasion may not be actionable although a statement made between friends may be. It may also not be

reasonable to rely on a response to an important business enquiry which is merely given over the phone rather than in writing (Howard Marine Dredging v Ogden & Sons (Excavations) Ltd [1978] QB 574 per Lord Denning MR at 591-592).

Calculation of loss

114. If there is an assumption of a duty of care where trustees, or administrators on behalf of the trustees, provide information to an employer, they have a potential liability if they fail to ensure that it is accurate. It follows that, if a party sustains loss as a result of the provision of incorrect information, the trustees can be liable for that loss if:

114.1. "but for" the statement the loss would not have arisen; and

114.2. the loss was reasonably foreseeable and not too remote.

Did the Administration Company assume a duty of care? - applying the law to the facts of the case

115. The first issue I need to consider in relation to the question of whether a duty of care has arisen is whether this is a novel case, as submitted by the Trustee and the Administration Company. The courts have held in several cases that trustees and scheme administrators can owe a duty of care to scheme members in relation to the performance of their duties in respect of the administration of their benefits. The Courts have also held that trustees and scheme administrators can assume a duty of care in relation to information provided to scheme members. (I have discussed some of these cases in paragraphs 124 to 127 below). There are also various cases in which the courts have held that an employer can assume a duty of care to employees when advising them on their pension benefits. Generally, employers will owe no active duty to look after the financial wellbeing of their employees.

116. I will proceed on the basis that this is a novel case and seek to first apply a Caparo-type analysis as to whether a duty of care can arise. I will then consider whether the Trustee/the Administration Company have assumed a duty of care. I consider that the Caparo-type analysis remains relevant to whether a duty of care can be assumed having regard to the approach the courts have taken in past cases. In the Barclays Bank case, the court applied all three tests in determining whether a duty of care arose.

117. So, I first need to consider whether there is a special relationship or sufficient relationship of proximity for a duty of care to arise.

118. Generally, it is unlikely that a duty of care will be owed by the trustees, or administrators of an occupational pension scheme, to an employer in relation to the performance of several of their functions under the scheme in question. Broadly, in the case of occupational pension schemes for associated employers, it may not be reasonable for an employer to rely on a statement from the trustees or administrators of the scheme (where the administrator was not also engaged by the employer), unless the employer has taken separate advice to confirm the position.

119. That said, the Scheme is not a standard occupational pension scheme. It is a multi-employer centralised non-sectionalised scheme in which TPO understands around 330 employers currently participate. Many of these are small plumbing businesses.

120. Unlike most schemes for associated employers, where it would be usual to expect the employers to have their own pension advisers, the Scheme is administered in-house by the Administration Company, on behalf of the Trustee. According to the Trustee's most recent report and accounts, the Administration Company has a Chief Executive and employs 22 employees.

121. The Administration Company should have specialist knowledge about pensions and the administration of occupational pension schemes. By contrast, the individual employers will more likely have little or no expertise in the field of pensions. The Administration Company's role is to ensure that the Scheme complies with the trust deed and rules and applicable pensions legislation.

122. In particular, the Trustee and the Administration Company were aware of the changes to the employer debt legislation in 2005 and the steps taken by the Trustee to seek an exemption for the Scheme from the employer debt requirements. As this information had not been shared by the Trustee or the Administration Company, Mr S and the other employers would not have been aware of the position at the time.

123. On reviewing the evidence, I find that there was a special relationship, and sufficient proximity for a duty of care to arise, if the Administration Company provided inaccurate information on which it was reasonable for Mr S to rely. The Administration Company undoubtedly does have special knowledge relating to the running of the Scheme which Mr S did not. The Administration Company, through the Administration Manager, was aware of the purpose for which the information was required and that Mr S was likely to rely on it.

124. The Trustee also seeks to rely on Outram as authority for the view that a duty of care cannot arise in the current case. Outram is just one example of a case where the courts have held that there is no general duty on employers[5] in contract or tort to give an employee advice on how best to exercise their rights under the Scheme (see also Crossley v Faithful & Gould Holdings [2004] EWCA Civ 293; University of Nottingham v Eyett [1999] ICR 87; and Hagen v ICI Chemicals and Polymers [2002] IRLR 31). There are also several other cases concerning trustees and administrators where it has been held that there is no general active duty to advise members on the advantages or disadvantages of taking a course of action (see for example Hamar v French [1998] PLR 321, and Miller v Stapleton [1996] 2 All ER at [62]). This is commonly known as the acts/omission distinction under which individuals are not liable in negligence for an omission to take steps to protect a third party but may be liable where taking active steps to damage or cause economic loss to a third party.

125. However, this does not preclude trustees or scheme administrators from assuming a duty of care in appropriate circumstances where they go beyond a duty to provide

[5] Outram is unusual in that the employer was also the trustee and administrator of the scheme.

information they are required to provide. In Outram for example, it was noted at [19] that it was not alleged that the company was "asked or expressly or impliedly assumed any contractual responsibility" to give advice.

126. In Wirral Borough Council v Evans and another [2000] 63 PBLR, it was held that there was no active duty on a manager of a public sector scheme to advise on transfer rights. However, in a letter concerning a proposed inward transfer, Mr Evans was invited to contact the administrators of the scheme, if he required further assistance in connection with the transfer. Mr Evans alleged that he telephoned the administrators of the scheme at the time to clarify the amount of service he would be credited in the scheme in respect of the transfer. It was recognised by Mr Justice Evans-Lombe at paragraphs [39] and [40] of his judgment that if the administrators had indeed offered Mr Evans advice, it might be contended that the administrators had assumed a duty to advise him competently and were in breach of that duty. The matter was remitted back to the Ombudsman to consider whether any duty of care had been assumed.

127. In Musawi v Bevis Trustees [2009] 055 PBLR, it was confirmed that there was no duty to advise the member of the loss of transfer rights when he started taking his benefits from the scheme. The only duty was to take reasonable care to ensure that any information supplied to the member, whether given in response to a request, or compliance with statute, or simply volunteered, was correct. The case recognises that where information is provided, care should be taken to ensure that it is accurate. A further example of where the courts held that a duty of care had been assumed by administrators of a pension scheme in respect of a member is in Corsham, referred to in paragraph 84 above.

128. I recognise that the above cases do not relate to a situation where a court has held a duty of care has been assumed in relation to information provided by trustees to an employer. However, they do represent probably the closest comparable cases where a duty of care has been assumed (or is capable of being assumed) in similar situations. The courts have held in the past that a duty of care can be assumed by administrators and trustees in a wide range of similar situations to the current situation. So, accepting that this is a novel situation, in terms of incremental development of the law, I consider that it would be appropriate, fair, just, and reasonable to impose a duty of care in this case. (See paragraphs 92 to 93 above.)

Applying the law to the facts – special relationship

129. The Trustee and the Administration Company are seeking to rely on Mutual Life, which I have mentioned in paragraph 104 above. In effect, the Trustee and the Administration Company are asserting that there needs to be an active assumption of a duty of care by a professional with a special skill and competence. Based on the facts of this case, they maintain that there was no active assumption of a duty of care.

130. Mutual Life is very different from the current case. The Administration Company and the Trustee possess, or ought to have, special skill and knowledge in administering the Scheme. Furthermore, as I have explained in paragraph 105 above, subsequent decisions in the UK have followed the minority judgements in Mutual Life. These cases demonstrate that a party with a lesser skill, or special knowledge, can assume a duty of care well within the principles established by Hedley Byrne. Furthermore, the provision of advice can create a special relationship with the individual making the enquiry, transforming a moral obligation into a legal obligation to take care as is reasonable in all the circumstances.

Applying the law to the facts – reasonable reliance

131. The Trustee contends that it was not reasonable for Mr S to have relied on the information provided by the Administration Manager without verifying the position and/or taking advice independently.

132. In particular, the Trustee submits that the Administration Manager's interactions with Mrs S were conducted in the context of her role and not on the basis that she was providing Mrs S with advice. However, I would observe, as noted by Mr S, that the Administration Manager was employed by the Administration Company and had been Mr S' sole point of contact for the Scheme over a period of several years. I find that it was reasonable in the circumstances for Mr S to have relied on the statement, "that nothing would change", in response to a specific question concerning the impact of incorporating the Business, when deciding whether to proceed.

133. The Trustee and the Administration Company seek to rely on the Steele case, mentioned in sub-paragraph 60.15 above. It provides authority for the general proposition, that where the information is within the claimant's knowledge, or could have readily been checked by the claimant, it would neither be reasonable nor foreseeable that the claimant would rely on the information.

134. The current facts are different from Steele. The Trustee had detailed knowledge of the position regarding section 75 debts and held discussions with the Government in an attempt to obtain an exception for the Scheme. Mr S had no knowledge of this at the time; indeed the Trustee had chosen not to share this information.

135. It may not have been reasonable for Mr S to have proceeded with the incorporation of the business solely on the basis of the telephone conversation in question. I agree with the Trustee on this point. However, the Administration Manager followed up the telephone call with the April Letter. The April Letter did not make any reference to the possibility that the incorporation of the Business would trigger a section 75 debt, or any disclaimer of responsibility for the statements that the Administration Manager had made to Mrs S. Nor did the April Letter include a statement that Mr S should consult his own advisers. The Administration Manager had an opportunity to check the position before following up the telephone call or could have included appropriate disclaimers in the April Letter. In cases such as these, I would expect pension scheme administrators to avoid making unqualified statements to employers, without

verifying the position internally, or to include a disclaimer that the employer should seek independent advice.

136. Generally, in the case of an occupational pension scheme, for associated employers, it is reasonable for a participating employer to obtain separate legal advice, or advice from its own accountant, on a matter of financial importance to the employer. However, in the case of the Scheme, a centralised scheme for 330 or so non-associated employers, which was actively marketed to small plumbers, I find it reasonable for Mr S to have relied on the statements made on behalf of the Administration Company, in response to the specific questions Mrs S had raised. In taking this view, I have considered that the statements in question were made by an employee of the Administration Company, with whom Mrs S had regular dealings over a period of several years. I also find that it was reasonable in the circumstances for Mr S to have assumed that the Administration Manager would have the relevant knowledge to answer the questions correctly.

137. Generally, I would not consider it reasonable for an employer to proceed with a major financial decision, based on verbal confirmation from administrators of a pension scheme, unless the employer has first obtained specific and independent advice.

138. On reviewing the evidence, I find that it was reasonable in the circumstances for Mr S to rely, and foreseeable that he would rely, on the statement the Administration Manager made on behalf of the Administration Company when deciding whether to incorporate the Business, without seeking independent verification of the position. In taking this view, I have considered the following:

138.1. the unusual nature of the Scheme. Specifically, it is an unsegregated scheme for non-associated employers;

138.2. Mr S would likely have had little or no pensions expertise;

138.3. the Administration Manager was Mr S' sole point of contact for the Scheme over a period of several years. The evidence supports the view that the Administration Manager was held out as having expertise in the running of the Scheme and knowledge of pension matters generally;

138.4. the statement in question was provided in response to a specific question Mrs S asked during the course of normal communications between her and the Administration Company, as an agent of the Trustee;

138.5. the April Letter which followed the statement; and

138.6. the fact that the Administration Company had an opportunity to correct/qualify the statement or include appropriate caveats in the April Letter, negating any duty of care, but failed to do so.

Applying the law to the facts – should a duty of care be recognised in the circumstances?

139. I now need to consider whether it is fair, just and reasonable, taking into account relevant policy concerns, that a duty of care should be recognised in all the circumstances of this case. The Trustee has submitted that a duty of care should not be owed to an employer on the basis that it could potentially conflict with their fiduciary duties to members of the Scheme.

140. I can see how this may be the case in relation to the exercise of trustee's statutory funding obligations, or when enforcing a section 75 debt. However, I am not convinced that the same considerations apply where a scheme administrator voluntarily assumes responsibility for the provision of information to an employer concerning the implications of incorporating a business.

Was there a negligent misstatement by the Administration Manager on behalf of the Administration Company?

141. The Trustee has submitted that there was no negligent misstatement, on the part of the Administration Manager, on behalf of the Trustee. In particular, it notes that the April Letter does not say that incorporation would have no material impact on the Business. Furthermore, in answer to the question Mrs S raised during the telephone call, concerning the implications of incorporating the Business, there was no reference to section 75 debts in the April Letter.

142. Mr S' response to the November 2018 Letter, supports his recollection of the information Mrs S said she relayed to him at the time. Mr S maintains in the December 2018 Letter, that the Administration Manager had "categorically" informed his wife that, following the incorporation of the Business, no material change would occur. I find that the response is wide enough to cover whether a section 75 debt would be triggered. There is nothing in the evidence to suggest that Mr S is not a truthful or credible witness.

143. I am mindful that there is an evidential issue of what other information the Administration Manager may, or may not, have conveyed to Mrs S during the telephone conversation in question. There is no contemporaneous note evidencing the alleged breach of the duty of care, only the April Letter. I note that the Trustee is not in a position to either refute or substantiate Mrs S' version of events. While the evidence concerning the telephone call is limited, it is necessary for me to reach a view on the balance of probabilities.

144. The April Letter is the only independent evidence of the conversation that took place between Mrs S and the Administration Manager on 28 April 2010.

145. I accept that the possibility of an employer debt being triggered, or otherwise, is not addressed in the April Letter. The Administration Manager acknowledged her telephone conversation with Mrs S and confirmed that it concerned a change in the

status of the Business. The Administration Manager also acknowledged that the entire Business and its employees, were being transferred to the Company.

146. However, I do not consider that these documents can be looked at separately as the April Letter was sent following the statement the Administration Manager made at the time. Mrs S had been told the previous day that no material change would occur as a consequence of the incorporation of the Business. I have evidence that Mrs S asked the Administration Manager what impact incorporation would have on the Business; and was told “nothing would change”.

147. On the balance of probability, I find that it is more likely, than not, that the statements alleged to have been made by the Administration Manager, on behalf of the Administration Company, as agent for the Trustee, were indeed made.

148. In taking this view, I have considered the fact that Mrs S sought assurances from the Administration Manager that nothing would change materially. The Administration Manager was aware of the purpose for which this information was sought, as evidenced by the April Letter. The assurances provided by the Administration Manager were factually misleading, given the knowledge the Administration Company had at the time regarding section 75 debts.

149. In the absence of a disclaimer, or warning that Mr S should seek advice, I find that it was reasonable for Mr S to rely on the information without seeking independent verification.

150. Moreover, the Trustee and the Administration Company (acting in a competent manner) should have ensured that any information volunteered by, or on behalf of the Trustee, was accurate, and not misleading.

Did the negligent misstatement cause loss to Mr S?

151. If there is a negligent misstatement in breach of a duty of care and a party sustains loss as a result of the provision of incorrect information, the trustees can be liable for that loss if:

“but for” the statement the loss would not have arisen; and

the loss was reasonably foreseeable and not too remote.

152. I am satisfied on reviewing the evidence, and submissions made by the Representative on behalf of Mr S, but for the assurance that “nothing would change”, Mr S would not have chosen to incorporate the Business in 2010. I am also satisfied that Mr S would have taken advice at the time, and, on the basis of that advice, he would not have proceeded with the incorporation until it was known whether the Scheme would be exempted from the employer debt requirements. It was also reasonably foreseeable that a method of mitigating the amount of the section 75 debt, or dealing with the debt, might be available at a future date. The fact that it was not known at the time that a new method of apportioning the debt would be made

available in future cases, where a debt was triggered using the FAA, does not materially change the outcome in the circumstances.

153. The Trustee is correct that Mr S is liable to pay the section 75 debt irrespective of whether the employer cessation event occurred in 2010, or at a later date. However, the liability would not have crystallised if an employer cessation event had not been triggered. Furthermore, Mr S would have been required to pay the section 75 debt from the date the debt was certified by the Scheme Actuary.

154. The Trustee noted in its submissions to TPO that when the employer cessation event was triggered in 2010, FAAs were not available. So, Mr S could not have entered into an FAA at the time.

155. FAAs were introduced from 2012. Consequently, Mr S may have been able to enter into an FAA if he retired on or after this date. I note that Mr S did not cease to be involved in the Company until May 2016.

156. However, I recognise that even if it had been possible for Mr S to enter into a FAA, it does not necessarily follow that the Trustee would have agreed to this. In particular, the Trustee has advised that if the section 75 debt had been triggered at a later date it would have been significantly larger than the debt triggered in 2010. Consequently, I need to consider whether, on the balance of probabilities, the parties would have entered into an FAA, following the change in the law in 2012. Specifically, at the time the Trustee began offering FAAs in respect of the Scheme from 23 September 2014 onwards.

157. I am mindful that the Trustee was not required to enter into an FAA. The Trustee would have considered whether it was appropriate to do so, having regard to its wider fiduciary duties to Scheme members. Before agreeing to enter into an FAA, the Trustee would have obtained advice from covenant advisers. The Trustee would also have obtained advice from the Scheme Actuary, to determine whether the funding test was met. Broadly, to meet the funding test two conditions must be satisfied:

(a) in the opinion of the trustees, the remaining employers are able to meet the relevant payments as they fall due under the schedule of contributions, taking into account any revision of the schedule of contributions that the trustees consider will be necessary when the FAA takes effect; and

(b) the trustees must be reasonably satisfied that the effect of the FAA will not adversely affect the security of member benefits as a result of:

a. any material change in legal, demographic, or economic circumstances that would justify a change to the method or assumptions used on the last occasion on which the Scheme's technical provisions were calculated; or

b. any material revision to an existing recovery plan.

158. Consequently, I need to form a view on whether the funding test would have been met having regard to the approach taken by the Trustee in other cases.

159. I have reviewed four covenant reports from the Scheme's covenant advisers, and information provided by the Scheme Actuary, in other cases where the Trustee has agreed an FAA. The approach and methodology are broadly similar in all the examples I have seen.

160. In one of the cases I have reviewed, where a retrospective FAA was granted by the Trustee, the impact of incorporation resulted in a significant reduction in assets available to meet a section 75 debt. It was noted by the Trustee that the illustrative funding requirement would appear to place a considerable cash burden on the employer, both pre and post incorporation, considerably in excess of the employer's net profit over a period of five financial years. The employer's cash reserves were minimal, so it would have been difficult to meet the illustrative cash reserves from ongoing cash generation. However, in the case in question, while the illustrative funding requirements may not have been affordable post-incorporation, there was nothing to indicate that the employer's cashflow would deteriorate following incorporation. I note that the entire business, including the assets, transferred in full from the sole trader to the incorporated entity. I also note that the sole trader's historic performance remained relatively stable.

161. In the case I examined, the covenant adviser concluded that:-

(1) The ability of the employer, post-incorporation, to be able to fund the requirements of the Scheme from trading cash flows should not be materially adversely impacted by the proposed FAA.

(2) Based on recent trading performance, there does not appear to be any short-term threat of insolvency to the employer.

(3) The step to establish a limited company is reasonable and normal practice.

(4) On a purely financial basis, the proposed FAA does appear to adversely impact on the Scheme's recovery on a standalone theoretical insolvency position. However, given the additional risks (including reputational) to the wider Scheme and its employer base, it is not possible to determine the impact on the strength of the overall covenant.

162. However, the covenant adviser also concluded that:

"Taking these factors into account, and based upon the information available to us, there is no clear evidence that the incorporation, combined with the proposed FAA, will materially adversely impact the covenant offered to the Scheme and we would recommend that the Trustee accepts the FAA."

163. The documents I have seen, do not indicate to me that a particularly demanding test was applied when determining whether the FAA should be granted, albeit I recognise that the Trustee was scrupulous in taking and following advice in all the cases I have reviewed. I do not consider that the Trustee can be criticised for following the advice of its covenant and actuarial advisers.

164. I have carried out a detailed review of the FAA cases approved to date by the Scheme and have reached my conclusion based on this.

165. I am satisfied on the basis of the information available that if Mr S had delayed triggering a section 75 debt until 2016, on the balance of probabilities, and having regard to the approach the Trustee took in other cases, that the FAA would have been approved without requiring extra security or mitigation. Having reviewed the outcome of the 27 cases, which were all approved by the Trustee, I am satisfied that on the balance of probabilities an FAA would have been granted in Mr S' case, had he still been participating in the Scheme when FAAs became available. The test applied in other cases was not particularly demanding.

166. Mr S would have been liable for the section 75 debt once triggered irrespective of whether or not he had been told that incorporation would trigger the debt. However, if Mr S had been informed that a debt would be triggered, I am also satisfied on the balance of probabilities that he would have delayed incorporating the Business until it was established that the Government was not willing to change the employer debt legislation to make a specific exception for the Scheme, and FAAs were available.

167. It follows that Mr S has indeed sustained financial loss as a consequence of the inaccurate information provided to Mrs S in 2010, on the basis that the Business would otherwise have become insolvent as a consequence of an FAA. It also follows that the Company, rather than Mr S, would have been liable for the section 75 debt.

168. The loss will broadly be equal to the amount of the employer debt Mr S now has to pay to the Scheme as a result of the debt being triggered. However, any redress I direct in this case shall be reduced by the amount of £35,638, that Mr S received from the sale of the Business. I do not consider that Mr S would have been able to sell his share of the Business or extract capital from the Business when his shares were sold, until the uncertainty surrounding the section 75 debt had been clarified and an FAA had been entered into. Accordingly, any award for financial loss shall be reduced to reflect this.

169. Irrespective of any redress I direct for financial loss, Mr S remains liable to pay the section 75 debt, which was triggered in 2010. I agree with the Trustee that any redress in respect of loss Mr S has sustained, as a result of the negligent misstatement, can be set-off and applied by the Trustee in partial settlement of the section 75 debt.

170. Regarding the recovery period for the section 75 debt that remains outstanding, I would observe that in other schemes trustees have agreed that any section 75 debt can be paid in instalments if the employer cannot afford repayment over a shorter period. The view taken in the past by other pension trustees, is that payment by instalments does not amount to a compromise of a section 75 debt which would preclude PPF entry for the Scheme as a whole. The full section 75 debt is still being paid albeit over a longer period. The Trustee should obtain advice before proceeding on this basis.

Conflict of Interests

171. Mr S' case raises issues regarding the Trustee's management of conflicts of interests. In particular, whether the Chairman at the time had a conflict of interest.

172. The fact that the Chairman at that time was a non-executive director of tPR, is not sufficient grounds on which to conclude he had a conflict of interest which would have prevented him from continuing his role as Chairman. The evidence does not support the assertion that the Chairman took part in any decisions involving regulatory action in connection with the Trustee's failure to take steps to collect section 75 debts.

Maladministration (non-financial injustice)

173. What is left for me to consider is whether the failure to calculate the section 75 debt and notify Mr S that a debt was due, while it sought a change in legislation, constitutes maladministration giving rise to a claim for non-financial injustice.

174. It has been confirmed in several cases that it is for the Ombudsman to decide what constitutes maladministration. A court will generally only interfere if I have erred in law or reached a decision that is so unreasonable that no reasonable Ombudsman could have come to that decision (Wild v Smith [1996] PLR 275 at paragraph 28 and Metropolitan Police Service v Hoar [2000] OPLR 267 at paragraph 20).

175. The evidence supports the view that the Trustee faced difficulties calculating section 75 debts and that it had issues with the Scheme data. I note that the Trustee was initially advised that there was insufficient information to undertake the calculation.

176. I am aware that the Trustee was seeking to lobby the Government to change the way in which the Employer Debt Regulations applied after September 2005 in relation to multi-employer sectionalised schemes. Although there was no guarantee that this would lead to meaningful change in the legislation, the Trustee remained optimistic. Against this backdrop, I appreciate that the Trustee would not have wished to alarm participating employers. It is unfortunate, and with hindsight a poor decision, that the Trustee did not take steps to warn employers participating in the Scheme, after the law changed in 2005, that section 75 debts on an annuity buy-out basis may be triggered on cessation of participation of a participating employer. Mr S was not notified until 10 November 2017, seven years after the employment cessation event, that a section 75 debt had been triggered and would be collected by the Trustee. The Trustee was proceeding on the mistaken assumption that it would succeed in persuading the Government to change the law. Namely, to introduce a specific mechanism that would allow participating employers in centralised multi-employer schemes, for non-associated employers, to avoid paying section 75 debts. Failing that, a specific exemption for the Scheme.

177. However, I find that the Trustee has no general duty of care in negligence to take active steps to advise Mr S of the risk of a section 75 debt being triggered, in circumstances where he ceased to participate in the Scheme. Similarly, the Trustee

has no general duty of care in negligence to take active steps to advise Mr S of the section 75 debt, in the absence of a duty of care being assumed in response to a request for information concerning the implications of ceasing to participate in the Scheme. I am satisfied that in the unusual context of this particular scheme, a duty of care is capable of being assumed (and has been assumed) by Mr S as an employer in relation to the accuracy of the information that was voluntarily supplied to Mrs S in 2010 by the Administration Company. Mrs S asked about the consequences of the transfer of the Business and the Administration Company had specialist expertise and knowledge in this area.

178. On balance, I do not consider that the steps the Trustee took, in the period from 2010 to 2013, which ultimately delayed action to recover the section 75 debt from Mr S, amounts to maladministration. Similarly, the Trustee's decision, not to actively pursue Mr S, due to the data issues and its attempts to lobby the Government, does not in itself, amount to maladministration.

179. That said, following submission of the 2012 actuarial valuation to tPR, the Trustee accepted that "meaningful change to employer debt legislation was unlikely to be forthcoming". I find that the failure on the part of the Trustee to inform Mr S of the position and commence steps to collect the debt (insofar as it was able) for several years, was a very poor decision and does amount to maladministration. The Trustee should have notified Mr S that he had triggered a section 75 debt at the earliest opportunity and informed him of any issues impacting the calculation, as part of the process for collecting the section 75 debt.

180. At the very minimum, the Trustee should, as part of its obligations to certify the debt, have shared this information with Mr S within a reasonable time period on discovering that it was possible to reconfigure the data. Mr S was denied the opportunity to plan his financial affairs for the possibility that a section 75 debt may arise in the future. Mr S could potentially have obtained advice on the options available to him. For example, bankruptcy or exploring the apportionment options. Mr S is entitled to a distress and inconvenience award, in recognition of the severe non-financial injustice he has suffered.

Implications of the Court of Session Judgment in relation to the Scheme in 2022

181. During the period I have been considering this case, the Trustee has petitioned the Court of Session for directions in relation to the various claims the Trustee is facing concerning the issue of section 75 debts. I have considered the findings of the First Division, Inner House, Court of Session in 2022, in response to a petition for directions by the Trustee under section 6(vi) of the Court of Session Act 1988, and at common law, to establish if this has any material implications on the outcome of Mr S' complaint.

182. The Court of Session found, among other things, that the actions of the Trustee, in relation to the running of the Scheme and failing to collect section 75 debts, did not amount to fraud or gross negligence. Accordingly, the Trustee was able to rely on the

indemnity under the rules of the Scheme in respect to the various claims being made against the Trustee, including similar claims to the one I am considering in Mr S' case.

183. However, the fact that the Court of Session concluded that there was no gross negligence does not preclude me from making any of the findings I have made in this case. It is possible for the Trustee to have been negligent without being grossly negligent.

184. The Court of Session does not appear to have been asked to address the question of whether the Trustee could seek to rely on the exoneration clause in the trust deed in relation to any claim. Therefore, I need to address the effectiveness of any exoneration clause in relation to my directions.

185. I would observe however that the wording of the exoneration clause in the trust deed governing the Scheme, is much narrower in scope than the indemnity clause. Also, it is considerably narrower than many exoneration clauses found in other scheme rules. Unlike the indemnity clause, it is solely restricted to breaches of trust. The indemnity and exoneration clauses provide as follows:

> "**22.2 Indemnity**
>
> The Trustee (and the officers and employees of the Trustee) will be indemnified against any expenses and liabilities which are incurred through acting as the trustee of the Scheme out of the Scheme's assets and will have a lien on the Scheme's assets for such indemnity. This indemnity does not apply to expenses and liabilities which are incurred through wilful wrongdoing or covered by insurance under Rule 22.4 (trustee insurance).
>
> **22.3 Limit on liability**
>
> The Trustee (and the officers and employees of the Trustee) will not be liable for any breach of trust other than a breach of trust knowingly and wilfully committed".

186. The exoneration clause would in my view only protect the Trustee against any claim for breach of trust and not, as in the current case, any claim for negligent misstatement made on behalf of the Trustee. Furthermore, the exoneration clause will not protect the Administration Company against a claim. Consequently, the existence of the exoneration clause does not affect any of my findings in this Determination.

187. Having considered all these matters and the full submissions of both parties, I find that there was a negligent misstatement on the part of the Trustee which caused reasonably foreseeable loss to Mr S.

188. The complaint of maladministration is partly upheld.

Directions

189. Within 28 days of the date of this Determination, the Trustee and the Administration Company shall:-

189.1. request that the Scheme Actuary certifies the final value of the section 75 debt (**the Final Value**);

189.2. apply an amount equal to the Final Value less £35,638 to partially discharge the section 75 debt; and

189.3. apply a further sum of £2,500, in respect of the severe non-financial injustice Mr S has suffered, to further partially discharge the section 75 debt.

190. Mr S remains liable for the remainder of the section 75 debt. That is, the Final Value less the sums to be applied under sub paragraphs 189.2 and 189.3 above.

Anthony Arter CBE

Deputy Pensions Ombudsman
13 October 2023

Appendix A

A summary of Mrs S' recollection of the telephone conversation with the Administration Manager

"To put into context the relationship between Ms [N] and Mrs S at the office of A. [S] & Son is that our client (Mr [S]) small business ran an In-House Sage Payroll scheme. The details of the employees entered into the Plumbing Pension were input into the Payroll program and pension contributions were calculated every time the payroll was run which in 2010 was weekly. There were weekly, monthly forms and an annual returns sheet to complete by paper and [send] to Plumbing Pensions in Edinburgh.

Over many years there were of course queries and occasionally problems regarding the running of the Pension Scheme through the payroll that Mrs [S] needed to seek advice on and her point of contact at Plumbing Pensions was always Ms [N]. She was the person who dealt with queries from A. [S] & Son unless she was on holiday or otherwise absent. Ms [N] was allocated specifically to A. [S] & Son due to her knowledge of the Plumbing Scheme and our client's participation in it. Over a period of many years, our client and Ms [N] spoke to each other via telephone and our client was informed and under the impression at all times that Ms [N] represented both the Trustee and the Administrator in those discussions.

Prior to the business going from sole Trader to Limited Company on 1 July 2010, Mrs S made a telephone call to the Administration Manager. She explained to her that the business was changing its legal status from sole trader to Limited Company on 01 July 2010 and asked what implications this would have both financially and practically. the Administration Manager's reply was that nothing would change save that the name on the paperwork would change from A. S & Son to A. S & Son Ltd from 01 July 2010. Mrs S did query the Pension Scheme Reference Number during the conversation as she thought that if the legal name was changing however slightly then she would be given a new scheme reference number but the Administration Manager assured her that the current scheme reference number would remain unchanged.

As the Administration Manager represented the Trustee and the Administrator, our client reasonably relied on her assurances and at no point did the Administration Manager ask Mrs S to put anything in writing or mention that the business would trigger a section 75 debt by changing its legal status. The conversation came to an end and Mrs S relayed the content of the call to her husband Mr S where [sic] they then considered the matter closed as no action was requested from them.

The reason Mrs S remembers this particular telephone conversation is that the calls to the Administration Manager were usually about the day to day running

of the Plumbing Scheme through the payroll or end of year problems. In this instance owing to there being so much organisation and preparation in Mr S' business to implement the change from Sole Trader to Limited Company our client paced [sic] particular attention to detail to facilitate the change on 01 July 2010. The telephone call from Mrs S to the Administration Manager was a crucial part of this preparation.

Our client's position is that she is entitled to rely on representations made on behalf of the Trustee as there is no requirement or basis of previous dealings that all matters would be set out or should be requested in writing. It is clear from the history of the Trustee's knowledge of the issues and in particular Section 75, it was aware that section 75 debts were required to be collected under legislation but ignored this deliberately and in particular, [misled] employers about this".

Appendix B

The April Letter

"28 April 2010

FAO Mrs [S]

***S & Son

Dear Mrs [S]

Change of Status

We refer to your telephone call on 28 April 2010 concerning your change from a sole trader to a limited company.

In these circumstances, we require you to complete a new Deed of Adherence, which is enclosed and should be completed where indicated and returned. We also require you to obtain a new contracting out certificate for the limited company.

If my understanding of the situation is correct, the whole of the business and its employees are being transferred to the new company.

In these circumstances, if the new company accepts the previous employer's responsibility in relation to the scheme a replacement contracting-out certificate can be obtained under the continuity provisions without surrendering the existing certificate and making a further election for a new certificate.

To do this we require your confirmation in writing that this is the case and I have attached a draft letter, which should be copied into your headed paper and signed and returned to us. We also require you to sign page 7 of the attached APSS105, which we have completed on your behalf".