Ombudsman's Determination

Applicants	Mr M & Mr Y
Scheme	The Focus Administration Pension Scheme (**the Scheme**)
Respondents	Punter Southall Governance Services (**Punter Southall**) Brambles Administration Limited (**Brambles**) & Mr Simon Kim Williams (**the Original Trustee**)

Throughout this Determination, where I refer to Focus Administration Limited (**Focus**) and to the Original Trustee collectively in their capacity as trustees of the Scheme, I will refer to "**Trustees**." Where I refer to Mr Simon Kim Williams in a capacity other than as the Original Trustee, including as sole director and shareholder of Focus, I will refer to him as Mr Williams.

Complaint summary

1. Mr M has made the following complaints:-

    1.1. Having transferred into the Scheme he has lost nearly 50% of his pension, despite his understanding that the Scheme would protect his funds.

    1.2. Having accepted the sale of the Scheme's leasehold interest in 3TC House, 16 Crosby Road North, Liverpool (**3TC House**), at a loss to facilitate a transfer, he remains unable to transfer and Brambles has given repeated excuses while delaying it.

    1.3. He should be allowed to transfer his investment of £46,970 in Tennyson Property Investments Limited.

    1.4. He has never received annual reports and Brambles has not provided details of the Scheme's trustee to enable him to make a complaint to the Trustees directly.

    1.5. On submitting complaints to Brambles, he did not receive a reply.

2. Mr Y has said:-

   2.1. He had not wanted to transfer to Brambles or invest in student accommodation.

   2.2. When he sought to transfer, he was told by Brambles that he could not, and then that the investment company had gone into administration.

   2.3. Brambles failed to give him information about his pension or the investment.

   2.4. He has lost his entire pension.

Summary of the Ombudsman's Determination and reasons

3. Having fully considered the evidence and submissions from all parties, I uphold the complaints against the Original Trustee and Brambles. My reasons are as follows.

4. The Trustees have acted in breach of trust by:

   4.1. failing to avoid being in a position of conflicting interests and failing to have in place and operate the necessary internal controls, as required by section 249A of the Pensions Act 2004;

   4.2. failing to have adequate regard to the need for diversification of investments, as required by Regulation 7(2) of The Occupational Pension Schemes (Investment) Regulations 2005 (the Investment Regulations);

   4.3. facilitating an unauthorised payment to Mr M before he reached his normal minimum pension age in breach of Rule 19 of the Scheme Rules; and

   4.4. acting in breach of the duties imposed on them by Part I of the Pensions Act 1995 (1995 Act), and by case law.

5. The Trustees have committed acts of maladministration by:

   5.1. failing to make the necessary enquiries to establish that the payment of Scheme funds to members on joining the Scheme constituted an Unauthorised Payment; and

   5.2. failing to have regard to the Pensions Regulator’s Code in respect of investment governance.

6. Brambles has committed acts of maladministration by:

   6.1. failing to maintain adequate records; and

   6.2. failing to address members’ concerns appropriately.

Oral Hearing

7. I held an oral hearing on 8 June 2022 (the **Oral Hearing**), as part of my investigation. I considered it necessary to do so because it appeared to me, from the evidence I had

received, that Mr Williams might be personally liable for his acts and omissions in his capacities as the Original Trustee, and later as the sole director and shareholder of Focus. The Oral Hearing was attended by Mr M and Punter Southall. Neither Mr Williams nor a representative from Brambles attended.

Jurisdiction

8. Under general trust law principles, any individual beneficiary has locus standi (standing) to require trustees to account for breaches of trust.

9. I have the power to direct the Trustees to restore, or pay, to the Scheme, any assets which have been lost by reason of the breach of trust, or appropriate funds for such breach. If specific restitution is not possible, the liability of the Trustees to the Scheme is to restore its funding to the position it would have been in had there been no breach of trust.

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

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

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

Detailed Determination

A. Material facts

A.1 Background

12. On 8 February 2013, Focus was incorporated by Mr Williams. He was the sole director and shareholder of Focus until it was dissolved on 21 September 2021.

13. On 21 March 2013, the Scheme was established by Trust Deed. The Principal Employer was Focus, and the Original Trustee was appointed as the sole trustee. The Scheme Rules were attached to the Trust Deed.

14. On 25 March 2013, the Scheme was registered for tax relief and exemptions by HM Revenue & Customs with the Pension Scheme Tax Reference 00797685RX.

15. On 14 June 2013, Mr M was contacted by a company called Pension Cash Release NI. It provided him with a Pension Max brochure and said that he would be referred to Mark Young "to discuss options on getting more money". Attached was the Pension Regulator's "Scorpion Leaflet", explaining the risks of pension loans or cash incentives, and the Pension Max brochure.

16. The Pension Max brochure described a "unique Pension Investment opportunity", guaranteeing a 20% instant capital gain. It said that the investment was not a loan, it was not repayable and no funds were released from the pension. Under 'how it works', the brochure stated:

> *"A purchase of property or land takes place, this property is purchased at a below the open market value [sic], and then sold to the pension at the current market value. This generates the investor with a capital gain."*

17. The brochure stated that the product was not regulated by the FSA (as it then was) and that Pension Max was not providing any advice about the product.

18. On 24 July 2013, Mr M received a Cash Equivalent Transfer Value (**CETV**) from his existing pension arrangement, the Mondelez UK Retirement Benefits Plan (**Mondelez**). This document pack requested certain information about the receiving scheme and included a copy of the Scorpion Leaflet warning individuals of the risks of taking accessing pension benefits before age 55. Mr M's CETV was £151,206.

19. Following further exchanges with Pension Cash Release NI, on 30 July 2013, Pension Max, an unregulated Gibraltar based company, contacted Mr M providing the Scorpion Leaflet and explaining that the arrangement did not allow early access to pension funds.

20. On the same day, Pension Max provided Mr M with a tax opinion from a company called Optimum Tax Solutions Ltd in relation to what was described as a Distressed Property Arrangement (the **Optimum Tax Opinion**). The Opinion explained a hypothetical investment in residential property in the form of a Genuinely Diverse Commercial Vehicle (**GDCV**), and how this could be used within a pension scheme to allow investment in residential property.

21. On 1 August 2013, Mr M signed the Trustee Discharge form. Completed in a different hand was the name of the scheme to which the transfer was to be made, the SHK Property Pension Scheme (the **SHK Scheme**).

22. On 6 August 2013, Pension Administration Resources (**PAR**), a trading name of Commerce Resources Limited, wrote to Mondelez confirming that Mr M was a member

of the SHK Scheme and wished to transfer his benefits into it. It provided the necessary forms and evidence of registration. The SHK Scheme had been registered for tax relief on 10 July 2012, the Trustee was recorded as Mr Simon Hamilton Kaigh and the administrator was Commerce Resources Limited.

23. On 4 October 2013, Pension Max emailed Mr M providing him with information about Strongbox Serviced Offices at 3TC House and an information memorandum for Capital Bridging Finance Solutions Limited (**CBFS**).

24. On the same day, the Mondelez UK Retirement Benefits Plan (**Mondelez**) confirmed in writing to Mr M that it had transferred £151,206, in respect of his benefits to the SHK Property Services Pension Scheme. Mondelez also wrote to PAR confirming the same.

25. On 22 October 2013, Mr M contacted Pension Cash Release NI concerned that Pension Max had received his funds but were not providing him with relevant documents. He questioned if it was a bogus company and that he may have lost his money.

26. On 23 October 2013, Mr M received an email from Brambles providing the necessary documentation to transfer from the SHK Property Services Pension Scheme to the Scheme. This included a Member-Directed Investment Form (the **Investment Form**) and an Information Memorandum for Tennyson Property Investments Limited, described as a GDCV. In the section titled "investment summary" the company was described as having been incorporated "in order to allow small pension funds to invest in a portfolio of residential properties which will be let out and managed by a professional management company" (the **Tennyson Investment**).

27. On 24 October 2013, Mr M signed an application form to join the Scheme (the **application form**).

28. On 7 and 8 November 2013, a total of £151,206 was received by the Scheme from the SHK Scheme. Between 7 November 2013 and 24 February 2017, the Scheme's bank account ledger shows total transfers into the Scheme of £831,683.03, set out at Appendix 5 (the **Total Transfer Sum**).

29. On 7 November 2013, Mr M signed a document titled a Declaration of Payment of Proceeds Re Sales of Office Units at 3TC House, Liverpool. He provided his bank details under the following statement:

> *"I can confirm that I wish for the proceeds of the sales of my office units to be paid to the following account:…"*

30. On 22 November 2013, Mr M signed the Investment Form. This instructed and authorised the Original Trustee to purchase:

- a 68.19% interest in a 250 year lease of Office Unit 1 at 3TC House, for £101,235.11 (the 3TC Investment); and
- 46,970 ordinary shares of Tennyson for £46,970 (the Tennyson Investment).

The total amount invested was £148,205.11.

31. In relation to the 3TC Investment, the form said:

> "*The scheme will purchase a 68.19% shareholding in the 250 year lease on the following office unit situated on the ground floor of 3TC House …*
>
> - *Unit '1' Purchase price: £145,722.00 (This includes a discount of 0.66% to account for lost rent whilst the build is in the completion stage. Expected completion of the build is 18th November 2013)".*

32. On 26 November 2013, the Scheme bank account ledger shows that £146,222 was paid to Middleton Solicitors.

33. On 10 December 2013, according to contemporaneous documentation produced by EAD Solicitors representing Imperium Enterprises Ltd (**Imperium**), a lease was granted by Imperium, and a contract for sale entered into, between Mr M, Bright Limited and three other individuals for £77,200. No party has provided executed versions of these agreements.

34. Also on 10 December 2013, Mr M received £29,694.43 into his bank account from Middleton Solicitors.

35. On 25 January 2015, Brambles submitted a Scheme Return to TPR for the period 6 April 2013 to 5 April 2014. This confirmed scheme assets of £333,341 and that there had been connected party transactions of £193,222 over the period. The nature of the asset was said to be unquoted shares with nil income received from the assets. £140,118 was held in cash.

36. On 27 January 2016, Brambles submitted a Scheme Return to TPR for the period 6 April 2014 to 5 April 2015. This confirmed assets of £321,530 and that there had been connected party transactions of £41,218 over the period. The market value of that asset was recorded as £88,218. The nature of the asset was said to be unquoted shares with nil income received from the assets.

37. The return also listed an Arms Length Transaction of £15,457. This was stated to be a loan and the income received was £827. This was listed in the Scheme Bank Account ledger under two payments as "Capital Bridging Reference Loan".

38. On 7 March 2016, Mr M contacted Brambles saying that he had transferred £148,205 into the Scheme in 2013 and asked whether in October 2018, when aged 55, he would be able to withdraw his pension from the investment. In subsequent correspondence Brambles explained that there had been minimal rental income for the 3TC Investment and expenses had been incurred therefore there were no net returns for 2014 and 2015. There were anticipated returns due for 2016.

39. In respect of the Tennyson Investment, Brambles said that there was no investment income in previous years and none so far in 2016. As it stood, neither investment had a buyer willing to purchase Mr M's shares of the scheme and he would be unable to access any benefits at age 55 if this did not change.

40. On 3 May 2016, a company called Know Your Pension contacted Mr Y in relation to a transfer to the Flexihive pension scheme.

41. On 5 July 2016, Mr Y signed a pre-populated New Member Application Form for the Scheme. This showed that the transferring scheme was the Flexihive Workplace Pension Scheme and that there was an approximate transfer value of £54,000. In respect of the investment selection, a box was ticked to indicate an instruction to invest in Mederco Student Accommodation. A box was also ticked indicating that no regulated financial advice had been received and that the transfer was on a 'No Advice' Execution Only basis.

42. On 8 July 2016, a Loan Agreement for a Principal Sum of £240,000 was executed between the Scheme and Mederco (Huddersfield) Limited (**Mederco**) (the **2016 Mederco Loan Agreement**). Clause 1.11 provided that:

> *""Arrangement Fee" means a fee of 50% (£120,000) payable to Bright Limited… to be deducted from the Principal Sum upon Completion."*

43. Also on 8 July 2016, Mr Y's transfer of £53,933 was received by the Scheme from the Flexihive Workplace Pension Scheme, as shown in the Scheme's bank account ledger.

44. Between 12 July 2016 and 14 July 2016, there were twelve transactions back and forth between the Scheme bank account and Mederco resulting in a net transfer of £240,000 to Mederco from the Scheme.

45. On 19 July 2016, Bright Limited received a payment of £12,000 (twelve thousand pounds) from Mederco in relation to the 2016 Mederco Loan Agreement.

46. On 20 July 2016, Mr Robert J Metcalfe of RMJ Solicitors[1] wrote to the Original Trustee confirming that the loan had completed on 13 July 2016, enclosing a copy of the 2016 Mederco Loan Agreement.

47. On 26 August 2016, a Supplementary Deed was executed. The Supplementary Deed removed the Original Trustee and appointed Focus as the replacement trustee.

48. On 12 January 2017, an individual called Brian Murphy wrote to Mr Y requesting he contact him to discuss completing a Focus Application Form.

49. On 30 January 2017, Brambles submitted a Scheme Return to TPR for the period 6 April 2015 to 5 April 2016. This confirmed assets of £340,530. The pension scheme return also listed an Arms Length Transaction of £19,000. This was said to be a loan and the income received was stated to be £927. This was listed in the Scheme Bank Account ledger as a "Bill Payment to Capital".

[1] RMJ Solicitors was closed by the Solicitors Regulation Authority in March 2017 following an investigation into Robert Metcalfe's role in a pension liberation scheme https://www.solicitorstribunal.org.uk/sites/default/files-sdt/11954.2019.Metcalfe.pdf

50. On 5 April 2017, Brambles issued an annual statement to Mr Y confirming that £53,933.24 had been transferred into the Scheme and £53,933.24 invested in Mederco.

51. On 9 January 2018, Brambles contacted Mr M and informed him that a sale of his 3TC Investment was due by the end of January. Following this, Brambles maintained that the sale would be "completed soon". The 3TC House investment was sold in late May 2018 to Capital Development Waterloo Limited (**CDWL**) for approximately £65,000 at a loss of approximately £35,000. Mr M accepted this loss on the understanding that he would be able to transfer away from the Scheme and access his benefits.

52. On 21 February 2018, Brambles submitted a Scheme Return to TPR for the period 6 April 2016 to 5 April 2017. This stated Scheme assets to be £498,447. The pension scheme return also listed Arms Length Transactions of £503,500 in loans and unquoted shares. The income received was stated to be £1,870.

53. On 19 June 2018, Brambles informed Mr M that the funds realised from the 3TC Investment were now invested in a commercial loan, earning interest at 6% per year. The loan would be released in advance of him turning 55 to allow him to transfer and take benefits.

54. On 10 July 2018, a Loan Agreement was entered into between the Scheme and Capital Bridging Finance Solutions (**CBFS**) (the **2018 CBFS Loan Agreement**).

55. Over the following months, Mr M liaised with Aviva and Brambles to try and arrange a transfer of the liquid funds within his pension.

56. On 27 September 2018, Aviva provided the necessary discharge forms for the transfer to Aviva to proceed.

57. On 8 October 2018, Mr M emailed Brambles saying:

> *"Been reading through my policy and understand Focus Administration Pension Scheme are my trustees and that Brambles Administration Limited are the administrator's. Do Brambles not do the transfer of £65,022.57. All the transfer forms have been completed and you stated would arrange transfer. However still waiting for this transfer to take place, I have followed all your instructions, sold this property with a loss of £35,000 last year to be able to move these funds to Aviva at the age of 55 years as they needed to be sold first in compliance with Focus Administration.*
>
> *I would like to speak to Focus Administration Pension Scheme and establish what the delay is, as you don't appear to be answering any of my emails or phone calls regarding this transfer."* [sic]

58. On 15 October 2018, a Loan Agreement was entered into between the Scheme and Bright Limited (the **2018 Bright Loan Agreement**).

59. Also on 15 October 2018, according to Punter Southall, “The Scheme rolled over a loan to MHL [Mederco]… At that time it amounted to £270,565 and became repayable on 15 October 2021.”

60. On 23 October 2018, Brambles responded to Mr M saying that contact with the trustee was through Brambles’ email address. It provided no detail on who the trustee was or how to contact them.

61. On 20 November 2018, TPR suspended Focus until 19 November 2019. Under the same Order, exercising its powers under section 7 of the Pensions Act 1995, TPR appointed Punter Southall as the New Trustee with immediate effect.

62. On 27 November 2018, the Determinations Panel of TPR issued a Determination notice suspending Focus as a trustee of the Scheme and appointing Punter Southall as sole trustee of the Scheme.

63. On 30 November 2018, Brambles emailed Mr M informing him that a new trustee had been appointed and that he would be contacted by them directly.

64. On 23 January 2019, Brambles submitted a Scheme Return to TPR for the period 6 April 2017 to 5 April 2018. The aggregate payments to and from the scheme was recorded as £29,535. A further purchase of unquoted shares was recorded under Connected Party Assets at a cost value of £29,535.

65. On 9 February 2019, Mr M submitted a complaint to Punter Southall outlining his concerns about how the Scheme had operated.

66. On 11 June 2019, Mr M submitted a complaint application to The Pensions Ombudsman (**TPO**).

67. On 26 September 2019, Punter Southall wrote to Mr M explaining its appointment and providing details of the Scheme’s investments. It confirmed that its records showed that following his transfer into the Scheme, his funds were invested in the Tennyson Investment and CBFS. It explained that it was likely that the money realised from the investments would be a small proportion of the money invested and that for the time being it was unable to transfer or pay any benefits.

68. On 30 September 2019, Mr Gary Quillan, previously a director of Bright Limited, responded to queries from Punter Southall. He said that Bright Ltd had only been paid £12,000 in respect of the July 2016 loan, not £120,000. In relation to the 2018 Bright Loan Agreement, he explained that “the security was based on the Mederco site and the personal guarantee provided by myself”.

69. In this letter Punter Southall provided details on the Scheme’s investments (see Appendix 4).

70. On 20 February 2020, Punter Southall provided a response to a complaint made by Mr Y. Punter Southall outlined the following points:-

70.1. Mr Y had applied to join the Scheme on 5 July 2016, transferring his benefits, £53,399.24, from the Flexihive Workplace Pension Scheme into the Scheme.

70.2. The Application Form indicates that Mr Y instructed the Trustee to invest in Mederco student accommodation.

70.3. A declaration signed by Mr Y shows he had not received regulated financial advice and that the pension was established on a "no advice" Execution Only basis.

70.4. The Mederco investment was in fact a loan to Mederco (Huddersfield) Limited:

> *"The Scheme rolled over a loan to MHL [Mederco (Huddersfield) Limited] on 15 October 2018. At that time it amounted to £270,565 and was repayable on 15 October 2021. MHL has now gone into administration and the Trustee is liaising with the administrator in relation to being a creditor of the company.*
>
> *Until the administrators advise otherwise the Trustee believes it would be appropriate to assume this investment has no value."*

71. On 4 May 2021, Mr Y submitted an application form to TPO.

72. On 21 September 2021, Focus Administration Limited was dissolved by Mr Williams, having been dormant from incorporation.

A.2 Relevant provisions of Scheme documents

73. Relevant sections of the Scheme's Establishing Deed and Rules are set out in Appendix 1 and 2.

A.3 The Membership Application Forms

74. Relevant extracts of membership application and investment forms are set out in Appendix 3.

A.4 The Scheme's investments

75. The following investments were made by the Scheme. I have summarised the information known about the investments and any documents received in relation to them.

<u>3TC House/Venture Business Centre:</u>

76. The freehold of 3TC House was owned by Imperium. According to the statement of administrator's proposals for Imperium filed at Companies House, dated 28 October 2016, Imperium was an investment company operating from 3TC House. Until December 2014, its Directors were Mr William Ross-Jones and Mr Robert John Metcalfe.

77. Mr M received an investment brochure issued by Imperium in 2013 from Strongbox Serviced Offices, a Trading Style of Strongbox Self-Storage Ltd (**Strongbox**). This described an Investment into Office Pods due for completion in November 2013. The investor would purchase a 250-year lease and enter into a management agreement with Strongbox which would then rent the units to end users. Strongbox would be responsible for marketing and other management responsibilities in exchange for a management fee.

78. Strongbox was incorporated on 29 January 2013 with the sole director from that date onward being Mr Paul Dalton.

79. The return was stated to be 8% per year return from the date of investment to the date of completion. On completion, the net return would be 3.4% allowing for 50% occupancy and 8.3% on the basis of 100% occupancy.

80. The brochure described the investment as an "excellent opportunity to enter the lucrative Commercial Property Market at an affordable level" and as being SIPP Compliant. In respect of selling the asset, the brochure stated that it could be sold privately by the investor, sold to the pension fund or marketed by Strongbox for sale.

81. The following risks were identified in the brochure:

- no recognised market and the investment could be illiquid;
- no guaranteed occupancy and there may be no return after expenses; and
- the value of the investment could rise and fall, and the full capital value might be lost.

82. A RICS valuation for 3TC House/Venture Business Centre dated 30 May 2013 was prepared for investment purposes and addressed to the Trustees of The Gilbert Trading Pension Scheme[2]. It concluded that the individual office pods were valued between £48,900 (for two persons) and £97,800 (for 4 persons) based on the following assumptions:

- The intention was to convert the building into 11 high quality office pods for investment purposes.
- The valuation assumed a yield of 7% and 85% occupancy over 10 years.
- The market was deemed slightly unstable and there was no advice regarding business viability.

83. The valuation report did not refer to "Unit 1" referred to in Mr M's investment form.

84. In contemporaneous documents produced by Imperium, the purchasers of Unit 1 were stated to be, in the following proportions, Mr M (43.34%), [Individual 2] (13.86%), [Individual 3] (0.88%), [Individual 4] (0.88%) and Bright Ltd (41.04%).

[2]Mr Simon Hamilton Kaigh was the sole trustee of The Gilbert Trading Pension Scheme at this time.

85. There are no executed lease agreements between Imperium and the Scheme or the parties stated to be the purchasers, and no executed TR1 filed at the Land Registry.

86. According to Companies House a number of companies operate or have operated from 3TC House, including:

- SHK Property Services Limited[3]
- Silvertree Investments Limited[4]
- Eleven Property Limited[5]
- Gilbert Trading Limited[6]

87. Each of these companies is the sponsoring employer of a similarly named pension scheme administered by Brambles.

88. Imperium, the freeholder of 3TC House, entered Administration on 28 September 2016. On appointment of administrators, CBFS made a direct offer for all of Imperium's freehold properties. The sole director of CBFS at the time was Mr Paul Dalton. Within the statement of administrator's proposal filed at Companies House, dated 3 November 2016, the Administrator said:

> *"It was also established that the ground floor at 3TC House was split into various units and sold individually to a number of different parties on 250 years leases. Further enquires revealed that the leaseholds were not registered at Land Registry which they were required to be. However, legal advice suggested that failure to register would not invalidate the leases however their existence would have a detrimental effect on the value of the property especially to developers. There was also a long term leases in favour of the resident management Company however this has yet to be located despite enquires with the Directors and their former legal advisers."*[sic]

89. According to the administrator the sale of the 3TC House freehold to CBFS completed on 10 February 2017.

90. Within the Administrator's progress report dated 13 March 2017, filed at Companies House, the Administrator stated the following in relation to money owed by SKW Investments Limited to Imperium:

> *"Whilst I cannot disclose confidential information in respect of each estate, I can disclose that in respect of SKW there are a number of outstanding loan obligations due from individuals and such loan obligations are triggered by payments made from their respective pension policies. The majority of such*

[3] Mr Simon Hamilton Kaigh was sole director since 5 July 2012.
[4] Co-directors, Mr William Kennedy Ross-Jones and Mr Robert John Metcalfe.
[5] Sole director since 26 June 2014, Mr Simon Hamilton Kaigh.
[6] Sole director since 5 July 2012, Mr Simon Hamilton Kaigh.

pension funds constitute the investments they have made via their investments in to the Company." [sic]

91. As set out below in paragraphs 143 to 147 below, Mr Williams was the sole director of SKW Investments.

92. Brambles has stated that in late 2017 or early 2018, Capital Developments Waterloo Limited (**CDWL**) contacted the leaseholders of 3TC House, including the Scheme, to purchase the leaseholds. At the time Paul Dalton was the sole director of CDWL. Brambles has said that it understood that CDWL owned the freehold of 3TC House.

93. The Original Trustee stated that as CDWL did not have the funds available to purchase the leasehold, he took security from CBFS and a personal guarantee from Mr Paul Dalton (the **3TC House Personal Guarantee**).

Tennyson Property Investments Limited (**Tennyson**)

94. Tennyson was incorporated on 30 September 2011. Mr Gary Robinson was appointed as sole director. On 21 March 2016, Mr Paul Dalton was appointed as a director and Mr Robinson resigned on 7 May 2016.

95. Mr M received an Information Memorandum dated 1 October 2012 which said that Tennyson intended to raise £2,470,000, allowing investment in a portfolio of residential properties which would be let out and managed by a professional management company. The long-term projected investment return was 2.5 to 3% per annum after tax and expenses. The investment was intended to be at least five years and it would take a number of years before initial costs were offset by the profits and dividends could be paid. The Information Memorandum also made the following statements:

- Tennyson Property Investments Limited was not regulated and was not providing financial advice.
- The investment was in Ordinary Shares of the company at £1 per share and intended for SIPP pension arrangements. The individual was recommended to take regulated advice and conduct their own due diligence.
- The company would be a Genuinely Diverse Commercial Vehicle (GDCV) to avoid the investment in residential property constituting an unauthorised investment.
- The investment was not and was not intended to be listed on any recognised investment exchange.

96. The Information Memorandum included a number of risk factors, including:-

- Commercial risks from operating within a fluctuating property market, without guaranteed return. The investment was speculative and the original capital might not be returned.
- Government tax and policy might change affecting tax rates and reliefs.

- Unquoted shares and stock are higher risk than quoted shares, may be illiquid, difficult to value and volatile.
- The investment may not be suitable and financial advice should be taken by the individual.
- Commission of 6.5% of the investment value would be paid to introducers.

97. The email from Brambles to Mr M, dated 23 October 2013, quoted the Tennyson Investment vendor saying:

"Currently Tennyson has raised £1,584,063. Any future investments into the company will be used to reduce the debt to the bridging finance company.

Also attached are the draft accounts from 1st April 2012 to 31 March 2013. The accounts show:

(a) Losses carried forward from the previous year of £64,033.24
and
(b) Losses for the year from 1st April 2012 to 31st March 2013 of £84,655.07.

In relation to this please note the following:

(a) There were significant professional fees of £92,739.62. This is primarily due to the commissions paid out to introducers and administration fees in respect of funds raised. These are one off costs and will not be borne by the company once the fundraise is completed.

(b) Maintenance costs of £14,908.28. This figure was substantially greater than expected due to problems associated with planning permission conditions and a fire in the 6 properties in Thursby Crescent."

98. An Annual Return submitted to Companies House on 9 March 2015 showed the following shareholders:

- Several SIPPs
- 93,849 Ordinary Shares held by the Scheme.
- 134,141 Ordinary Shares held by the Business Way Pension Scheme.
- 110,139 Ordinary Shares held by the SHK Property Services Pension Scheme.
- 90,678 Ordinary Shares held by the Silvertree Investments Pension Scheme.
- 40,739 Ordinary Shares held by the Gilbert Trading Pension Scheme.

99. On 6 April 2021, a court order was lodged to wind up Tennyson and a liquidator appointed on 7 March 2022.

100. The Administrator's progress report dated 6 June 2022 includes the following details:

- Tennyson owned leaseholds of a number of Student Pods in Bradford. The Freehold of the property was owned by CBFS, which was also a creditor of Tennyson.

- CBFS held a charge against the Pods of £712,726. The Pods were valued between £100,000 and £160,000.

Mederco (Huddersfield) Limited

101. Mederco was incorporated on 29 April 2014 by Mr Stewart Paul Day.

102. A 2016 summary of the Mederco Group stated that it offered "individuals the opportunity to invest in a strategic and carefully planned but aggressive UK-based property portfolio." The stated intention was to purchase properties at least 30% below market value and sell the property on at a profit. The "investment period" for funds was described as 5 years and the risk of repayment deadlines not being met was described as "minimal".

103. The 2016 Mederco Loan Agreement provided for a loan of £240,000 to Mederco and was signed by the Original Trustee and the sole Director of Mederco, Mr Paul Stewart Day. The agreement does not contain a purpose clause but the loan appears to be in connection with the "Property," defined in the Agreement as, " land containing planning permission to build Blocks B & C, Colne Hall, Manchester Road, Huddersfield."

104. The Mederco Loan Agreement also refers to a "legal charge" but provides no further information. Included in the agreement was an Arrangement Fee stated to be 50% (£120,000) payable to Bright Limited. Clause 2.3 provides that "all interest will be 'rolled-up' and repaid at the redemption date along with the Principal Sum." The "Redemption Date" is defined as the date falling on the second anniversary of the date of drawdown of the loan.

105. Mr Stewart Day is referred to as the Personal Guarantor of the Principal Sum in the 2016 Mederco Loan Agreement. A Personal Guarantee dated 8 July 2016 and signed as a deed by Mr Stewart Day (the **Mederco Personal Guarantee**) provides that:

> *"The Lender has agreed to lend the Company £240,000 by way of the Loan Agreement. In return, the Guarantor unconditionally guarantees to personally repay the Advance should either of the following events arise:*
>
> *i) The Lender has not received repayment of The Advance in full at the Redemption Date stated on the Loan Agreement.*
>
> [No further events are included]
>
> *All repayments will be in pound sterling without any deductions except for any returns already returned to the Lender. The Personal Guarantee does not extend to the interest element of the Loan."*

106. A property valuation for Block B dated 6 March 2015 valued the freehold interest with planning permission at £5,510,000. A similar valuation for Block C dated 16 February 2016 valued the freehold interest with vacant possession at £9,050,000.

107. On 14 July 2018, the Scheme entered into a new loan agreement with Mederco for a sum of £270,565. This sum appears to represent the principal sum from the 2016 Mederco Loan Agreement plus rolled up interest accrued between the date that agreement was signed and 14 July 2018.

108. On 28 March 2019, Mederco entered into Administration. It is notable that the following pension schemes, individuals and companies were shareholders at the point that the company entered administration:-

- Capital Bridging Finance Solutions Limited
- The Silvertree Investments Pension Scheme
- Mr Gary Robinson
- The SHK Property Services Pension Scheme

Capital Bridging Finance Solutions Limited

109. CBFS was incorporated on 24 January 2012 by Mr Paul Dalton. Mr Gary Robinson was also a director between 1 January 2013 and 1 January 2014.

110. Initially the company operated from 3TC House and it later returned to that address, renamed the Venture Business Centre, from 14 February 2014 to 21 September 2018.

111. An undated Information Memorandum stated that CBFS intended to raise £1,000,000 in loan notes to new lenders (the **CBFS Investment Memorandum**). The stated purpose of CBFS was to provide bridging finance to professional investors with security on land and property. It was anticipated that borrowers would pay significant interest of 12% to 30% per year. A lender to CBFS would receive interest of 6% per year and CBFS intended to return capital after five years, with a possible extension up to six years. As of 31 May 2013, the company owed £95,077 to existing lenders.

112. The CBFS Information Memorandum stated that the investment involved a "significant degree of risk" and identified the following relevant risk factors:-

> *"The Company will be operating within a fluctuating lending and property market whereby there are commercial risks. Bridging finance loans made by the Company may not be repaid by the borrower and therefore your loan to the Company is speculative and you may not get back your original investment. Bridging finance loans made by the company may not be repaid by the borrower on time and therefore any loan you make to the Company may be repaid late."*
>
> *"…any loan you may make to the Company will be for a fixed period and you may not be able to realise or sell on your investment during that time."*

> *"The investment described in this document may not be suitable for you and you are strongly advised to consult a person authorised under the Financial Services and Markets Act 2000 who specialises in advising on investing in unquoted shares and securities."*

113. The memorandum stated that a commission of 7.5% of the investment would be paid to introducers.

114. Under "Principal Personnel" the CBFS Information Memorandum states that "Paul Dalton is entitled to remuneration of £36,000 per annum. He is entitled to take this in any form he wishes i.e. Salary, dividend, loan, pensions etc."

115. Under "Interest Policy" the CBFS Information Memorandum states that, "Holders of Loan Notes will be entitled to interest on their investment. The interest will be paid monthly in arrears. The first payment will be made on the final day of the month, following the month of the loan to the company."

116. In 2017 CBFS purchased the freehold of 3TC House from Imperium while Imperium was in Administration.

117. The 2018 CBFS Loan Agreement between the Scheme and CBFS, dated 10 July 2018, executed by Mr Simon Williams on behalf of Focus and Paul Dalton on behalf of CBFS, provided for an unsecured loan facility of £381,892.00 at a simple interest rate of 5.5% per annum. The purpose of the agreement was stated to be to consolidate previous lending between the parties. Under "purpose", the agreement stated that "The Lender is not obliged to monitor or verify how any amount under this Agreement is used."

118. I understand that Mr Paul Dalton has provided a personal guarantee in relation to the 2018 CBFS Loan Agreement (the **CBFS Personal Guarantee**).

119. On 17 April 2020, the company went into administration and on 31 March 2021, it entered Creditors Voluntary Liquidation.

120. The Joint Administrator's proposals dated 18 May 2020 stated that:

> *"According to the Company's records, Tennyson (a related company by virtue of common directors and shareholders) is indebted to CBFS for approx. £524K, which was secured by way of a first ranking charge on part of Hockney Court."*

121. CBFS also held shares in Mederco (Huddersfield) Limited and creditors of CBFS included: -

- The Scheme
- Gilbert Trading Limited
- Mapleleaf Enterprises Limited
- SHK Property Services Limited
- Silvertree Investments Limited

- Strongbox Self Storage Limited

Fleet Street Liverpool Limited

122. Fleet Street Liverpool Limited (**Fleet Street**) was incorporated on 7 March 2016 by Mr Christopher Saggers. On 30 September 2016, Mr Mark Roberts was appointed as director and on 1 October 2016, Mr Saggers resigned as director.

123. It is my understanding that the investment was made in March 2018, with the purchase of shares for £29,535.

124. A further £3,762 was paid by the Scheme to Fleet Street on 12 March 2018 with the reference "Bill payment to [member's name] Reference Fleet St Shares, Mandate No 0014".

125. On 30 June 2020, Fleet Street changed its registered address to the Venture Business Centre/3TC House.

126. From 1 December 2016 to 12 June 2020, the Shareholders of Fleet Street included:-

- Mark Roberts
- Rachel Maria Rosa Quillan

127. On 25 November 2021, Fleet Street entered administration.

128. According to the Administrator's Proposals dated 6 January 2022, Fleet Street had intended to purchase and develop land in central Liverpool for student accommodation. As part of this it sought finance from CBFS.

Bright Limited

129. Bright Limited was incorporated on 2 March 2005. The following individuals have been directors:

- Mr Gary Quillan – 2 March 2005 to 1 October 2019
- Mr Christopher Gary Hoole – 2 March 2005 to 1 April 2011
- Mr Mark Roberts – 1 October 2019 to 4 June 2020
- Mr Simon Hamilton Kaigh – 4 June 2020 to the present

130. On 7 February 2012, the company's address changed to 3TC House/Venture Business Centre.

131. The 2018 Bright Loan Agreement provided for a Principal Sum of £89,510 to be loaned by the Scheme to Bright Limited, repaid over 3 years with interest at 6%. The purpose of the loan was stated to be "to provide loans to Mederco Block A Limited for the development of student housing at a maximum LTV of 80%." The Agreement was signed by Mr Gary Quillan on behalf of Bright Limited, Mr Simon Williams on behalf of Focus Administration Limited and Mr Robert Metcalfe as witness.

132. A confirmation statement filed at Companies House on 12 December 2016 confirms that Mederco Block A Limited had a share capital of 200 ordinary shares, and lists the following relevant shareholders:-

- Stewart Day (100 shares);
- Mark Roberts (11 shares); and
- Rachel Quillan (22 shares).
- Mr Stewart Day was the sole director of Mederco Block A Limited.

133. Over the course of 2019, Punter Southall corresponded with Mr Gary Quillan regarding the loan. Mr Quillan explained that the loan to Mederco Block A was personally guaranteed by Mr Stewart Day and that there were discussions about moving the security to a different asset. Further, Mr Quillan had personally guaranteed the Scheme's loan to Bright Limited and was confident that it would be repaid (the **Bright Limited Personal Guarantee**).

134. Punter Southall proposed a repayment schedule, but Mr Quillan appears not to have agreed to one.

A.5 Companies and individuals associated with Mr Simon Kim Williams

135. In addition to Focus Administration Limited, Mr Williams is involved in the following relevant companies:

JVC Developments Limited

136. Mr Williams is the sole Director of JVC Developments Limited, incorporated on 11 May 2012 and still active. Since 7 September 2017, JVC Developments Limited has had its registered office address listed as the Venture Business Centre, formerly 3TC House.

137. Annual Returns filed at Companies House show that Mr Williams holds 1 ordinary share and the Mapleleaf Enterprises Pension Scheme holds 307,268 ordinary shares.

138. Mapleleaf Enterprises Limited, which I understand to be the sponsoring employer of the Mapleleaf Enterprises Pension Scheme, operates from 3TC House/Venture Business Centre. The directors of Mapleleaf Enterprises Limited between 7 February 2011 and 3 January 2017 were Mr Robert Metcalfe and Mr William Ross-Jones. Mr William Ross-Jones resigned as a director on 4 January 2017.

Business Way Ltd

139. Mr Williams was the sole director of Business Way Ltd between 11 November 2011 and 21 September 2021, when it was dissolved. I understand that Business Way Ltd is the sponsoring employer of the Business Way Ltd Pension Scheme, of which Mr Williams was the sole trustee, and that Punter Southall has been appointed to the Scheme as an Independent Trustee by TPR.

140. Mr Williams was suspended from acting as trustee of a pension scheme by the Pensions Regulator in 2018 due to his involvement in the Business Way Ltd Pension Scheme.

GBT Partnership Limited

141. Mr Williams was the sole director of GBT Partnership Limited between 27 May 2011 and 6 September 2016, when it was dissolved. From incorporation to dissolution, Mr Williams held 1 ordinary share.

142. The list of shareholders submitted to Companies House on 6 April 2014 included 1,950,000 Ordinary Shares held by the Silvertree Investments Pension Scheme.

143. The list of shareholders submitted to Companies House on 8 July 2014 included 404,546 Ordinary Shares held by CBFS.

144. The list of shareholders submitted to Companies House on 24 March 2015 included:

- 419,315 Ordinary Shares held by the Silvertree Investments Pension Scheme;
- 317,763 Ordinary Shares held by The SHK Property Services Pension Scheme;
- 33,235 Ordinary Shares held by the Gilbert Trading Pension Scheme;
- 23,005 Ordinary Shares held by KBY Investments Limited; and
- 180,095 Ordinary Shares were transferred out of Mr Gary Quillan's name in November 2014.

SKW Investments Limited

145. Mr Williams was the sole director of SKW Investments Limited (**SKW**) between 5 January 2009 and 28 May 2019 when it was dissolved. Between 15 February 2012 and 2 March 2012, it was registered at 3TC House.

146. As at 5 January 2016, the last annual return submitted to Companies House, the list of shareholders included:

- 1 Ordinary Share held by Gary Quillan
- 1,869,710 Ordinary Shares held by BOH Investments Limited

147. In the Liquidator's progress report dated 29 January 2018, there was a schedule of debtors totalling £3,017,264. The liquidator described these as:

> *"The debtors are loans which appear to be conditionally repayable upon such debtors drawing their pensions."*

148. I note from the Statement of Company Affairs dated 16 January 2017 that both BOH Investments Limited (**BOH**) and Imperium were creditors of SKW.

149. As of 20 May 2015, SKW held 33,640 Ordinary shares in Imperium. The Administrator's proposal also set out that Imperium had made a loan to SKW Investments of £38,859.

Mr Williams' association with Mr Gary Quillan

150. Mr Williams is a FIDE Chess Grandmaster.

151. I understand that Mr Gary Quillan, a FIDE International Chess Master, is an associate of Mr Williams through chess. Mr Williams has confirmed that he met Mr Quillan at a chess tournament in 2005 and that they became friends. In 2008, he stayed with Mr Quillan in Liverpool during the British Chess Championships. During this visit, Mr Quillan spoke to Mr Williams "in more detail about his business activities and showed me a number of the projects he was working on, including property investments and bridging finance." Mr Williams stated that "I was still trying to make my income through chess alone, and so I enquired with Mr Quillan as to any part time opportunities."[7]

152. Mr Williams was contacted shortly afterwards by Mr Quillan about an "opportunity" to become director of SKW Investments, to which Mr Williams agreed. In 2010, Mr Williams stated he was asked by Mr Quillan to become a director of GBT Partnership.

153. Mr Gary Quillan was disqualified as acting as a director in September 2019 due to his involvement in KJK Investments, which operated a pension liberation scheme[8].

154. I also understand that Mr Glenn House, the sole director of Brambles, is a FIDE Chess Master and an associate of Mr Quillan.

155. In the context of Mr Williams' association with Mr Quillan, I note the following paragraphs from the judgment of the first-tier tax tribunal in *Sippchoice v Revenue and Customs* [2016] UKFTT 464 (TC)[9], regarding an alleged pension liberation scheme involving Imperium Enterprises Limited and companies associated with Mr Williams and Mr Quillan:

> *"12. The nature of the Pension Liberation Scheme alleged to have been operated in this case was as follows:*
>
> *Step One: An individual (the Member) transferred his/her pension savings to the SB SIPP.*
>
> *Step Two: At the request of the Member, Sippchoice, as scheme administrator of the SB SIPP, invested the Member's pension savings in shares in Imperium Enterprises Limited (Imperium).*
>
> *Step Three: Imperium lent the funds to BOH Investments Limited (BOH).*

[7] Mr Williams' second witness statement dated 1 February 2023
[8] https://www.gov.uk/government/news/multi-million-pound-pension-liberation-bosses-banned-for-34-years#:~:text=Kevin%20John%20Kirkwood%20(39)%20and,found%20to%20have%20misled%20investors.
[9] https://www.casemine.com/judgement/uk/5b2897f62c94e06b9e19e6f9

Step Four: BOH funded a subsidiary, SKW Investments Limited (SKW) by way of a share subscription.

Step Five: SKW made a loan (the Loan) to the Member. The Loan was of an amount up to 25% of the value of the Member's savings with the SB SIPP and was expressed to be repayable out of the Member's pension derived from the SB SIPP.

13. The alleged Pension Liberation Scheme was in practice implemented as follows:

(1) SKW found individuals who needed a loan and who had funds within a conventional pension scheme.

(2) SKW promised a loan to such an individual of up to 25% of the value of his/her pension fund, if the individual transferred his/her pension fund from the existing provider to a pension fund administered by Sippchoice and, therefore, became a Member.

(3) After transferring the pension funds, those individuals requested that Sippchoice invest their pension funds in shares in an unquoted trading company, Imperium.

(4) As well as investing in property, Imperium made loans to BOH and another company, Real Bridging Finance Ltd (RBF).

(5) BOH subscribed in cash for new shares in SKW.

(6) Either before or afterwards, SKW made the promised loan to the Member. The precise timing is unclear.

14. The overall effect was that funds moved from the Member's existing pension scheme to a pension scheme administered by Sippchoice. From there cash flowed to Imperium, then, sooner or later to BOH, then to SKW and then by loan from SKW to the Member. Thus, the Member enjoyed a loan indirectly from his/her own pension fund. HMRC say that this was an unauthorised payment."

156. The judgment makes further relevant comments about the conduct of the various parties, including:

"*79. We find that the concerns which [SIPPchoice] had, were laid to rest by misinformation deliberately given them by Imperium (and Mr Quillan). On a number of occasions, SIPPchoice were very clear about their concern that a pensions liberation scheme was being operated, and yet they were given answers designed to give false assurances. We refer to the comment that loans may be being made by an unconnected third party, made at the meeting on 7 July 2011. We also refer to Mr Roberts's misleading email to [SIPPchoice] of 31 January 2011 in which the involvement of SKW in deliberately soliciting pension funds for transfer to the SB SIPP with proposals to unlock your pension were concealed from [SIPPchoice]. We also refer to the financial information about*

Imperium which was provided to SIPPchoice and which (intentionally, in our judgment) gave no indication of how the investments of Imperium were a cover for the eventual loans to be made to Members by SKW. Further back, there were the assurances given by William Ross-Jones of Imperium in the initial conversations with [SIPPchoice] in May 2010, and the explicit assurance given by Mark Roberts of Imperium in his email to [SIPPchoice] of 16 August 2010, covering the Investment Memorandum. Our findings are, of course, confirmed by the evidence that the contact at SKW had rebuked Mr Bates for contacting SIPPchoice at all, telling him that he had jeopardised everything they were doing."

157. Mr Gary Quillan was the sole director and shareholder of BOH and Mr Williams was the sole director of SKW. I note from the Statement of Company Affairs dated 16 January 2017, filed at Companies House, that Bright Limited and Imperium Enterprises Limited were creditors of BOH. BOH was dissolved following liquidation on 15 April 2020.

158. Mr Williams has submitted that, while he knew Mr Quillan personally, he did not know the other individuals involved in the SIPPchoice case personally.

B Summary of the Applicants' position

B.1 Summary of Mr M's position

159. He invested in the Scheme on the basis of advice from Pension Max which said it was a five-year plan, an investment in unspecified properties and that his pension would increase.

160. The Original Trustee has said that Mr M owned Unit 1 3TC House prior to the Scheme purchasing it. However, he did not own the property and has no knowledge of the other people named on the document that the Trustees have now provided. He has never received any deeds stating that he was the owner, is unaware of the solicitor involved and has had no contact with them.

161. He did not receive any payments for the property mentioned but did receive a sum as a capital gains payment, not for a property sale. This payment was not mentioned at the oral hearing as he understood it was separate to his investment and had nothing to do with properties. He has provided bank statements that show the amount received and he stands by his position on this.

162. He has provided copies of all communication with Pension Max and Brambles.

163. As he understands it, the pension was transferred directly from the Mondelez Scheme to the Scheme.

164. Brambles informed him that in order to transfer his funds and access his benefits at age 55, in October 2018, he would need to sell his "shares" in one of the properties, 3TC House. His investment of £104,000 would be sold for £65,022, with a loss of

£39,000. Although the sale proceeded, the subsequent transfer never completed. He has been told no paperwork was completed for the sale and there is no evidence of the sale or losses.

165. This money and his pension have been embezzled by Brambles and the Trustees.

166. He did not provide consent for the bridging loan and Brambles repeatedly lied about the money being transferred. This shows dishonesty on Brambles' part.

167. Mr Williams is trying to blame everyone but himself. If he did not understand the nature of the role of trustee or director, why did he feel it was suitable to undertake the role? Someone with relevant experience and competence ought to have taken the role, not simply because he was friends with Mr Quillan.

168. Mr Williams states that his evidence of innocence is unavailable due to the companies going into administration, however there are surely legal requirements for such documents to be retained.

169. If Mr Williams has nothing to hide, he should not require legal representation and the 21 days notice for the hearing was adequate time to prepare.

170. He had no knowledge of Imperium until Mr Williams raised it in his submissions.

171. He had not received regular statements despite what Mr Williams may argue.

172. Punter Southall has informed him that he has lost his entire pension fund of £151,206.60. He has had to re-mortgage in order to make ends meet.

173. He would like his pension transferred if possible.

174. He is concerned that he is being made out to be the guilty party.

175. He put his trust in the pension and believed everything to be legitimate. He has now been told by Punter Southall that his pension is worthless.

176. Excluding the pension held by the Scheme, Mr M has a current defined contribution occupational pension of £3,408. He has no other retirement provision.

177. He will have to continue work for as long as possible, as he has two dependents under the age of 5.

178. He and his wife have been severely impacted by the loss of his pension:

> *"It has caused a great deal of stress, anxiety, panic attacks and even contemplation of suicide. I am working all hours I possibly can to try and make ends meet. We had to remortgage our home because the money in my pension that I had worked hard for was "invested badly". It continues to impact our life and is causing us great hardship."*

179. He has had low moments including saying to his wife that she would be better off with him dead, causing great upset.

180. He had intended to drawdown pension funds at age 55, but that was not possible and this had impacted their ability to seek IVF treatment and pay off debts. They have had to borrow money from family on occasion.

181. He was repeatedly lied to by Brambles about the availability of a pension transfer.

B.2 Summary of Mr Y's position

182. In 2015 he was advised to transfer from Metlife to the Flexihive pension scheme. He had £54,000 to transfer. The transfer process took an extended period and when it eventually completed it was not transferred to Flexihive but to Brambles Administration.

183. He understands that Brambles Administration then invested his pension in student accommodation with the Mederco group. He was not made aware of the risks of this investment.

184. He had never wanted to invest in student accommodation and had believed the transfer would be into Flexihive.

185. He suggests that given Mr Williams' allegations he ought to have carried out more due diligence on Brambles and the Mederco investment.

186. In 2017 he asked to transfer but he was told he could not, and it was following contact from Punter Southall, explaining the situation with the Scheme, that he made a complaint to TPO.

187. His only hope is to get his original investment back.

188. In 2015, he started a separate workplace pension with a current value of £6,919.14. He has no other pension funds.

189. If the money had been available when he turned 55 he would have considered paying off some of his mortgage, but he will now have to work beyond age 67 to pay the mortgage.

190. The situation has been a "massive worry". He had started saving early, since 1987, and tried to build for the future. Losing it all has made him very nervous for the future and he has lost the piece of mind that having a good pension behind him gave him. It was a significant amount that has been lost.

191. He has been on mild antidepressants because "some days it does get you down knowing all that money has gone."

192. He has spent "hours, days, and even weeks" trying to chase the pension and going through old paperwork and since referring the case to the Ombudsman the uncertainty of the outcome has been a further worry.

193. He has missed out on growth on the pension for the last 8 years.

194. His wife has no pension at all and so they were jointly reliant on this.

C Summary of Punter Southall's position

195. It was appointed as an independent trustee because TPR had concerns about the previous trustee and the way the Scheme was being run.

196. There is no evidence that the Original Trustee or Focus sought or received any investment advice in relation to the investments made. The Scheme has ten members with direct investments. None of the investments were suitable for a pension scheme of this type and in its opinion, an adviser would not have concluded that the investments were suitable regardless of the members' preferences.

197. The Original Trustee describes his role as one of facilitating investments and little more. However, the role of a Trustee requires the Trustee to take responsibility, not to pass it on or act under direction. The Original Trustee seems to have no proper understanding of how the Scheme should have been run. Additionally, he says that a Trustee should not be involved in the Scheme's structuring, but this is not accepted by Punter Southall. The Original Trustee was responsible for taking advice.

198. The Original Trustee also mentions, in the context of his role as a director of Focus, "I was responsible for... acting in the best interest of the company", but there is no mention of the interests of the Scheme members. There is also no explanation as to why he, as the director of Focus Limited, appointed himself as the sole trustee of the Scheme when he was not from a business background.

199. The Original Trustee argues that he acted within his powers, but would that not require him to also act within the law of the land? In particular, the Scheme Rules require that the Trustee's investment power include, "the performance of all duties on them by law".

200. In respect of whether the Scheme is segregated, it is noted that within the Scheme Rules there is no mention of how expenses should be deducted from individual pots. Therefore, if a member's investments were to become insolvent, then the Scheme expenses for that member could be drawn from other members' funds. Scheme Rule 10.1 mentions that all costs can be borne by the Fund if not met by the Principal Employer.

201. None of the Scheme's investments would have been made had Punter Southall been the Trustee from the outset. They were all high-risk and some raise concerns that would have warranted far greater due diligence prior to investment, that is to say they raise red flags regarding potential fraud/dishonesty.

202. Punter Southall strongly disagrees that any reasonable trustee would have made these investments and it does not consider that any s36 regulated investment advice would have recommended them, particularly given the Scheme's membership. Had section 36 advice been taken and the investments diversified, the probability of most of the assets losing all of their value would have been minimal.

203. The Original Trustee argues that the Scheme's investments unravelled due to the failure of Lendy, a peer to peer lending platform that provided bridging and

development finance to property professionals. This highlight's the Scheme's lack of diversity.

204. The Original Trustee should have acted in the best interests of the members when making the investments and taking account of the members' circumstances. Few if any members were sufficiently sophisticated regarding investments to have understood the risks of these investments, and the members would not have been aware of the need for diversity and the pooling of risks.

205. The Original Trustee suggests that the members knew that the Scheme offered, "a narrow range of Alternative Investments", but these members would not have known what an Alternative Investment was.

206. Although the Original Trustee argues that the members understood that these were individual investments disconnected from other members' investments, this is a distraction from the fact that these investments should not have been offered by the Scheme at all.

207. Brambles and the Original Trustee give contradictory explanations as to how the investments came about. Punter Southall's understanding from Brambles is that investment decisions and actions came from the Trustee. If the Original Trustee completed the investment section of the Trustee Toolkit he would have been aware of the requirement to seek investment advice.

208. Brambles has communicated to Punter Southall that it has almost no information on how the Scheme operated or how the financial decisions, such as investments, were made. Investments were handled by the Trustee and Brambles acted on the Trustee's instructions.

209. Brambles has said that members were introduced to the Scheme through a Mr Joe Tohill of Pension Max who is now deceased. Brambles says it has no other information about the process of members joining the Scheme or the investment due diligence undertaken, beyond the Investment Form that the members completed.

210. It is remarkable how little background information is available on the membership.

211. There is no money in the Scheme's bank account to hire professionals to investigate the situation. Punter Southall has been effectively working pro-bono for many months and there are large fee arrears. Part of the Scheme funds were used to hire a legal adviser to pursue Mr Day until an agreement was reached.

212. Brambles had informed them that there were no audited accounts and they had seen no accounts for the Scheme. There was no exemption for the Scheme from producing audited accounts.

213. There was no evidence of an investment adviser or fund manager appointed to the Scheme. An investment adviser or fund manager was required unless the Trustee considered himself to be sufficiently qualified to make the investment decisions himself.

214. The annual statements issued by Brambles are not statutory money purchase illustrations, as required by legislation, as they did not show projected benefits.

215. No Chair's statement has been issued by the Trustee despite being a legal requirement since 2015.

216. It appears that no rent was received from the Scheme from the 3TC House investment before it was sold to Capital Bridging Finance Limited.

217. The current position of the investments is:

> *"Capital Bridging Finance Limited ("CBFS") – has entered administration [any return to creditors is likely to be less than 5p in the £]. [Punter Southall] has yet to decide whether to call in a guarantee of the CBFS loan given by its Director, Mr Paul Dalton.*
>
> *Mederco (Huddersfield) Limited – has entered administration. The [Punter Southall] called in a guarantee from a Mr Stewart Day for the Mederco (Huddersfield) loan and came to an agreement with him to make 20 payments of £1,220 per month from 1st December 2021. The [Punter Southall] is not convinced that it will receive all of these payments as it believes that he will end up bankrupt due to other significant debts due to third parties. The payments due to FAPS [the Scheme] under this arrangement were guaranteed in November 2021 by Mr Day's brother.*
>
> *Fleet Street Liverpool Limited – entered administration in November 2021. As the FAPS [the Scheme] held shares in this company the [Punter Southall] says it would be surprised if there were any capital repayment. As it appears unable to pay its debts it seems inconceivable that there would be any return to the FAPS as a shareholder.*
>
> *Tennyson Property Investments Limited - in compulsory liquidation. The FAPS held shares in the company and, again, it seems inconceivable that there will be a return to the FAPS.*
>
> *Bright Limited – not yet in formal insolvency but insolvency possible/likely as it has not repaid its loan which was due for repayment to the FAPS in October 2021. The [Punter Southall] has a guarantee in respect of the Bright loan which was provided by a Mr Gary Quillan who was a previous Director of Bright Limited. It has yet to decide whether to call in this guarantee."*

218. None of the investments are expected to provide any value or recovery through insolvency:

> *"[Punter Southall] is currently receiving no payments from Mr Dalton in respect of his guarantee. Indeed [Punter Southall] is not convinced that Mr Dalton has any assets to make it worthwhile applying for his bankruptcy. We have had the same problem with Mr Day who guaranteed the Mederco (Huddersfield) loan. He seems to have given a number of guarantees (of which we are aware of*

another for over £700,000) and we settled for around 10p in the £ just before bankruptcy proceedings. It would be interesting to know the research carried out by Mr Williams on the standing of each guarantor for the loans made.

It should be noted that CBFS may have had assets of £10m but these assets were loaned out to property companies; i.e., should not have been taken as implied security for the loan. The unaudited balance sheet showed shareholder funds of £99k, £177k, £255k at 31st January 2016, 2017 and 2018 respectively."

219. In respect of possible fraud/dishonesty:

"The rate of interest payable on the loans to Bright Limited, CBFS and Mederco (Huddersfield) were considerably below the rates which should have been charged given the risks involved. The loans carried an interest rate of less than 7%. My understanding is, if the loans had been made on commercial terms, this rate would have been around 15% or more.

Commissions were paid, I suspect, but I have little detail. From the Mederco loan agreement, as attached, it appears half the loan was payable as a commission to Bright Limited. From bank statements it appears only 50% of the monies designated to be invested by FAPS ultimately went to a Mederco company (there were several) and even then the administrators were unable to trace its receipt by any Mederco company. All but one of around 13 Mederco companies went into insolvency with the rem[a]ining solvent one having Stewart Day as its Director. There is a proposal to strike it off."

220. The Pensions Ombudsman could take independent advice on the correct rate of interest, but Punter Southall's position is that it should have been significantly higher than 7%.

221. There appear to be connections between the investment vehicles and the individuals involved. The loan to Bright Limited was then used to fund a Mederco company for student housing.

222. CBFS also invested in Mederco (Huddersfield) Limited, indicating that its Director, Mr Paul Dalton, knows Mr Stewart Day.

223. Mr Gary Quillan, a previous Director of Bright Limited is a top chess player and may be connected to the Original Trustee through their involvement with chess.

224. It is understood that Mr Williams and Mr House knew each other through chess.

225. The Original Trustee was also the initial trustee of the Business Way Pension Scheme and sole director of its sponsoring employer, which was later appointed as that Scheme's Trustee. The Business Way Pension Scheme has approximately 65 members and its asset position is essentially the same as the Scheme.

226. It is hard to see the relevance of the Optimum Tax Opinion. It was written for SIPP members and deals with residential property, neither of which apply to the Scheme. Notwithstanding that, it contains provisos that HMRC might take a different view of the

advice, and so the Original Trustee ought to have sought advice from HMRC, something which Punter Southall would do in similar circumstances. This is particularly the case given the limited capacity for investment loss for most if not all of the members.

227. In response to the Original Trustee's comments regarding Punter Southall's professional fees and allegations of a conflict of interest (set out in paragraph 254.24 below), Punter Southall stated that if the Scheme has sufficient assets then payment of its fees would normally be a priority charge on the Scheme's assets. If the fees are recovered, then it will not have worked pro bono.

228. Punter Southall considers it has no conflict of interest. It would be expected for the work undertaken in connection to the Scheme, including the involvement in the complaint to be paid for by the Scheme's assets.

229. Punter Southall is a professional trustee and there is no provision for its employees to act in a personal capacity.

230. The fact that Mr Williams appears not to have drawn any remuneration as trustee points to him drawing remuneration from elsewhere for undertaking the role.

231. Punter Southall does not consider that Mr Quillan was a good adviser or role model. He does not appear to have had any investment qualifications.

232. The statement that the Scheme required a Statement of Investment Principles was an oversight.

D Summary of Brambles' position

233. All members would have signed a Member Directed Investment Form and most/all members were introduced by Pension Max.

234. Brambles did not provide the members with information about the investments and does not have them on file.

235. Brambles believed that the Trustee would have carried out due diligence on the investments, but as the administrator Brambles did not carry out any investment due diligence, make investment decisions nor make any of the investments.

236. Brambles was never a signatory to the Scheme bank account.

237. Brambles at all times has tried to provide a good standard of service and has retained relevant records. Annual statements and scheme returns have been issued. Brambles has also answered information requests made by the members.

238. The decision not to provide the Trustee's contact details was intended to provide the members with a single point of contact, but it is now recognised that this was not the correct approach. It apologises to Mr M for its failings in this respect.

239. It denies any other suggestion of maladministration.

240. Brambles was the administrator of the SHK Scheme, but no longer holds any records in relation to Mr M's membership. From memory, Mr House does not believe that any investments were made while Mr M was a member. Cash was transferred in and cash was transferred out.

241. The freehold of 3TC House was owned by Imperium at the time the leasehold was purchased.

242. Brambles no longer holds any written record of instructions from the Trustee. All communication with the Trustee was by telephone.

243. In late 2017, or early 2018, CDWL approached the leaseholders of 3TC house to purchase them. CDWL owned the freehold at the time.

244. Documentation provided by Mr M to Brambles indicates that he may have received a payment in the form of a 20% capital gain.

245. Brambles has never given investment advice or instructions to anyone.

246. Brambles does not accept Mr Williams' position that it directed him or the Trustees in any way and Brambles' role was solely administrative.

247. The investments were directed by the members and not by Brambles.

248. Brambles provided administrative services to various pension schemes. This is the only relationship between it and the Trustees.

249. It is unreasonable for Brambles to be held accountable for any alleged acts or omissions of the Trustees and vice versa. Therefore, it is unjust for any directions to be made on a joint and severally liable basis.

250. The suggestion that the distress and inconvenience be £8,000 for each applicant is outrageous and disproportionate to any maladministration or inconvenience suffered by the applicants. This is out of line with historical directions of The Pensions Ombudsman and £1,000 each would be more reasonable.

251. As inflation has been low over the period, any suggestion that inflation would increase the distress and inconvenience award made is unjustified.

252. Brambles has not commented on every point made by Mr Williams, but that should not be taken to mean that it accepts or disagrees with anything he has said.

E Summary of Mr Williams' position

253. In response to TPO's request for a formal response to Mr M and Mr Y's complaints, Mr Williams made the following brief submissions on 26 September and 26 November 2021:

    253.1. He was the director of Focus, but the company is now dissolved.

253.2. The new Trustee and Administrator is Punter Southall and he has not retained documents or records in relation to the Scheme. Scheme accounts were completed and submitted to TPR by Brambles.

253.3. There were two other companies involved in the Scheme, Brambles Administration Ltd and Pension Max.

254. In a witness statement submitted to TPO on 27 May 2022 (the **First Witness Statement**), following the notice of oral hearing and in response to my first preliminary decision, Mr Williams made the following summarised submissions:

254.1. He does not know any of the individuals that were involved in Mr M's transfer to the Scheme; Mr Ben Roberts, Ms Brona Donnelly or Mr Mark Young.

254.2. The investments were requested by the members. It was their responsibility to take professional advice and they had indemnified him against any claims or losses. He would not have made the investments had the members not requested them and indemnified him. The members did not just consent to the investments, they actively sought them, and so they have a high degree of contributory negligence.

254.3. He did the necessary due diligence to check that the investments were allowable for a pension scheme and that the scheme was not paying more than market value.

254.4. For all of the property investments he had received a valuation from a chartered surveyor. For the loans, he had obtained personal guarantees and for share purchases, he ensured that there was a detailed investment memorandum. This demonstrates that he had conducted sufficient due diligence prior to making the investments.

254.5. He believes that the members received a payment of 20-25% in the form of a capital gain. This is suggested by the information received from the administrator and the Optimum Tax Opinion. Any payment received by the members should be deducted from any compensation.

254.6. The only reason he allowed the investment in Unit 1 3TC House was because Mr M asked him to. Mr M was incentivised for the transaction to complete. He was a partial owner of Unit 1 3TC House prior to the Scheme's purchase, owning 43.34% of the property. Mr M did not make TPO aware of this fact and denied it under oath during the oral hearing. He did not know why Mr M had concealed this information but a finding of dishonesty should be made against him. This is a clear example of contributory negligence on Mr M's part.

254.7. The purchase price of Unit 1 was £145,722 and Mr M owned 43.34% of the asset. Therefore, the value that was transferred to Mr M at the point of purchase was £63,155.

254.8. The payment from Middletons to Mr M following the sale of the property was for £29,694.43. Mr M's bank statement has the reference 'Unit 1 Middletons'. This shows that the payment was in connection to Unit 1. Mr M should provide his tax return for the year in question to prove the question of whether Mr M sold the property to the Scheme.

254.9. The Scheme purchased Unit 1 from Mr M, three other individuals and Bright Limited. Middletons Solicitors Liverpool, acted for the scheme and EAD Solicitors acted for Imperium, the freeholder. Bright Limited has been able to share information with him about this transaction.

254.10. For the 3TC Investment, he had sight of a RICs valuation to ensure the assets were appropriately valued and that the Scheme was not overpaying for the assets. The valuation was received from the Gilbert Trading Pension Scheme which had commissioned the chartered surveyor. It was reasonable and he was entitled to rely upon that document as an accurate valuation.

254.11. There was no conflict of interest in the use of 3TC House as a registered office. None of his businesses ever traded from 3TC House and the market rate was paid for those services:

> *"The fact that I know some of the people named here does not in anyway give rise to a conflict of interest. It is common practice for people to know the people they do business with. Likewise any relationships between any companies named. Any transactions were at arms length. It is a major stretch for the TPO to suggest any conflict exists."*

254.12. The commission paid to Bright Limited was only £12,000, not £120,000. Bank statements confirm this. The reference to 50% within the loan agreement is likely to be a typing error.

254.13. In relation to the Mederco Loan, Stewart Day provided detail of his Assets and Liabilities which showed personal net assets exceeding £20million. Therefore, as Mr Day had provided a personal guarantee, he was satisfied that the loan was highly secure.

254.14. For the Tennyson investment he requested sight of the investment memorandum to ensure that the investment was suitable.

254.15. In relation to a payment of £72,132.83 on 16 April 2014 with the reference PJN Bolton, he believes this was a "purchase of a share in some land at Great Moor Street, Bolton".

254.16. At the point of sale of the Office units, the purchaser, Capital Developments Waterloo Ltd, could not meet the purchase price. Therefore, he accepted security from its sister company, CBFS. He was of the view that this was a prudent decision as he obtained a personal guarantee from its director, Mr Paul Dalton. Mr Dalton is currently making payment to the Scheme and Punter Southall can enforce the personal guarantee if it chooses to.

254.17. He had taken on the role of Trustee in the belief that he would gain valuable pensions experience and that it could be an entry level position for a career in the pensions industry. He completed all the then available relevant modules from TPR's Trustee Toolkit and received no payment or any other benefit for his involvement in the Scheme and denies any allegation to the contrary.

254.18. He also does not understand the title of "quasi professional trustee" referred to by the Ombudsman and has not had the opportunity to seek legal advice on this.

254.19. Following notification of the oral hearing, and receiving the bundle and preliminary decision, he was not given the opportunity to read, understand or seek legal advice on their contents before the oral hearing. His request for an extension was refused. By refusing the extension, The Pensions Ombudsman had prejudiced his right to a fair hearing and breached his human rights.

254.20. He was unable to attend the oral hearing because he had not had sufficient time to seek the appropriate advice on a very technical issue.

254.21. His first witness statement was prepared at short notice, without legal advice and without full understanding of the bundle.

254.22. The Scheme was not required to complete a statement of investment principles as it had less than 100 members. Punter Southall had misled the Ombudsman on this point and having been the Scheme's trustee for four years it ought to have been aware of this. Punter Southall's other evidence should be considered in the context of this error.

254.23. The interest rate for the investments made by the Scheme were within the parameters of a 2019 report by "London Economics and YouGov for HM Treasury stated that the typical rate for non transferable debt securities between 2009 and 2019 was 6-9%." This is a credible source of information and commissioned by HM Treasury. They refer to unsecured loans and are therefore comparable.

254.24. Punter Southall has made a number of mistakes in its submissions, and therefore its comments should be treated with a degree of scepticism. Punter Southall has said that it is working pro bono but then contradicts itself by saying that there are large fee arrears. In these circumstances, it has a conflict of interest as any money recovered would be used to pay Punter Southall's fees. This should be confirmed, and Punter Southall should clarify what it has done to mitigate the risk.

254.25. It is perfectly acceptable for a Scheme to have a limited company as a trustee and no adverse inference should be made due to his decision to operate the Scheme with a corporate trustee.

254.26. The Scheme Rules allowed for individual investments for members, and this is how the Scheme was operated. The member directed investment form shows that the member instructed the Trustee as to how the funds should be invested.

The annual statements also demonstrate that the individual's benefits were based on his or her investments. Additionally, separate member records were kept for each member.

254.27. At all material times, the Trustees, members and administrator understood that the Scheme operated on an earmarked basis and decisions were taken accordingly. Mr M's complaint shows that he believed that the funds were segregated as he referenced specific investment values and to decide otherwise would be unconscionable on the part of the Pensions Ombudsman.

254.28. The exoneration clause and members' indemnity are effective and should he be directed to pay money into the Scheme he will seek reimbursement from Mr M and Mr Y under the indemnity clause signed when joining the Scheme.

254.29. At no point had he acted dishonestly. As the director of Focus he had only ever carried out the activities of a company director and he denies being a dishonest accessory.

254.30. Some of the complaints have been brought out of time.

255. A second witness statement by Williams dated 1 February 2023 (the **Second Witness Statement**), was submitted by Mr Williams's legal representative, Ai law, in response to my second preliminary decision following the oral hearing. I have set out a summary of these submissions:

His background and relationship with Mr Quillan

256. He is a chess professional and, although it can be an extremely difficult way to make a living due to having to win prize money, he has sought to boost his income through tutoring and online courses.

257. Mr Williams met Mr Gary Quillan in 2005, at the time an independent financial adviser who had provided other chess professionals with financial advice. In 2008 Mr Quillan introduced Mr Williams to projects he was working on, including bridging finance and property investments.

SKW Investments Limited and Sippchoice

258. In 2008, Mr Quillan proposed that Mr Williams establish a new company, SKW Investments Ltd, and apply for a consumer credit licence. The arrangement would involve SIPPs investing in Imperium, that would in turn invest in property or private loans. A proportion of the amount invested in Imperium was then invested in SKW which would then make a regulated credit loan to the SIPP members. The loan would be repaid by the members and ultimately returned to the SIPP as a return on investment.

259. Mr Quillan had tax advice from Optimum Tax Services that this arrangement worked and was compliant with pension rules. Mr Williams highlights the following from the Optimum Tax Opinion as advice that he relied upon, when he was not a professional trustee, to believe that SKW's activities were legitimate:

> "*Whilst these [*the use of offshore companies to purchase UK properties and the revaluation of properties at a higher value*] are the 2 main areas of weakness, which I believe could be well defended by the promoters of this arrangement, HMRC may take another view and come up with other approaches for attacking these arrangements. The above is just my opinion and some of my technical analysis might not be in alignment with the views of HMRC, or indeed any Tax Tribunal. At worst, the amount of any unauthorised payment charge could amount to be the size of the total net contributions/ transfers made to the SIPP. This would result in a tax charge on the client, calculated at up to 55% of the amount contributed. However, it seems difficult to see how HMRC could justify this argument and impose this tax charge, given that the investor might not receive that full amount within the SIPP."*

260. Mr Williams highlights that this was around the time of the housing market crash and that "This structure was a way to allow SIPP owners to access the money in their SIPPs before they were 55…" He also indicates, in the context of the housing market crash, that a number of the individuals were happy to take the tax risk. SKW was established as a legitimate way to allow SIPP members to receive cash without being subject to tax, and this was the purpose of the option sought.

261. He accepts that he did not have a full understanding of the rules or SKW's operation but relied on the tax opinion and his trust in Mr Quillan, based on his business success and reputation in the chess world. He therefore accepted the role as director of SKW.

262. During the 9 years of his directorship there were no complaints or adverse events causing him to doubt the legitimacy of SKW. Borrowers were happy to receive their cash payment in the economic climate. In 2018, Imperium called in its loans and as a result SKW entered insolvency.

263. The Sippchoice case related to SIPP members investing wholly in Imperium on an execution only basis. The court's decision was that this was pension liberation, a term which at the time Mr Williams did not understand. As the director of SKW he was unaware of this issue and relied on the tax opinion, instructions of Mr Quillan and the borrowers, and professional advisers who prepared the loan documentation. He only became aware of the case after its conclusion when it was in the press.

264. Imperium was operated by William Ross-Jones and Robert Metcalfe, with whom he had no other dealings and were not known to him.

265. Mr Williams notes that the owners of Sippchoice were highly experienced pension professionals who allowed the Imperium investment despite it not meeting the criteria for diversification. This shows that his actions were not uncommon and were being taken by other professional trustees and pension companies.

266. His involvement in SKW and its links to the Sippchoice is unrelated to his trusteeship of the Scheme and is viewed with the benefit of hindsight. It does not demonstrate dishonesty, the events were prior to the issues complained of, and there has been no formal finding of wrongdoing on his part in relation to SKW.

267. It should also not be used as evidence of wilful ignorance of pension rules. He had no information to suggest that the Scheme's investments would not meet the criteria for diversification. Sippchoice's decision to allow the Imperium investment shows that there was no reason for him to believe the Scheme's investments were not diversified.

268. It cannot be right to take the facts from his involvement in SKW Investments Limited with the benefit of hindsight and there have been no formal findings of wrongdoing in relation to his involvement with SKW.

269. For his involvement in SKW, he received remuneration totalling approximately £60,000. There was no other benefit for his involvement.

270. He had no information to suggest that the Scheme's investments did not meet the criteria for diversification, noting especially SIPPchoice's decision to allow a single investment within its SIPP. Regardless, he does not agree that the Scheme's investments did not meet the criteria for proper diversification.

GBT Partnership Limited

271. In 2010, Mr Quillan asked him to become a director of GBT Limited, a company funded by selling shares to pension schemes. Approximately £1.95m was raised in capital, to be used to purchase land in a then up-and-coming area of Liverpool. Between 2012 and 2014, the shareholder funds increased from £1.95m to £3.7m, showing a significant return.

272. Mr Quillan advised that as long as GBT did not pay more than the RICS valuation for the land it would be a compliant investment. The land was subsequently sold for £2.5m with £2.2m in cash and the balance by way of a secured loan to the property developer. The loan was ultimately not repaid despite attempts to enforce it.

273. As GBT's director, he dealt with day-to-day company matters, but work and advice relating to the investment and land sale were carried out by Mr William Ross-Jones and Mr Robert Metcalfe, contacts of Mr Quillan. He did not have day to day contact with them, or direct association with them. There were no issues with the activities of GBT or the investments.

274. Mr Williams challenges any suggestion that there was any connection or interconnectedness between him and the individuals involved in the investments. Mr Quillan was his friend but he did not know the other individuals, apart from those explained in his statement. In his understanding, all of the investments were arms' length transactions. He had acted on the instruction of either the investors or the borrower. He was not a trustee as a director of GBT Limited and only undertook the actions necessary of him as the Director.

275. The Ombudsman should not Determine the case with the benefit of hindsight. At all times he acted in good faith and the investments were viable based on his knowledge of them and the due diligence undertaken.

276. The joint use of 3TC House as a mailing address does not demonstrate dishonesty. This was used because Mr Quillan used it. Mr Williams has never visited 3TC House.

Focus Administration Pension Scheme – structure and Mr Williams' role

277. Mr Williams first heard about the Scheme in January 2013 and "[he] was told that this scheme would sign off on investments mainly into local property projects… [he] had been involved in SKW and GBT without issue and was keen to continue building up [his] knowledge and experience of pensions in general. [He] had never been a trustee".

278. In response to a query from Mr Williams, Mr Quillan explained that pension rules became more restrictive if the number of members within a scheme passed 100. By having a separate Focus Administration Pension Scheme, independent schemes and individual members would be able to diversify more and invest in these types of assets. This would allow investment in more residential property, which at that time was a strong market.

279. Mr Williams was introduced to Brambles around this time. He was told that Brambles was registered with HMRC. He stated that Brambles would "carry out the vast majority of paperwork relating to investments as the administrator and I would be required to simply sign off on investments as the Scheme's trustee… there would be an appointed regulated company to administer the Scheme and direct me."

280. Mr Williams submitted that "Brambles would prepare any paperwork that was needed and direct me on decisions of the Scheme. My role was to facilitate the operation of the Scheme, such as opening the bank accounts and to checked [sic] the paperwork and conduct basic due diligence to ensure that I was personally happy to sign off on the Focus Scheme's activities."

281. Mr Williams stated that his role "was to simply ensure that the pension scheme did not pay more than the valuation on the investments and that everything was in order. [For the 3TC House investment] Brambles provided me with [a] valuation written by a RICs qualified valuer, addressed to Gilbert Trading… Although this valuation was not addressed to Focus, I was informed that Gilbert Trading was another of the schemes administered by Brambles who were buying some of the other units and was a current valuation on which another scheme was satisfied."

282. Mr Williams confirmed that Focus, "was set up for the purpose of the scheme as the Principal Employer."

283. Mr Williams made the following statement about why he resigned as trustee and appointed Focus as sole trustee on 26 August 2016:

"To explain the reasoning for the change of trusteeship, it was not any particular event that brought about the change. It was Brambles who suggested to me that it was more common for trustees to be corporate entities rather than individuals and it made sense to me to have the benefit of a limited entity rather than myself personally. I believe this is very common. I did not regret my decision because in 2018 I was

suspended as a pension trustee due to my involvement in Business Way, as referred to in the Preliminary Decision. Business Way had accepted a bulk transfer from another scheme and it appears that previous scheme was being investigated, therefore Business Way was also investigated. Ultimately the investigation did not amount to anything, although I was suspended by the Pension Regulator, and I am not aware as to whether that suspension was ever lifted."

284. Mr Williams has stated that in my second preliminary decision I sought to, "pierce the corporate veil of the Focus Company as I was its controlling mind. As [TPO] has set out, the corporate trustee is a limited company and I had limited liability as a director of that company. I seek to rely on the limited liability principle. I have not acted dishonestly at any time, and I do not accept that there is any scope to pierce the corporate veil on this basis."

285. With reference to the statement at paragraph 460 of my second preliminary decision that "Mr Williams procured the breaches of trust" Mr Williams admits signing documents to make investments, but that this was strictly in his capacity as director on the belief and knowledge that he had at that time. He denies procuring a breach of trust by Focus. Mr Williams submits that he fulfilled his statutory and fiduciary duties to Focus.

286. Mr Williams has submitted that each member's investment was held on an earmarked, rather than pooled, basis within the Scheme.

Scheme Investments

287. Mr Williams has submitted that the majority of investments were made on the instruction of members via forms from "Pension Cash Release and Pension Max, companies that I did not know. I did not know these companies. I am aware that the members who received contact from these companies also were given a copy of the Pension Regulator's "scorpion leaflet" and had been told of the risks of pension loans or cash incentives and that any investment would not be regulated by FSA [sic]"

288. He had no involvement in structuring the Scheme's investments. He recalled that:

"it appeared that Pension Max obtained their client's [sic] *through marketing potential investments and opportunity for returns. Their clients would then sign up to Pension Max who would pass those investors to Brambles who would then provide me with the member's instruction form, along with any appropriate due diligence for me to ensure it was not fraudulent and for me to verify the identity of the investors and the valuations relating to the investment (IMs, valuations, brochures) before processing the investment for them."*

289. With regard to the Scheme's investment in Tennyson, Mr Williams has submitted that Mr M was provided with information setting out the risks and the information, "would not be such to suggest any concern or anything out of the ordinary. An income projection of up to 3% per annum would not be seen as a risky investment."

290. With regard to the Scheme's investment in Mederco, Mr Williams has submitted that "Mederco was an already funded and active company with over £50m in assets." He stated that "Mr Day was a well-known businessman of who [sic] it was confirmed had assets amounting to over £50m at the time of his connected insolvency issues." Mr Williams submits that it would not have been possible to scrutinise Mr Day's affairs more fully. The fact that Mr Day's other unsecured guarantees of £20m were unsecured means that there would have been no public record or way for him to have checked this information.

291. With regard to the 3TC House Investment, "Brambles had informed me that a number of similar pension schemes administered by them also bought the office leases and have provided me with one lease that was actually signed by a member of another scheme. The 11 units were sold to the different pension schemes using 'back to back' transactions, which I believe are fairly common. It is unfortunate that both solicitors involved in the transaction, Middleton's and EAD, are no longer trading and I cannot obtain the signed leases."

292. Mr M invested his pension scheme into Imperium who had purchased 3TC House. The payment to Mr M was not on the basis of information received at that time an unauthorised payment and should not result in a finding of breach of trust.

293. Problems arose with the onward sale of 3TC House because both sets of solicitors failed to register the leases. When CDWL bought the 3TC Building and sold the leases, it did not have to apply to have the registrations removed. "Therefore CDWL was in full control, and when the deal was agreed and the sale agreements signed, CDWL said they didn't have the funds to hand over, but they said they would have very soon."

294. Regarding the investment into CBFS, Mr Williams has submitted that "this was not a transfer of further funds to CBFS. The 2018 CBFS loan Agreement was in fact a conversion of debt owed by CDWL [as a result of the sale of 3TC House] into a loan note from CBFS that was personally guaranteed by Paul Dalton. From my perspective as trustee, CBFS was a stronger company than CDWL and therefore converting unpaid debt into a personally guaranteed loan note was in the best interests of the Scheme and Mr M." The funds were never received.

295. Mr Williams acknowledged that he did not receive professional advice regarding the 2018 CBFS Loan Agreement, but was reassured by the following information available to him at the time:

"b[10]. Gary Quillan had been involved in bridging finance since 2005 and was involved in the company

c. The company had been going since 2012 and appeared to be growing exponentially

[10] No item 'a.' was included

d. They had set up their own ISA - The Capital Bridge Bond

e. They had set up a bond listed on the Irish Stock Exchange - Capital Innovative Finance Ltd

f. All their literature confirmed that their money was secured on property and the bridging finance returns were significant."

Bright Limited

296. Mr Williams has submitted that he "was not privy to the inner workings of the deals" and can rely on sections 164 and 171 of the Finance Act 2004. He does not see the relevance of money being made by other entities, including Bright Limited, in transactions involving the Scheme.

297. Bright Limited co-ordinated the 2016 Mederco Loan Agreement. The arrangement fee was 5%, not 50% and, "as the commission was being paid by Mederco [it] should not have impacted upon the amount repaid to the scheme." He does not believe that 5% is an unreasonable amount for organising a loan to a private company.

Diversification

298. Mr Williams has submitted that with respect to diversification, 'Regulation 7(2) of the Investment Regulations requires trustees of schemes with fewer than 100 members "to HAVE REGARD to the need for diversification of investments IN SO FAR AS APPROPRIATE TO THE CIRCUMSTANCES OF THE SCHEME [Mr Williams' emphasis]". Clearly the members of Focus knew this was a scheme offering a narrow range of Alternative Investments.

299. At all times when acting in his capacity as trustee he had adequate regard to the need for diversification of investments, as required by Regulation 7(2) of The Occupational Pension Schemes (Investment) Regulations 2005. His actions as trustee and the type of investment made were no different to those made by other professional trustees within the industry.

The failure of the Scheme's investments

300. Mr Williams has submitted that the insolvency of Lendy Limited on 24 May 2019, resulted in the failure of the Scheme's investment in the 2016 Mederco Loan Agreement. Lendy had significant exposure to Mederco and CBFS had loaned Mederco £3 million secured on Bury Football Club's stadium. Mr Williams submits that "hence there was a huge domino effect which could not have been anticipated." Mederco was a substantial organisation and appeared to be risk averse and secured. But for Lendy entering administration, it cannot be said that the Mederco investments would have failed. The failure of the Scheme's investments was not due to their underlying merits.

301. Mr Williams acknowledged that the investments have failed but submitted that this was not due to any breach of trust by him.

302. Mr Williams has submitted that:

> *"There was nothing to suggest to me that there was anything untoward in relation to the investments made. The investments through Focus Scheme that failed did not fail based on their own merit, but rather they failed due to the failure of a third party lender, which caused insolvencies for many companies, not just to Focus. I do not accept that the losses stemmed from making risky investments. The investments were asset backed and secured, but the insolvency of Lendy and then Bury FC was something that nobody expected to happen."*

Adverse findings against Mr Williams

303. Mr Williams has submitted that he was not aware of the concept of pension liberation until he was contacted by the Times in the summer of 2019. He was not aware at any material time when acting as trustee of the Scheme that any of the investments being made could constitute a pension liberation scheme or were not permitted by the Scheme's rules or legislation. "At all times I acted in good faith based on my knowledge of professional advisers and advice from others who were in the industry. There was nothing at that time to suggest that there was anything to be concerned about."

304. Mr Williams does not accept that he meets the test for dishonesty set out in *Royal Brunei v Tan* [1995] UKPC 4. He strongly disagrees with any insinuation that he has acted dishonestly.

305. Mr Williams has submitted that, "I have not financially benefitted from my actions… and did not stand to make any personal gain from the investments of the Focus Scheme."

306. He is concerned that he is being accused of dishonesty in order to obtain compensation from the Fraud Compensation Fund.

307. The second preliminary decision uses the benefit of hindsight, and association and circumstance, to reach a conclusion that is completely unfounded.

308. Mr Williams denies any wrongdoing that would render him personally liable. He states that, "at all times I acted with integrity and in good faith to the best of my knowledge and ability based on the instructions I was given by my advisors."

The oral hearing and procedural fairness

309. He received notice of the hearing on 22 May 2022, with a bundle of around 600 pages of documents 21 days before the date of the hearing. A request for an extension was refused. Due to the short timescales he was ill prepared and therefore did not attend.

310. He does not agree with an adverse inference being drawn from his non-attendance at the hearing. The receipt of the bundle and notice was a very stressful and daunting experience. He has never been the subject of investigation before and the idea of

attending a hearing at which he would be subject to questioning was very distressing. He is currently taking medication for anxiety and has done so for quite some time. He suffers from panic attacks in public settings.

311. He concluded that it would be better to not attend at all, rather than attend ill-prepared. He did not want to appear to be ignoring the investigation or be non-cooperative, which is why he opted to put his position in writing instead.

312. Mr Williams considers that there is an inequality of arms between him and the applicants as "[TPO] is running this investigation on behalf of the applicants." He does not wish his non-attendance to be taken as unwillingness to cooperate with the investigation or as indicative of his state of mind or dishonesty.

313. He feels that he has been treated very unfairly throughout this process and has not been afforded a real opportunity to make his own representations until now or give his own account of what took place. He does not know why he was not consulted on the early stages of TPO's investigation.

314. He has received audio recordings of telephone calls between my office and the applicants that appear to be one-sided and suggest that his guilt was a foregone conclusion. This confirmed the correctness of his decision not to appear at the oral hearing.

315. In response to submissions made by Mr M and by Punter Southall following my second preliminary decision, Mr Williams made additional submissions on 24 August 2023:

315.1. With regard to Mr M's comments (set out at paragraph 169 above), he needed legal advice and representation in order to defend himself against very serious and very false allegations that had been made against him. His need for legal representation does not suggest that he has anything to hide.

315.2. He denies Mr M's false allegation that he claimed that the bank statement/documentation was conveniently "unavailable."

315.3. He acted within his powers as trustee.

315.4. In practice, Scheme fees were charged at member level. At all material times, the members and the trustees behaved as though the scheme had individual member pots and it is unconscionable for the members or the trustees to now claim otherwise.

315.5. The Scheme was set up to allow members to knowingly invest their pension funds in property. It was perfectly reasonable for him to carry out their written requests in this regard. Investments were put forward by the members.

315.6. If Punter Southall has evidence of the background and circumstances of members, or the level of sophistication regarding investments, including their other savings or knowledge of Alternative Investments, it should provide this.

315.7. His understanding was that Mr Quillan is a highly experienced and very well-qualified advisor.

315.8. His understanding is that HMRC do not give advance tax advice to taxpayers.

315.9. Punter Southall should provide evidence that Mr Day considered the 2016 Mederco Loan Agreement to be the best terms he could get.

315.10. He does not accept Punter Southall's statement, that the Scheme required a Statement of Investment Principles, was an oversight. Punter Southall clearly provided false information to the Ombudsman and is further evidence of bias and a desire to present him in a bad light.

315.11. Punter Southall's motivation is to attract monies into the Scheme which will then be taken in the form of fees.

Summary of representations on behalf of Mr Williams:

316. Alongside Mr Williams' second witness statement, Mr Simon Douglas, counsel for Mr Williams, submitted written representations on Mr Williams' behalf, which are summarised below:

Nature of the Scheme

317. When most members of the Scheme joined, they instructed that the Trustees invest in specific assets and not a general fund. Given the context of the Scheme, the members understood that their investments would not be pooled with other members. As a result, it is not correct that the Scheme was a single trust, but was comprised of several separate trusts, with a new settlement established when a member joined. This will change the nature and quantum of Mr Williams' liability, and Mr M and Mr Y's claims for breach of trust should be handled separately rather than a general liability to reconstitute the Scheme.

318. While it is accepted that as per Rule 18.2 of the Scheme Rules, the creation of an Individual Fund does not automatically create a separate trust settlement, the parties were free to agree to the creation of a separate settlement. Rule 18.1.2 allows this through the wording: "shall not constitute a separate arrangement for the purposes of the Act *unless the Member and Trustees expressly agree*." [Counsel's emphasis].

319. Whether this agreement occurred is a question of fact. The courts approach this question by looking at certain indica of a separate settlement. Lord Wilberforce in Roome v Edwards [1982] AC 279, 292-3 said:

> "*There are a number of obvious indicia which may help to show whether a settlement, or a settlement separate from another settlement, exists. One might expect to find separate and defined property; separate trusts; and separate trustees. One might also expect to find a separate disposition bringing the separate settlement into existence. These indicia may be helpful, but they are not decisive*."

320. One indicia which is not mentioned in this quote is the pooling of benefits and risks, which is fundamental to the existence of a single pension fund. In practice this means that where an investment increases in value all members benefit and when an investment reduces in value all members' benefits decrease in value. Risks and benefits are shared by members proportionately.

321. In the case of the Scheme, any potential member would be aware that there was no such pooling of benefits and risks for the following reasons:

    321.1. There were no regular contributions, only one off transfers on joining the Scheme.

    321.2. In the majority of cases the investments were made at the direction of the member, as expressly provided for by Rule 17.4, which states that an investment will be allocated "to such one or more new or existing Individual Funds as the contributor may direct at or before the time when it is made."

    321.3. The investments directed by the members were often highly specific. Mr M, for instance, directed that Mr Williams purchase a "68.19% shareholding in the 250 year lease" of "Unit 1" of the 3TC House property. This gives the impression to the member that the investment was a separate asset and not a general fund. Mr M would have no expectation that he was acquiring rights in other Scheme investments.

    321.4. This understanding is strengthened by the fact that the investments directed by the members were very different in nature, for instance a lease of an office pod against Mr Y's investment in student accommodation.

    321.5. If the Scheme was a single trust fund, the commercial risks of the investments would be shared proportionately despite the express instructions of investment into specific investments. The members were most likely unaware of the other investments made by the Trustee.

    321.6. Mr M and Mr Y would have been surprised if they were told that they bore a proportionate share of risks of the other investments given their specific investment instructions. They would most likely have understood that their risks/benefits were tied exclusively to their chosen investments.

322. The nature of the Scheme involved investments being directed by the members that required a higher degree of risk than a typical pension portfolio. Members joining the Scheme could not reasonably expect these risks to be shared proportionally with other members or that they would bear the risk of others' investments. In the absence of an intention to share the risks and benefits of the investments, when Mr M and Mr Y joined the Scheme, each agreed that their investments would be held through a separate settlement.

323. It follows that Mr Williams' potential liability to each member is distinct and a breach in respect of one member does not automatically mean a breach in respect of other

members. Further, any liability should be limited to that individual and not a direction to reconstitute the entire fund.

Findings of dishonesty

324. Mr Williams' position is that at most, at times, he acted naïvely, but he did not act dishonestly.

325. Although Mr William accepts the inter-relationships of the various investment companies and the Scheme, he does not accept that he acted in bad faith or committed fraud against the members. The arrangements and structures were designed by Mr Quillan and Mr Williams acted on the advice and assurances of Mr Quillan and Brambles.

326. Mr Quillan's design of the various schemes is evident from the following:

326.1. Mr Williams had no history of deliberate involvement in pension liberation fraud. His connection to the Sippchoice judgment, and his directorship of SKW Investments Ltd came about on the basis of Mr Quillan's advice, and it was Mr Quillan who planned the transactions that SKW Investments Ltd undertook.

326.2. Mr Williams did not fully understand the SKW Investments Ltd scheme, but relied on Mr Quillan's reassurance that it was fine and the tax opinion issued by Optimum Tax Services.

326.3. Mr Williams was unaware of the Sippchoice judgment at the time did not become aware until 2019, when it was reported in the national press.

326.4. His role as director of SKW Investments Ltd was largely passive, and he followed Mr Quillan's instructions. He received a modest salary of between £500 and £1,000 and did not enrich himself.

326.5. The GBT Partnership arrangement was operated similarly. It was established on the basis of Mr Quillan's advice and the transactions it was involved in were set up by Mr Quillan.

326.6. As with SKW Investments Limited and the GBT Partnership, Focus Limited and the Scheme were designed by Mr Quillan, and Mr Williams was asked to act as its Trustee.

326.7. Mr Williams initially relied on Mr Quillan's advice that this arrangement was lawful and relied on this understanding at all times in good faith.

326.8. Mr Williams, both as an individual trustee and as the director of Focus, also relied on Brambles' advice. Mr Williams checked documentation before signing it, but the transactions were entered into on Brambles' advice.

326.9. Pension Max appears to have been the primary introducer to the Scheme and by the time the members joined, their chosen investment had already been agreed, which was subsequently communicated to Mr Williams.

326.10. Mr Williams had little knowledge or contact with the directors and shareholders of the companies connected to the Scheme. Mr Williams' main contact was Mr Quillan and it was through this friendship that he became aware of the network of individuals.

326.11. Mr Williams did not benefit financially from the Scheme. He was in difficult financial circumstances and Mr Quillan had offered him limited remuneration for his directorship of the companies mentioned. He received no remuneration for his role as trustee and his aim was to gain pensions industry experience.

Mr Williams' liability

327. The Scheme should be seen as having separate settlements for each member. Further, in respect of the main transactions that led to losses, CBFS, Mederco and Tennyson, these investments were within the trustee's power under Rule 5.1 of the Scheme. As such, there is no automatic duty to reconstitute the fund, as would be the case where a trustee acts outside of its powers, as per *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 [1513].

328. Instead, Mr Williams' liability is to pay equitable compensation for the breach of trust. This requires the member to establish the breach of trust and show that it caused a loss. This is the approach set out in *AIB v Redler* [2015] AC 1503, in which Lord Toulson said:

> *"Monetary compensation, whether classified as restitutive or reparative, is intended to make good a loss. The basic equitable principle applicable to breach of trust, as Lord Browne-Wilkinson stated, is that the beneficiary is entitled to be compensated for any loss he would not have suffered but for the breach."*

329. Mr Williams' liability is personal liability for breach of trust, which requires compensation for losses as a result of particular breaches. Not all breaches alleged to have been committed by Mr Williams have resulted in losses.

Liability to Mr M

330. In respect of the 3TC House investment, Mr Williams highlights that he was not involved in the design or marketing of this investment and at all times relied on the advice of Mr Quillan and Brambles. Mr Quillan's advice that the transaction was permitted was supported by the property valuation, and Mr Williams believed it was entirely proper. He had limited knowledge of or contact with other individuals involved in the 3TC House investment, such as the directors and shareholders of Imperium. This lack of knowledge meant that it is very unlikely that a conflict in his role as trustee or director could have arisen.

331. Mr Williams believes that the transactions involving 3TC were genuine, but is unable to access copies of the signed leases as the conveying solicitors are no longer trading.

332. If it is found that Mr Williams failed to take reasonable care when making the 3TC investment or in diversifying the fund, it is highlighted that Mr M specifically requested the investment on the member directed investment form. Although this may have been pre-populated by Pension Max or Brambles, it does not mean that Mr M did not agree to the investment, and therefore he consented to the narrow investment of his assets. Further, this investment was selected because of the promised capital gain. The nature of this gain may be under dispute, but it is relevant to explain Mr M's motivation.

333. Should the 3TC House investment be found to be a breach of trust, Mr Williams requests that the following be taken into consideration:

    333.1. Mr M's only direct loss was the 37.5% loss of value when it was sold to the Scheme, and it should be viewed in light of the fact that he received a capital gain.

    333.2. This breach of trust would not justify a wider general liability on Mr Williams to reconstitute the Scheme's fund, as there is not causal link between the breach and the eventual losses. The main losses occurred due to the collapse of Mederco and CBFS, not the 3TC House investment. Any breach in respect of 3TC House should be limited to the income tax liability triggered by the payment to him of £28,121 in 2013. The correct procedure in these circumstances is for Mr M to sue for professional negligence, in the course of which he would be required to disclose whether Pension Max had warned him of the risks of a potential tax charge.

    333.3. While bad faith or dishonesty is denied in respect of the 3TC House Investment, if he is found liable for breach of trust in respect of this investment, that breach has no causal link to the Scheme's significant financial losses.

334. In respect of the CBFS loan, Mr Williams disputes the alleged conflict of interest on the basis of a lack of contact with and knowledge of the individuals connected to the investment.

335. On the issue of the level of interest, Mr Williams maintains that the interest agreed was reasonable in the circumstances, but if this was a breach, the only loss would be the difference between the actual interest charged and the rate that ought to have been charged, a difference of approximately 3-5% of the value of the loan.

336. It is maintained that the CBFS loan was diversified, having provided finance to companies controlled by a well- known property developer, Mr Stewart Day, formerly chairman of Bury FC. CBFS became insolvent when his businesses collapsed, with over 200 lenders losing funds as a result, including 'Lendy', which had loaned several million pounds to his projects.

337. This failure should not be viewed in hindsight. What is relevant is whether the loan was reasonable at the time it was made. It should be viewed as such on the basis of the following:

337.1. While Mr Williams did not obtain independent, professional advice regarding the loan, he relied on Mr Quillan's assurances and extensive experience of bridging finance before making the loan. Mr Williams notes that Mr Quillan was involved in CBFS.

337.2. CBFS had an established trading history and there was nothing to indicate that it was not creditworthy. It is accepted that its assets were loans to other companies, but those loans were often secured, providing assurance to a reasonable trustee.

337.3. Indeed, CBFS appeared to have been growing, including having a bond listed on the Irish Stock Exchange.

338. The failure of CBFS was unforeseeable, resulting from the failure of Mr Day's business activities, for which CBFS was one of several investors. The Trustee cannot be required to have greater foresight than any other investor in Mr Day's businesses.

339. Should a breach be found, Mr Williams' liability should be restricted to Mr M's losses only, and it should not justify a wider liability to compensate all of the members.

Liability to Mr Y

340. Mr Y's main losses stemmed from the investment in Mederco, another of Mr Stewart Day's companies. The following is highlighted in respect of this investment:

340.1. Mederco was an established company with trading history which had attracted significant investment, including from "Lendy", its principle creditor.

340.2. Mr Williams recalls that Mederco had assets worth £50m. While it also had unsecured debts, which contributed to its collapse, this should not be viewed with the benefit of hindsight. The appropriate question is whether a reasonable trustee would have viewed Mederco as a safe investment. "Given Mederco's debts were unsecured, it may not have been possible for a reasonably prudent investor to discover the extent of Mederco's borrowing. Indeed, the fact that Mederco had attracted a large number of investors suggests that its indebtedness was not readily discoverable."

341. With regard to the risk posed by Mederco, Mr Y knowingly accepted that risk:

341.1. The membership form shows that Mr Y ticked and selected the investment.

341.2. While the precise nature of the investment may not have been understood by Mr Y, he should have understood the investment was dependent on the performance of Mederco and he should be taken as having consented to the risks.

341.3. If the investment was mis-sold to Mr Y by Pension Max and/or Brambles, claims should be made against those companies for professional negligence.

342. On the issue of diversity:

342.1. The Scheme Rules allowed investments to be made at the members' direction.

342.2. As per the application form dated 5 July 2016, Mr Y agreed that the investment would be in Mederco only and must have understood that there would be a single investment. Mr Y should be taken to have consented to a lack of diversification.

343. On the issue of a lack of due diligence, the question is whether a reasonable trustee would have made the investment had the appropriate checks been made, and it is wrong to judge this with the benefit of hindsight. Mederco was a significant property development company and several investors lost significant funds through its collapse. On this basis there was no breach of trust for the decision to invest in Mederco. If a breach is to be found, the membership form demonstrates that Mr Y consented to the investment's risks.

344. Finally, if a breach is found, then Mr Williams' liability should be limited to the loss caused to Mr Y's fund only, not the Scheme as a whole, as argued above (paragraphs 323 to 325).

Accessory liability and defence under section 61 Trustee Act 1925

345. Counsel for Mr Williams submitted, "In the context of accessory liability (and, it is suggested, the s. 61 defence), whilst dishonesty might be inferred from recklessness, recklessness ought not to be equated with dishonesty. This is made clear in Lewin on Trusts (20th ed):

"Recklessness may not be equated with dishonesty in this area of the law, but it is evidence of dishonesty. Though in typical cases of the of the kind considered in the previous paragraph, there is no recklessness which suffices to justify a finding of dishonesty, in other cases the degree of recklessness on the part of the defendant combined with the absence of any good explanation why the defendant acted as he did may suffice to enable a finding of dishonesty to be made." [43-41]"

346. It was submitted above that the main transactions into which SKW entered were not entered into carelessly and in breach of trust. However, in the event that SKW is found to have been reckless in entering in those transactions, it is denied that dishonesty could be inferred from such recklessness.

347. Mr Williams has explained the context and background to the Scheme and the main transactions. The Scheme and transactions were primarily designed by Mr Quillan and/or Brambles, not Mr Williams. Further, Mr Williams had limited contact with and knowledge of the individuals involved in the transactions. They were Mr Quillan's contacts, not Mr Williams. Importantly, Mr Williams did not benefit financially from the transactions other than a modest salary.

348. Should Mr Williams be considered reckless, this does not infer dishonesty. Mr Williams typically acted on Brambles' advice or instruction. His motive was to act on their instructions, not enrich himself at the expense of the members.

349. To the extent that Mr Williams can be said to be reckless in his management of the funds, that cannot be used to draw an inference of dishonesty.

F. Conclusions

350. The Applicants' complaints centre on the lack of information, the inability to transfer and the performance of the Scheme's investments. On investigating the Applicants' complaints, concerns have arisen concerning the Scheme and the acts and omissions of the Original Trustee and Focus.

351. I will consider the Applicants' complaints under the following headings, to determine whether the Original Trustee and or Focus have committed any breach of trust and whether Brambles has committed maladministration.

352. For the avoidance of doubt, I have considered Punter Southall's involvement in the Scheme since appointment and cannot see any evidence of maladministration on its part. Although it is a respondent to the complaint, I make no adverse findings about its involvement.

F.1 Limitation

F.2 The Status and Structure of the Scheme

F.3 Mr Williams' roles as the Original Trustee and as the director of Focus Administration Limited

F.4 Investment of the Scheme's Funds

F.5 The Pension Regulator's Code of Conduct

F.6 Pension Liberation

F.7 Administration of the Scheme

F.8 Member consent and contributory negligence

F.9 The Original Trustee and Focus' liability

F.10 Accessory Liability for dishonest assistance in a breach of trust

F.11 Confidentiality

F.12 Procedure

F.1 Limitation

353. Mr Williams raised a brief limitation defence in his First Witness Statement. A complaint to TPO does not fall outside the Ombudsman's jurisdiction purely because the Limitation Act 1980, would prevent a court from accepting it. However, it is well established in case law that the Ombudsman is prevented from directing a remedy that a court could not order where a respondent can establish a successful limitation defence, per Scott V.C in *Edge and others v Pension Ombudsman and another* [1998] Ch 512:

> *"In a case in which the maladministration complained of consists of an alleged breach of trust, the Pensions Ombudsman has no power, in my judgment, to direct remedial steps to be taken that are not steps that a Court of law could properly have directed to be taken."*

354. In the case of Arjo Wiggins Limited v Henry Thomas Ralph [2009] EWHC 3198 (Ch), the court held that the powers available to the Ombudsman when investigating a complaint that is time-barred under the Limitation Act are the same as those of a Court. So, I shall consider whether Mr Williams has a successful limitation defence.

355. Mr Williams has not referred to a specific cause of action of the Applicants that he considers to be time barred. I consider that the appropriate cause of action by each is for breach of trust under section 21(3) Limitation Act 1980.The relevant part of section 21(3) provides:

> *"an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued."*

356. I shall consider the earliest point at which each applicant's complaint accrued.

357. As set out in paragraphs 30 to 33 above, Mr M's transfer of £151,206 was invested by the Scheme into the 3TC and Tennyson Investments shortly after 26 November 2013. Mr M complained to TPO on 11 June 2019. As set out in paragraphs 44 and 45 above, Mr Y's transfer of £53,933 was loaned by the Scheme to Mederco between 12 and 14 July 2016 and he submitted a complaint TPO on 4 May 2021. Therefore, the Applicants brought their complaints to TPO within the prescribed period under section 21(3) Limitation Act 1980.

358. It follows that I am not prevented from directing a remedy in respect of the Applicants' complaints.

F.2 The Status and Structure of the Scheme

359. It is not disputed that the Scheme is an occupational pension scheme.

360. For the purpose of this Determination it is necessary to establish how the Scheme funds were structured, on a pooled basis or individually. The Original Trustee has stated that the Scheme allowed for 'earmarked' individual investments and that each

member's individual investments were recorded and attributable to that member. Counsel for Mr Williams has submitted that when Mr M and Mr Y both joined the Scheme, each agreed with the Original Trustee that their respective investments would be held upon a separate settlement.

361. The Scheme's Rules define 'Fund' as:

> "all contributions, gifts and transfer payments made to and received by the Scheme and any other monies, investments, policies, property or other sums or assets for the time being held by the Trustees upon the trusts of the Scheme. The allocation of any part of the Fund to any Individual Fund or to the General Fund **shall be notional and for the purpose of calculating benefits only**." [my emphasis]
>
> "Individual Fund" is defined, as far as relevant, as:
>
> *"…in relation to a Member or Dependant… that part of the Fund which the Trustees determine is attributable to him having regard to:*
>
> *(i) (in the case of a Member only) any contributions made by him and by any other person in respect of him;*
>
> *…*
>
> *(iv) Any transfers made to the Scheme in respect of him;*
>
> *(v) Any allocation or reallocation of any part of the Fund in accordance with the Rules*
>
> *…*
>
> *(vii) Any income, gains or losses (whether realised or not), fees, costs and expenses borne by the Fund and any actual or prospective liabilities of the Trustees (other than liabilities to pay Benefits) or of the Scheme Administrator attributable to the Fund.*
>
> *The Trustees may for this purpose determine that a specific asset of the Fund, or a specific proportion thereof, shall be attributed to a specific Individual Fund (either for a fixed period or indefinitely) and may vary or revoke any such determination, but in each case only with the consent of any person whose Individual Fund is affected."*

362. Rule 17.4 provides that contributions shall be allocated:

> *"17.4.1 to such one or more new or existing Individual Funds as the contributor may direct at or before the time when it is made; or*
>
> *17.4.2 in the absence of any such direction, to the General Fund."*

363. Rule 18 provides:

> *"18.1 The Trustees may at any time treat any existing part of a Member's Individual Fund or any new contribution in respect of a Member as if it were a separate Individual Fund, in which case it:*
>
> *18.1.1 shall constitute a separate Individual Fund for the purposes of the Rules (including without limitation this Rule 18.1); but*
>
> *18.1.2 shall not constitute a separate arrangement for the purposes of the Act unless the Member and Trustees expressly agree."*

The "Act" refers to Part 4 of the Finance Act 2004.

364. The Rules of the Scheme do allow for multiple individual funds, the part of the Fund which the Trustees determine is attributable to each member based on their contributions and investment returns. I accept that the evidence suggests that funds were allocated to an Individual Fund for each member.

365. Counsel has submitted that the effect of Rule 18.1 of the Scheme was that the creation of an Individual Fund did not automatically result in the creation of a separate settlement as a general matter of trust law, but that the parties were free to agree that a separate settlement would be created. I agree that the wording of Rule 18.1.2 is wide enough to permit such explicit agreement and that the existence of such agreement is a question of fact.

366. However, there is no evidence that either Mr M or Mr Y expressly agreed that their fund would be held as a separate settlement.

367. Counsel has referred to indicia set out in the judgment of Lord Wilberforce in *Roome v Edwards* [1982] AC 279, 292-3 which may indicate an intention to create a separate settlement. These are set out at paragraph 319 above.

368. Clearly, most of the indicia set out by Lord Wilberforce do not apply in this case. There are no separate trustees, only the Original Trustee and, after 26 August 2016, Focus. There are no separate dispositions bringing a separate settlement into existence, only the Trust Deed dated 21 March 2013. Whether the existence of separate trusts suggests the existence of a separate trust is, in this context, circular.

369. Counsel has submitted that a further indicia, not referred to in *Roome v Edwards*, but "fundamental to the existence of a single pension fund, is the pooling of benefits and risks." In the absence of such agreement between Mr M, Mr Y and the Trustees, it was submitted that the different and specific nature of each of their selected investments suggest that the intention of the parties was that each member's investments would be held upon separate settlements. I do not accept this submission for five reasons:

    369.1. Firstly, it is a common feature of defined contribution trust based occupational pension schemes that members' individual transfer values and contributions are invested into various assets and recorded separately, but that all scheme assets are held within a single trust. All defined contribution master trust

schemes are set up on this basis. The fundamental nature of a defined contribution pension scheme is not to pool all benefits or risks proportionally between members on a trust wide basis, but to provide benefits to members that are attributable to their contributions, and investment returns on those contributions, within a single trust structure.

369.2. Secondly, as a matter of construction, Rule 18.1.2 requires *express* agreement that an individual fund will be treated as a separate arrangement. In the absence of explicit agreement, the definition of "Fund", set out in paragraph 361 above, confirms that the allocation of any part of the Fund to any Individual Fund or to the General Fund shall be notional and for the purpose of calculating benefits only. Even if I were to accept that it is possible to infer an understanding between the parties that their investments would be held in separate settlements, I do not consider that this would be sufficient to create separate settlements as there is no evidence of any explicit agreement to this effect between the parties. In this context, I also note that the draft TR1 provided by Mr Williams in respect of the Scheme's interest in 3TC House records the registered owner as the Scheme, not Mr M.

369.3. Thirdly, the default position in the Rules regarding expenses are that these are borne centrally by the Fund. Rule 10.1 of the Scheme Rules provides that:

"All costs charges and expenses of and incidental to the administration and management of the Scheme shall be borne by the Fund except to the extent that they are borne by the Participating Employers."

Although some administration payments appear to have been deducted from the transfer values of individual members, there is no express provision for proportionate Scheme administration costs to be allocated to an individual fund in the Scheme documentation. This further supports the position that the attribution of investments to an individual fund was notional. The practical operation of the Scheme bank account, as demonstrated through the ledger document, does not suggest any practical segregation of the Scheme funds. Once received, the members' transfers and contributions were banked collectively, in some instances invested collectively and any investment returns (such as they were) were credited to the collective balance and reinvested again.

369.4. Fourthly, although certain scheme investments were defined in specific terms, namely the 3TC House, Fleet Street and Tennyson Investments, the majority of the Scheme's funds were invested in the 2016 Mederco Loan Agreement, the 2018 CBFS Loan Agreement and the 2018 Bright Loan Agreement. Each of these loan agreements comprised Scheme funds attributable to multiple members, including those of Mr M once the Scheme's interest in 3TC House had been purportedly sold. This does not suggest any intention to ringfence assets by reference to individual members' contributions. Indeed, Mr M was not aware at the time that the purported sale proceeds of Unit 1 had been subsequently loaned to CBFS. Mr Y's instruction to invest his fund in "Mederco

Student Accommodation", lacks any specificity regarding the nature of that investment and plainly does not suggest an intention to invest in a separately identifiable ring fenced asset.

369.5. Fifthly, the structure of multiple individual funds within a scheme was considered in the case of *Dalriada Trustees v Woodward*[11] (**Woodward**), in which the defendants had submitted that the schemes in question were divided into sub-trusts, each member having his or her own fund under the schemes. The court found, per paragraph 32 of the judgment, that each scheme was set up under a single trust, in which members' funds were pooled:

"The argument for [the defendants] rests largely on the terms of clause 13. The use therein of the word 'Arrangement' appears to be against the background of the definition of that word in s.152 Finance Act 2004. That section also includes the definition of money purchase benefits. It is, in my view, clear that the 'separate and clearly designated account' to which clause 13 refers is intended to reflect the 'amount available for the provision of benefits…to the member' by reference to which, in accordance with s.152(4), the rate or amount of the pension or lump sum benefit to which that member is entitled is to be calculated. Such an accounting tool does not predicate a series of sub-trusts, one for each member; it is consistent with a single trust scheme for all the members whose benefits are variable by reference to the contributions made by or in reference to them."

369.6. The court in Woodward found that a member of any of the pension schemes was "one of many beneficiaries entitled to benefits from the trust assets, the rate or amount of which is ascertainable in accordance with the rules and by reference to the amount credited to his account for contributions made by or in reference to him and investment returns thereon."

369.7. I consider that the conclusion in the present case, that the Scheme was established as a single trust in which notional individual funds were recorded, is based on stronger evidence than the court's conclusion in Woodward because Rule 18.1.2 of the Scheme rules makes clear that an Individual Fund is not a separate arrangement for the purposes of the Finance Act 2004.

370. I find that, on the evidence I have seen, all the Scheme assets were held within the Fund, which constituted a single settlement, and no member of the Scheme has a sub-trust under which his or her funds are maintained or ringfenced.

F.3 Mr Williams' roles as the Original Trustee and as the Director of Focus Administration Limited

371. Mr Williams was the sole trustee of the Scheme until 26 August 2016. Following his resignation as trustee and the appointment of Focus as the Scheme's trustee, while no

11 [2012] 086 PBLR (017) - [2012] EWHC 21626 (Ch)

longer an individual trustee of the Scheme, he remained the sole director and shareholder of Focus until its dissolution on 21 September 2021.

372. With regard to the period between 26 August 2016 and 21 September 2021, I note that Mr Williams executed both the 2018 Bright Loan Agreement and 2018 CBFS Loan Agreement, for and on behalf of Focus. He also purchased shares in Fleet Street on behalf of Focus and has stated that Focus loaned sums to CDWL prior to the entry by Focus into the 2018 CBFS Loan Agreement. I have seen no evidence that these prior loans by Focus to CDWL were documented by Mr Williams or Focus.

373. Mr Williams has only provided brief explanation as to why he resigned as trustee. In his First Witness Statement he simply asserted that it is acceptable for a limited company to act as a trustee. In his Second Witness Statement he stated that there was no particular event which prompted the change. Brambles had suggested to him that it was more common for trustees to be limited companies and "it made sense to me to have the benefit of a limited entity rather than myself personally. I believe this is very common." I note that Mr Williams' explanation appears to suggest that he appointed Focus as a mechanism in order to attempt to distance himself from personal liability to the Scheme.

F.4 Investment of the Scheme's Funds

374. Both applicants have raised concerns over the security of their investments having lost significant value through transferring to the Scheme. They are also affected by the illiquidity of the investments as neither has been able to transfer out of the Scheme. Having considered the Scheme's investments, there are a number of relevant points about their appropriateness for a pension scheme of this type. All of the investments were unregulated and no regulatory redress is available, for example, through the Financial Services Compensation Scheme.

375. All the investments were illiquid, split between: providing lending to unregulated finance companies (the 2018 Bright Loan Agreement and the 2018 CBFS Loan Agreement); lending directly to a small property developer (the 2016 Mederco Loan Agreement); purchasing leases of office pods (3TC House); or purchasing shares in small property development companies (the Fleet Street and Tennyson Investments). I also note that many of the underlying property assets or development projects were geographically concentrated around Liverpool and northern England, making them potentially more susceptible to changes in local market conditions.

376. Only Bright Limited and CBFS had significant trading history and they had limited levels of accountability, requiring only unaudited micro company accounts to be submitted.

377. The literature provided to members proposed a high level of return in the context of typical pension arrangements.

378. The interest rates in the 2016 Mederco Loan Agreement, the 2018 Bright Loan Agreement and the 2018 CBFS Loan Agreement appear to have been below the

appropriate market rate for corporate funding of this type. The Original Trustee, in his First Witness Statement, sought to justify the interest rates agreed on the loans based on a report issued in November 2019, by London Economics and YouGov, in relation to Research into Non-Transferable Debt Securities (NTDS)[12]. He highlighted that this report shows a typical interest rate for mini-bonds with 3-5 year terms being 6-9%, in line with those loans made by the Scheme.

379. While I acknowledge the content of the report, I am not persuaded that the investments made by the Scheme are in fact NTDS, given that there appears to be no restriction within the loan agreements on assignment. But even if I were to accept this as relevant evidence relating to the loans, as the Original Trustee argues I should, the report includes the following relevant findings:

"A NTDS is a high-risk investment product.

The concentration of the risk in an individual company increases the risk relative to diversified investments such as mutual funds.

There is no secondary market and often little due diligence by third parties. NTDS investors need to value the security independently. But this is more difficult compared to other securities because the documentation requirements are lower for NTDSs."

"Of the £570 million in outstanding mini-bonds in 2019, £330 million is accounted for by mini-bonds issued by failed businesses. At least 16 of the 68 companies that issued at least one mini-bond went into administration or liquidation before they repaid the debt.

This suggests a very high level of credit risk that does not seem to be sufficiently priced in mini-bond interest rates. The price discovery mechanism may be impaired because mini-bonds are illiquid and because investors are often unsophisticated or have limited access to information."

380. It is also relevant that the report, at Figure 2, shows that approximately 12% of the NTDS' issued in the UK between 2009 and 2019 had a coupon of 9-12%. This demonstrates that the window for an appropriate interest rate is much wider than 6-9% cited by the Original Trustee. I also note that the interest rates agreed were in any event at the bottom or below that range, paying between 5.5% and 6%.

381. Also, I have seen no evidence that the particular risks associated with the companies, to which monies were lent by the Scheme, were given any consideration when contemplating the loans and there is no evidence of any proper independent due diligence being undertaken.

382. In his Second Witness Statement, the Original Trustee acknowledged that, "I have no knowledge as to the market rates at that time and so a 7% interest [sic] would not

12 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/978557/Research_into_Non-Transferable_Debt_Securities.pdf

have seemed unusual." Despite the fact that the rate of interest in each loan agreement was in fact less than 7%, this further questions his retrospective reliance on the YouGov report and illustrates a lack of contemporaneous due diligence and consideration of the risk of each investment.

383. Given these factors, I consider that all of the investments would be classed as high-risk by any competent financial adviser.

384. Looking at the investments individually, I note the following points:

384.1. The 2018 Bright Limited Loan Agreement and the 2018 CBFS Loan Agreement were both unsecured. The terms of the 2016 Mederco Loan Agreement provides for a fixed charge to be taken by the lender over the property, but I have seen no evidence of a signed or registered fixed charge. Each agreement also has an associated personal guarantee provided by a director of each borrower, Mr Gary Quillan, Mr Paul Dalton, and Mr Stewart Day respectively.

384.2. All three loan agreements provided for an interest rate of between 5.5% and 6% per annum. As set out in paragraph 378 above, and even if I were to accept the Trustee's view, this appears to be a rate below what would be ordinary in these circumstances. The 2018 Bright Loan Agreement provides for two inconsistent interest rates of both 5.75% and 6%.

384.3. In support of the reliance on the personal guarantees, the Original Trustee has provided a copy of a spreadsheet which he says proved Mr Stewart Day had sufficient assets to provide a secure personal guarantee. However, I have seen no evidence of independent scrutiny being undertaken as to the existence or valuation of the listed assets. This spreadsheet appears to have been produced by Stewart Day himself and been taken at face value by the Original Trustee. A recent report into Mr Day's affairs indicate that he had given £20m of unsecured guarantees[13].

384.4. In his Second Witness Statement, the Original Trustee has suggested that it was not possible to scrutinise the information given by Stewart Day because his liabilities were unsecured. As set out in paragraph 290 above, it had been confirmed to him that Mr Day had assets of £50 million at the time he was facing insolvency. Despite the obvious contradiction in the assertion that Mr Day could have both £50 million in assets while also being insolvent, it is highly concerning that the Original Trustee considers that it was reasonable to rely on a single spreadsheet prepared by Mr Day without asking any further questions or attempting to verify information that was not in the public domain. If, after attempting to verify the information, it was not possible to do so, a prudent trustee complying with the duties placed on him by the law would not have proceeded.

[13] https://www.burytimes.co.uk/news/19984979.nearly-200-small-investors-left-pocket-ex-bury-fc-chairmans-firm-dissolved/

384.5. The Original Trustee has provided no evidence that any due diligence was undertaken on the financial circumstances of Mr Gary Quillan or Mr Paul Dalton when accepting their respective personal guarantees as security.

384.6. In relation to the 2016 Mederco Loan Agreement, the document provides for a 50% Arrangement Fee payable to Bright Limited. The Original Trustee disputes this and says that the actual amount paid was £12,000 or 5% and the reference to £120,000 was an error. Having seen the associated evidence, including Bright Limited's bank statement for that date showing the payment being received, I am satisfied that on the balance of probabilities, the actual amount paid was more likely to have been £12,000. However, no evidence has been presented as to what services Bright Limited carried out to justify a commission payment.

384.7. Mr Williams has admitted that Focus took no professional advice regarding the 2018 CBFS loan Agreement, but states he was "reassured" by the factors set out in paragraph 295 above. Again, Mr Williams was content to invest Scheme funds on the basis of his impression about the company's growth rate, the fact that it had introduced two financial products and unspecified "literature" referring to significant financial returns. I consider that no prudent trustee director would consider that this amounted to sufficient due diligence.

384.8. The Original Trustee has also commented on a payment of £72,132.83 made by the Scheme on 16 April 2014, with the reference PJN Bolton, saying that this was "a payment to Paul Nicholson of Middletons Solicitors in respect of purchase of a share in some land at Great Moor Street, Bolton." I assume that this related to Mederco's development of a Bolton town centre apartment block[14]. However, this seems unrelated to Mederco (Huddersfield) Limited, which was only incorporated on 29 April 2014 and was not linked to the development of property in Bolton. The Original Trustee has provided no satisfactory explanation for this investment, any due diligence that may have been undertaken or any investment advice received in relation to this investment.

384.9. In respect of the 3TC House investment, I have been provided with no evidence that the lease(s), said to be purchased by the Scheme, was or were executed or registered with the Land Registry. I have only been provided with a draft TR1, a draft lease and a draft sale and purchase agreement for the lease.

384.10. Additionally, it is not clear what Mr M's investment of £101,235.11 was purchasing. The member directed Investment Form suggests that the Scheme would purchase a 68.19% interest in the lease for Unit 1 of 3TC House, said to have a total value of £145,722. However, Unit 1 is not clearly defined in any of the documentation. The valuation that the Trustee seeks to rely upon refers to units being the individual office pods. Office Pod 1, which might be assumed to equate to Unit 1, is valued at £73,350, well below the value of £145,722.

[14] https://www.theboltonnews.co.uk/news/17571153.town-centre-apartment-block-left-unfinished-funds-dry/

384.11. Alternatively, Unit 1 may refer to the entire ground floor of 3TC House, which would accord with the description of it in the documents relating to the transaction between Imperium, Mr M, Bright Limited and others. Given that the purchase price in that transaction was also £145,722, this seems the most likely scenario. However, this valuation for the whole of the ground floor being Unit 1 is significantly at odds with the valuation that the Trustee seeks to rely upon, which gave a total valuation of £709,050 for the whole of the ground floor.

384.12. It is also notable that the Member Directed Investment Form refers to the expected completion of the build being 18 November 2013 and the form was signed after this date. I would have expected the Trustee to establish an up-to-date status of the renovation before the investment was made, but there is no evidence of any due diligence having been undertaken by the Trustee on this point.

384.13. When the Scheme came to sell its interest in 3TC House, I understand that there was a loss of 37.5% on the investment. I have seen no evidence of communication between the purchasing party, CDWL, and the Original Trustee, explaining how this figure was agreed or advice received that it was appropriate to accept this value on the property. Ordinarily I would expect to see a negotiation on the part of the Trustee to achieve the best available price. Instead, the Original Trustee appears to have accepted the first offer that was made. It is also striking that the buyer, CDWL, on the arguments put forward by the Original Trustee, did not even have the funds available to purchase the interest. The Original Trustee has submitted that he sought a personal guarantee from Paul Dalton but did not take any security over the assets of CDWL or CBFS. He also does not appear to have conducted any independent due diligence into the strength of the personal guarantee.

384.14. Mr M had requested that the funds realised from the sale of the 3TC Investment be transferred out of the Scheme, which ought to have been transferred to Aviva pursuant to Mr M's transfer request. However, it appears, based on emails from Brambles, that those funds were instead loaned to CBFS as part of a 'bridging loan'. The CBFS Information Memorandum states that, "the investor would receive interest of 6% per year with the aim of returning capital after five years" and "involved a significant degree of risk." On the balance of probabilities, I find that these funds were one of the loans recorded in the 2018 CBFS Loan Agreement.

384.15. In relation to the Tennyson Investment, I note that the investment memorandum projected a dividend of only 2.5% and referred to high commission payments payable to introducers.

384.16. In relation to the Fleet Street Investment, Mr Williams has presented no evidence of any due diligence whatsoever, carried out into Fleet Street before shares were purchased by Focus.

385. The duties imposed on pension scheme trustees in relation to investments are contained in: the pension scheme's documents, such as the scheme's trust deed and

rules; Part I of the Pensions Act 1995; case law; and The Pension Regulator's Codes of Practice. I will examine each of these below.

F.4.1 Investment powers and duties under the Trust Deed and Rules

386. Clause 5.6 of the Scheme Rules set out the Trustees' investment powers as follows:

> *"The Trustees have full powers of investment and application of any monies and other assets which form part of the Fund including all such powers which they could exercise if they were absolutely and beneficially entitled to the Fund. In particular and without prejudice to the generality of the foregoing the Trustees may invest or apply all or any part of the Fund in any part of the world".*

387. While it is evident from the forms completed by Mr M and Mr Y that they had provided instructions as to how the funds should be invested, the Trustee, under Clause 5.2 of the Scheme Rules, was not bound by those instructions:

> *"The Trustees shall not be required to consult, or act upon the wishes of, Beneficiaries and section 11(1) of the Trusts of Land and Appointment of Trustees Act 1996 shall not apply to the Scheme".*

388. This approach is consistent with the Trustee's wider investment duties.

F.4.2 Statutory investment duties under the Pensions Act 1995

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

390. The 1995 Act, Section 36(1), requires the Trustees to exercise their powers of investment in accordance with: (i) The Occupational Pension Schemes (Investment) Regulations 2005 (the Investment Regulations); and (ii) subsections 36(3) and 36(4), to the extent that the trustees have not delegated the exercise of such powers to a fund manager in accordance with the 1995 Act, section 34.

F.4.3 The Investment Regulations

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

392. However, despite this restriction, Regulation 7(2) of the Investment Regulations still requires trustees of schemes with fewer than 100 members to "have regard to the need for diversification of investments, in so far as appropriate to the circumstances of the scheme".

393. Investigations undertaken by Punter Southall showed Scheme assets of approximately £860,000. Of this, the majority of the assets, £711,402, was loaned to three companies:-

- £240,000 under the 2016 Mederco Loan Agreement;
- £381,892 under the 2018 CBFS Loan Agreement; and
- £89,150 under the 2018 Bright Loan Agreement;

394. A further £101,235.11 appears to have been applied to the purchase of a 68.19% interest in the 250-year lease of Unit 1 of 3TC House, £46,970 to the purchase shares in Tennyson and £29,535 and £3,762 to shares in Fleet Street Limited. It is not clear whether these sums also include the sum transferred to Paul Nicholson with reference "PJN Bolton."

395. In respect of diversification, I note:

395.1. the sums loaned to Bright Limited under the 2018 Bright Loan Agreement were intended to then be loaned to Mederco, to which the Scheme had already loaned £240,000 under the 2016 Mederco Loan Agreement and appears to have invested a further £72,132.83 in Mederco via the "PJN Bolton" payment;

395.2. the Scheme loaned £381,892 to CBFS under the 2018 CBFS Loan Agreement. CBFS in turn made several loans to Tennyson and is listed as a shareholder in Mederco, as well as a secured creditor.

396. This concentration of investment in a small number of already high-risk companies, displays a reckless approach to investment within a pension scheme on the part of the Trustees. There appears to have been no suitable management of these risks through taking regulated advice or any diversification of investment in liquid, regulated or lower risk investments. Further there was no cash reserved if the Scheme required access to liquidity in the short term.

397. The Original Trustee has asserted that he had appropriate regard for the need for diversification in the circumstances of the Scheme, because it had only 11 members and it was clear from Pensions Max literature that the scheme offered only a narrow range of alternative investments.

398. I do not find the Original Trustee's assertion persuasive. The Scheme was set up as an occupational pension scheme, so I cannot see any merit in the suggestion that the small number of members is relevant when considering the circumstances of the Scheme. On the contrary, it might be considered more appropriate that a trustee of an occupational pension scheme, with so few members, ought to have placed an even greater emphasis on liquidity and preservation of the Scheme's assets than a larger scheme. Further, I have seen no evidence that Pension Max had any involvement in Mr Y's transfer or that any "range" of investments was in fact offered. Mr Williams also appears to substitute the fact that such narrow "alternative" investments were offered as a justification for not diversifying the investments, which is of course entirely circular.

399. I consider that the investments chosen by the Trustees were high risk, narrow, illiquid and undiversified.

400. As a result, I find that the Trustees acted in breach of the requirements of Regulation 7(2), by failing to have regard to the need to diversify investments taking into account all of the circumstances of the Scheme.

F.4.4 Section 36(3) and (4) (Choosing investments: requirement to obtain and consider proper advice)

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

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

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

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

404. In respect of the process of deciding upon the investments, Mr Williams has said that: the investments were requested by the members; that the responsibility was on them to take professional advice; and that the Trustees would be indemnified against any claims or losses.

405. He says that in the case of each investment he did the necessary due diligence, ensuring that the investment was allowable within a pension scheme and that the investments were purchased at a suitable market value, and not above the market value. For each property investment he received a valuation from a chartered surveyor and for each loan he had obtained personal guarantees. In respect of the shares purchased he ensured that there was a detailed investment memorandum.

406. Irrespective of these points, Mr Williams has provided no evidence that a qualified financial adviser or someone he believed was qualified through practical experience was involved in the Scheme. He has said that the only other parties involved were Brambles and Pension Max. In this context, I have seen evidence that Pension Max appear to have operated from 3TC House, giving 3TC to potential customers as a postal address.

407. I note that the valuation survey for 3TC House was addressed to the Trustees of the Gilbert Trading Pension Scheme and the valuation for the Mederco (Huddersfield) investment was addressed to Lendy Ltd and Saving Stream Security Holdings Ltd. On this basis I cannot see that the Trustees undertook any of their own independent due diligence on these properties, simply relying on valuations commissioned by, and addressed to, third parties. This does not satisfy the requirement of Section 36.

408. Further, there is no suggestion on the face of any of the Investment or Information Memorandums provided to me as evidence of due diligence, that they were prepared by a person with the appropriate FCA authorisation. Indeed, each of the Tennyson Investment Memorandum and CBFS Information Memorandum state explicitly that the contents were, “not authorised by the Financial Services Authority” (as it then was). Both documents state that they were issued, “for the sole purpose of providing you with the information you have requested about [applying to make an investment]/[making a loan to the Company].” So, these documents do not constitute proper advice to the Trustees.

409. While the Original Trustee has stated that the members requested the investments, I note that these were prepopulated on the form and offered to the members at the point of application. I consider it is significant that the investment forms were prepopulated with the investments, implying that they were not at the discretion of the member. I am not persuaded that they were independently chosen by the member. Having questioned Mr M under oath at the oral hearing and being unable to question the Original Trustee under oath due to his non-attendance, and having considered the totality of the evidence presented, I am satisfied, on the balance of probabilities, that Mr M did not choose the specific investments in Tennyson and 3TC House. Also, I consider that the way in which Mr M was introduced to the Scheme, through an unregulated introducer, put him at a high risk of the investments being misrepresented. I consider the member consent defence further in section F.8 below.

410. In any event, the obligation to obtain proper advice is not obviated under the 1995 Act, section 36(3), by a member requesting a particular investment. In his formal responses Mr Williams has not referred to the Trustees having taken any written investment advice. For the reasons set out, I consider that the advice referred to by Mr Williams in his witness statement, did not amount to written advice for the purposes of the 1995 Act, Sections 36(3) and (4).

411. I find, therefore, that the Trustees acted in breach of the requirement to obtain written advice under the 1995 Act, sections 36(3) and (4).

F.4.5 Delegation of the Trustee’s power of investment

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

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

414. I have seen no suggestion that the Trustees delegated investment decision-making discretion to a fund manager. Therefore, the Trustees remain liable for any breach of the obligation to take care or exercise skill in the performance of any of his investment functions.

F.4.6 Duties under case law

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

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

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

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

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

417. Citing the case of *Re Whiteley*, Megary V-C said, at paragraphs 49 to 50, "that the standard required of a trustee in exercising his powers of investment is that he must take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide. That duty includes the duty to seek advice on matters which the trustee does not understand, such as the making of investments and, on receiving that advice, to act with the same degree of prudence. This requirement is not discharged merely by

showing that the trustee has acted in good faith and with sincerity. Honesty and sincerity are not the same as prudence and reasonableness. Some of the most sincere people are the most unreasonable..."

418. A trustee's power to choose and make investments is a fiduciary power. As set out in *Cowan v Scargill* above, this power must be exercised in the best financial interests of beneficiaries. It was also confirmed in *Merchant Navy Ratings Pension Fund v Stena Line & Ors* [2015] EWHC 448 (Ch), that for a trustee to act in the best financial interests of beneficiaries it is necessary for that trustee to identify the purpose of a trust and to act accordingly to promote that purpose. Per Mrs Justice Asplin at paras 228 to 229:

"In my judgment, it is clear from Cowan v Scargill that the purpose of the trust defines what the best interests are and that they are opposite sides of the same coin, an approach which is supported by the way in which the matter is dealt with in Harries v Church Commissioners, another case concerning investment policy and in Australian Securities and Investments Commission v Australian Property Custodian Holdings Limited (No 3), in which Murphy J made comments which were obiter in which he described the principle as a "portmanteau". The learned Judge's comments were made in the context of his consideration of a statutory duty to act in the best interests of the members of a trust. He explored the common law and equity in some depth and concluded that the statute did not extend beyond the general law. If by his conclusion that the "best interest duty" operates "in combination with other duties" he meant that it flows from and is moulded by the trustee's obligation to promote the purpose for which the trust was created, I agree. As Lord Nicholls pointed out, first it is necessary to determine the purpose of the trust itself and the benefits which the beneficiaries are intended to receive before being in a position to decide whether a proposed course is in the best interests of those beneficiaries".

419. Here, it is not in dispute that the Scheme was set up as an occupational pension scheme. The fundamental purpose of a pension scheme is to safeguard and invest trust assets in the best financial interests of members, in order to ensure the provision of long-term retirement benefits, as well as maintaining sufficient liquidity to enable members to exercise a transfer right, whether statutory or otherwise. I consider that the Trustees' investment decisions took no account of the proper purpose of the Scheme and were not exercised for a proper purpose.

420. In his Second Witness Statement, the Original Trustee has sought to characterise the "unravelling" of the Scheme's investments in CBFS and Mederco, as an entirely unforeseeable event, caused by the insolvency of Lendy, a peer to peer lender. The insolvency of Lendy resulted in it being unable to advance funds to Mederco, which caused Mederco to become insolvent and in turn set off a "chain reaction" leading to the collapse of CBFS and Bury Football club. The Original Trustee states that this was "wholly unforeseeable."

421. I find this explanation unpersuasive. I consider that it is clear that the loss to the Scheme is due to the failure of the Trustees to identify the purpose of the trust and to exercise their fiduciary power of investment to promote that purpose. In itself the fact

that the Scheme's investments were so intertwined with one another that the failure of one caused the failure of others, provides further support to my conclusion, in paragraph 399 above, that the Scheme's investments were high risk, illiquid and undiversified. The fundamental reason for diversifying investment is to protect the members' funds. If one investment fails or does less well than anticipated, it then does not affect the other investments as they are entirely unconnected. Further, had the Trustees taken proper advice or conducted any independent due diligence, it would have been immediately apparent from Companies House records that the Mederco group of companies was excessively reliant on external financing to fund its operations. It was wholly foreseeable that Mederco would become insolvent if it was unable to continue to secure financing on sufficiently favourable terms.

422. Prior to the Original Trustee's entry into the 2016 Mederco Loan Agreement, accounts filed by Mederco (Huddersfield) Limited at Companies House on 15 June 2016, for the year ending 30 April 2015, show creditors totalling £3,983,481, of which £3,203,500 was secured debt. Total net assets were only £74,196 and the company held only £227 in cash on its balance sheet. Prior to Focus' entry into the 2018 Bright Loan Agreement (the terms of which provided for the sum to be loaned in turn to Mederco Block A Limited), accounts filed at Companies House show creditors totalling £2,019,612, of which £1,913,856 was secured debt. Total net assets were minus £488,946 and the company appears to have held no cash on its balance sheet. Companies House records for Mederco (Huddersfield) Limited also show three secured charges by CBFS, dated 25 November 2015 and 20 March 2015. At the time the 2016 Mederco Loan Agreement was signed, one of these charges, in respect of a loan from CBFS to Mederco for the sum of £250,000, was still outstanding.

423. In his second witness statement the Original Trustee asserted that the Scheme's investments were secured, and that the sums loaned to CBFS were secured on a charge over Bury FC football stadium. Besides the personal guarantees, the entry into which was based on no, or severely deficient, due diligence, his assertion is not correct. Neither the 2018 CBFS Loan Agreement nor the 2018 Bright Loan Agreement refer to any charge or security in favour of the Scheme. Bury Football Club limited did grant a charge, dated 30 October 2017, in favour of CBFS, in respect of a loan of £1,600,000 secured on Bury Football Club. Clearly, this was an unrelated charge which could not have been enforced by the Scheme. While it is the case that the 2016 Mederco Loan Agreement refers to a fixed charge, dated 8 July 2016, to be registered against Mederco (Huddersfield) Limited, I have not been provided with a copy of this charge and I have only seen a draft pro forma charge document, between Mederco and "ABC Pension Trust", defining a loan of £100,000. In any event, I can see no evidence at Companies House that this charge, if it ever was prepared and executed, was registered at Companies House.

424. Similarly, I consider that the investments made in the 3TC House leasehold, Tennyson, and Fleet Streety, demonstrate a failure of the Trustees to identify the purpose for which their fiduciary power of investment ought to have been exercised and a failure to invest in the best interest of members. This would have been apparent at the point each investment was made had the Trustees had regard to the best financial interests

of the members. As set out in paragraph 384.10 above, it remains unclear what leasehold interest was being purchased by the Scheme. Tennyson had been recently incorporated and the first accounts only filed in December 2012. As set out in paragraphs 95 to 96 above, the Tennyson Investment Memorandum disclosed large commissions being paid to introducers, as well as risk factors highlighting the illiquidity and speculative nature of the investment. At the date of investment in Fleet Street, accounts filed at companies house show net liabilities of £98,898, as at 31 March 2017. A confirmation statement, dated 12 December 2016, shows Rachel Maria Rosa Quillan as a shareholder.

425. I find that, in investing the entirety of the Scheme's assets in the manner in which they have been invested, and by loaning Scheme assets representing Mr M's transfer value to CBFS, the Trustees failed to meet the requirements set out in case law. I consider that the Trustees failed in their equitable duty to exercise due skill and care in the performance of their investment functions. The investments made were high-risk in nature, entered into without taking any independent advice, with no regard to liquidity, and there was a lack of diversification of risk, showing a lack of regard for members' financial interests and a failure to avoid hazardous investments, contrary to the requirements imposed on trustees by *Cowan v Scargill* and *Learoyd v Whiteley.* The fact that Punter Southall has been unable to recover significant funds from the investments and has concluded that most of the Scheme's assets have been lost, is a further demonstration of the effect of the Trustees' failure to invest the Scheme's assets in accordance with their duties under case law. In failing to invest in the best long term financial interests of the members, obtain appropriate advice, and to identify and promote the purpose for which the Scheme was established, the Trustees did not exercise their fiduciary power of investment for a proper purpose. I find that each of the Scheme's investments made by the Trustees constitute a breach of trust.

F.5 The Pension Regulator's Code of Conduct

F.5.1 Conflicts of interest

426. Under section 249A of the Pensions Act 2004, pension scheme trustees are required to have in place an effective system of governance and "internal controls", including controls enabling them to identify and manage conflicts of interest.

427. In addition, Code of Practice No.13 (the **2013 Code**), published by TPR in November 2013, and entitled, 'Governance and administration of occupational defined contributions trust-based pension schemes', applied to the Trustee. The 2013 Code was replaced by a new code in July 2016 (the **2016 Code**). TPR's codes of practice are not binding in their nature. However, I am required to take them into account, insofar as they are relevant, in determining complaints made to TPO.

428. Paragraph 143 of the Pensions Regulator's Code of Practice No.13 (**the 2013 Code**), states that this includes a requirement for pension scheme trustees to ensure that they have processes in place to manage any conflicts of interest.

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

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

430. Pension scheme trustees also have a fiduciary duty not to be in a position where their interests' conflict with those of another, or where there is a real possibility that this might happen.

431. In the case of the Scheme, multiple conflicts of interest are apparent:

Imperium, Silvertree and Mapleleaf

432. By entering into the 3TC House investment, the Scheme invested in a property that Mr Williams is connected with through the registration of two of his businesses at that address. In this context I note that the fall in value of the 3TC Investment communicated to Mr M by Brambles was ascribed to low rental receipts. I understand Mr Williams' argument to be that this was a registered office, for which he paid market value, and that none of his businesses ever traded from it and therefore he was not conflicted. However, I cannot ignore that he had an existing business connection with the property. I have received no evidence that this fact and the potential conflict was disclosed to Mr M or that any steps were taken to manage this potential conflict of interest, as required by the Pensions Act 2004.

433. Investment in 3TC House was promoted by Imperium via the Strongbox brochure under the trading style of "Strongbox Serviced offices". I understand that Imperium owned the freehold of the building in 2013 as well as the individual office leasehold interests before the sale in November 2013. The Directors of Imperium at the time were Mr William Ross-Jones and Mr Robert Metcalfe. Records at Companies House

show that the Silvertree Investments Pension Scheme, of which both Mr Ross-Jones and Mr Metcalfe were trustees, purchased 1,950,000 shares in GBT Partnership Limited for £1,950,000 between 6 April 2011 and 6 April 2012. The Original Trustee was the sole director of GBT Partnership. I note that the recorded SIC code for GBT Partnership was "41100 – Development of building projects."

434. The Original Trustee is the sole director of JVC, and the Mapleleaf Pension Scheme holds 307,268 ordinary shares in JVC. The directors of Mapleleaf and, I understand, the trustees of the Mapleleaf Pension Scheme, are Mr Ross-Jones and Mr Metcalfe.

435. Imperium was dissolved following a Creditors Voluntary Liquidation on 28 May 2019. The Statement of Affairs filed by the (then) Administrator lists in the Summary of Assets a loan to SKW whose book value was £38,859 and a realisable value of £0. Under "Company Shareholders" SKW is listed as holding 33,640 shares at a nominal value of £33,640. In the Final Account filed by the liquidator on 12 February 2019, the liquidator confirmed that "dividends were paid to Shareholders on 11 May 2017, 15 August 2018, 30 April 2018, 10 August 2018 and 02 October 2018 for £1,000,000, £160,000, £150,000, £76,537.92 and £9,866.64." While it is not clear what dividend was received specifically by SKW, it is clear that it did receive dividends from Imperium.

436. Mr Williams was the sole director of SKW, and the majority shareholder of SKW was BOH. As set out in paragraph 153 above, the sole director and shareholder of BOH was Mr Gary Quillan.

437. To summarise, the Original Trustee, on behalf of the Scheme, purchased the leasehold interest in Unit 1 of 3TC House from Imperium. The directors of Imperium, in their capacity as trustees of the Silvertree Scheme and, I understand the Mapleleaf Scheme, invested substantial sums on behalf of those schemes in GBT Partnership and JVC Developments, of which the sole director of each was the Original Trustee, who was also a minority shareholder. Further, SKW, of which the Original Trustee was the sole director, was a shareholder of Imperium and Imperium was a creditor of SKW.

Tennyson and CBFS

438. In respect of the investment in Tennyson and loan to CBFS, Mr Gary Robinson was a Director of both companies until 10 October 2014. He was also a Director of KBY Investments Limited, which held 23,005 shares in GBT Partnership, as at 24 March 2015. Paul Dalton was a director of Tennyson from 21 March 2016 and a director of CBFS from 24 January 2012.

439. The Confirmation statement for Tennyson, dated 10 May 2018, filed at Companies House lists the following relevant shareholders:

- The Scheme;
- SHK Property Services Pension Scheme;

- Silvertree Investments Pension Scheme;
- Gilbert Trading Pension Scheme; and
- Business Way Pension Scheme.

GBT Partnership

440. The Silvertree Scheme invested £1,950,000 in GBT Partnership between 6 April 2011 and 6 April 2012. Based on GBT's accounts, this appears to have been the only investment made directly into GBT.

441. I have seen an undated investment memorandum issued by GBT Partnership. In the section headed "Principal Personnel", the memorandum states:

442. "He [the Original Trustee] will be paid £10,000 once the required money (£1.95 million) has been raised. Should £1.95 million not be raised, he will be paid 0.5% of funds raised with a minimum of £2,000. This is a one off payment.

443. [the Original Trustee] will not be on an annual salary but will be able to negotiate a percentage of the profit when the decision is taken to build the development out."

444. Had the development proceeded, any profit would have accrued to GBT Partnership. As the sole director of GBT Partnership, it would have been for the Original Trustee to have negotiated his personal profit share with the, at the time, sole shareholder of GBT (besides the single share held by the Original Trustee), the Silvertree Scheme.

445. While the ability of the Original Trustee to negotiate an unspecified percentage profit is unusual, it clearly demonstrates that the Original Trustee stood to gain financially by the investment made into GBT Partnership by the Silvertree Scheme, whose trustees were Mr Robert Metcalfe and Mr William Ross-Jones.

446. The Annual Return filed by Mr Williams on 24 March 2015, on behalf of GBT Partnership Limited, lists the following relevant shareholders, which appears to have followed a share transfer by Silvertree to CBFS, and subsequent transfers from CBFS to other individuals and offshore entities:

- Silvertree Investments Pension Scheme;
- The SHK Property Services Pension Scheme;
- KBY Investments Limited;
- Gilbert Trading Pension Scheme;

and lists the following previous shareholders:

- CBFS; and
- Gary Quillan.

447. The Original Trustee, asserted in his first witness statement, that it is “common practice for people to know the people they do business with.” I acknowledge that this statement is, in an ordinary commercial context, uncontroversial. But the closely interlinked network of pension schemes and investee companies I have identified, as well as the Trustees’ fiduciary duties to members, can be sharply distinguished from that ordinary context. It is clear that there was an extremely close relationship between Mr Williams in his capacity as Original Trustee, as a director of GBT Partnership, JVC Developments and SKW, and the principals and directors of Imperium, the Silvertree and SHK schemes, CBFS, Tennyson and BOH. The Scheme’s assets were composed entirely of investments in which the principals and directors of those companies held an economic interest, and in turn those principals invested in or made loans to companies of which the Original Trustee was a director and in which he held an economic interest. Scheme investments were made in a context of conflicting interests, personal relationships and mutual advantage between the principals. The Trustees have provided no evidence that these clear conflicts of interest were managed appropriately. I note in this context that almost all these companies were registered at 3TC house.

448. I do not accept the Trustees’ assertion that this interlinked network of transactions were simply ordinary business transactions between individuals who knew each other. The pattern of interconnected investments between the various parties demonstrates a consistent investment of the Scheme’s funds into those principals’ businesses, and consistent investment by the schemes of which those principals were trustees into companies directed by the Original Trustee. This is not coincidental and demonstrates investment choices being prioritised by personal connections and interests, before investment diversity, risk management and members’ interests.

449. In his Second Witness Statement, Mr Williams submitted that the only person he knew personally was Mr Quillan. But neither the interlinked network that is apparent even from publicly available records, nor his assertion in his First Witness Statement that it is common practice to do business with people they know, accord with these later submissions.

450. In the absence of any proper explanation as to how these conflicts were managed, I consider that the proximity between Mr Williams and the principals of the companies and schemes set out above was highly irregular. The pattern of consistent cross investments, I have identified, could give rise to fundamental conflict between the financial interests of the Scheme members and the financial interests of the Original Trustee and his business associates. I also cannot ignore the connection with proven pension liberation schemes operated or facilitated by Mr Williams and several of these principals, see paragraphs 155 and 156 above and section F.6 below.

451. Under clause 7.1 of the Scheme Rules, “The Trustees shall keep such books and records in such form and manner and for such periods as may be required either: for the proper administration and management of the Scheme; or by section 49(2) Pensions Act 1995”. I have seen no evidence that the Trustees took any steps to manage or record these potential or actual conflicts of interest, and Mr Williams has

admitted in his submissions that he did not retain records. On that basis, I find, on the balance of probabilities, that the Trustees breached the requirements of section 249A of the Pensions Act 2004, and clause 7.1 of the Scheme Rules.

452. In addition, I find, on the balance of probabilities, that the Trustees failed to act in accordance with the 2013 and 2016 Codes. I find that such failure to have regard to those Codes amounts to maladministration on the Trustees' part and a breach of their fiduciary obligations.

F.6 Pension Liberation

3TC House

453. After the oral hearing, Mr Williams made written submissions drawing my attention to the fact that Mr M received a payment believed to be connected to the pension around the time that he transferred into the Scheme. Mr Williams obtained evidence from Bright Limited that indicated that Mr M received a payment of £29,694.43. If Mr Williams had attended the oral hearing, he would have been able to put this to Mr M to answer, under oath.

454. My office made further written enquiries with Mr M, who agreed that he did receive a payment of £29,694.43 on 10 December 2013, describing it as a "capital gain". Mr M's bank statement shows that the payment was received from Middletons Solicitors.

455. Mr Williams argues that this payment was received due to Mr M having an existing interest in 3TC House and that as a result Mr M was motivated to sell that interest to the Scheme.

456. Mr M did not disclose this payment at the oral hearing despite being questioned on whether he had received any payments in connection with transferring into the Scheme. This has implications for the redress payable and the potential defence of member consent which I will address in section F.8 below.

457. Mr Williams provided additional information he had gained from Mr Mark Roberts, who I understand was involved with Imperium at the time of the transactions[15]. An email from Mark Roberts to EAD Solicitors (acting for Imperium) and Middletons Solicitors dated 21 November 2013 stated as follows:

> *"As you may now be aware via Paul Nicholson [of Middletons Solicitors], [Individual 1] sadly passed away a few weeks back. The structure of the sale of Unit 1 of the office pods by Imperium has therefore now been amended as follows:*
>
> *1) [Individual 1] has been removed as a middle buyer. [Individual 2] will be added as a middle buyer in his place*
>
> *2) [Individual 2] will purchase 13.86% of the unit and sell the same holding to Focus Administration Pension Scheme.*

[15] Mark Roberts was a director of Bright Limited from 10 October 2019 to 4 June 2020.

3) Bright Limited's ownership will increase to 41.04% to make up the shortfall."

458. Attached to this email was a spreadsheet. Below a column headed "Proceeds to Imperium (before legal fees)" there is a figure of £77,200. In the next column, under the heading "Buyer (s) 1" is the entry "[Mr M] (43.34%), [Individual 2] (13.86%), [Individual 3] (0.88%), [Individual 4] (0.88%), Bright Ltd (41.04%)." In the next column under the heading "Proceeds to Buyer (s) 1" is a figure of £68,522.00. In a column under the heading total is the figure of £148,460.34. This figure is the sum of £145,722 (£77,200 + £68,522) plus £2,238.34 "1 years' service charge in advance," £360 "Legals" and £140 "Disb." In the final column under the heading "End Buyer" is "Focus Administration Pension Scheme."

459. Mr Williams provided a further email from Mark Roberts attaching an unexecuted and undated "Contract for Unit 1" between Imperium and Mr M, Individuals 2 to 4 and Bright Limited. In this contract:

- The Buyer's Conveyancer is defined as "Middletons, Liverpool [Reference: Paul Nicholson]".
- The Purchase Price is defined as "£77,200."

460. Mr Williams forwarded an email chain between EAD Solicitors and Imperium attaching an unexecuted lease between Imperium and Mr M, Individuals 2 to 4 and Bright Limited, granting a 250 lease of Unit 1 for a premium of £77,200.00.

461. Mr Williams has also provided a screenshot of the first page of a Land Registry TR1 form. Mr M, Individual 1, Individual 3, Individual 4 and Bright Limited are listed under "Transferor." Under Transferee for entry in the register "Simon Kim Williams as Trustee of the Focus Administration Pension Scheme."

462. Finally, Mr Williams forwarded an email from Mark Roberts to Paul Nicholson dated 10 December 2013 attaching bank details for each of Mr M, Individual 1, Individual 3, Individual 4 and Bright Limited. The email also contained a table setting out the following "proceeds of sale" of Unit 1:

Name	Proceeds of sale
	UNIT 1
Mr M	29697.43
[Individual 2]	9497.15
[Individual 3]	602.99
[Individual 4]	602.99
Bright Limited	28121.44
Imperium	77200

Middleton's fees	360
Disbursements	140
	146222

463. The Scheme's bank ledger shows a transfer of precisely the same sum, £146,222, sent to Middletons Solicitors on 26 November 2013.

464. Based on the evidence set out in paragraphs 457 to 463 above, I am not persuaded that Mr M genuinely owned a share of the lease of Unit 1 3TC House prior to the Scheme's investment.

465. It is clear that at the point Mr M signed the Declaration of Payment form on 7 November 2013, and the Investment Selection form on 22 November 2013, he cannot have owned any share in Unit 1. The email set out in paragraph 245 above was sent on 21 November 2013, and its contents demonstrate quite clearly that the transaction has not completed. Completion appears to have occurred later on 10 December 2013, the date Mr M received the payment. Further, Mr Quillan has confirmed that, "the transaction was completed as a 'back to back' purchase whereby the asset was bought by Bright Ltd and the individuals (at the discounted level) and then immediately sold to their pension funds at the market valuation." While I cannot impute Mr Quillan's knowledge to the Original Trustee at the time of the transaction, it is clear that the Original Trustee's argument that Mr M owned part of Unit 1 prior to 10 December 2013 is, at the very least, inaccurate.

466. It is clear that Mr Williams was aware of the nature of the transaction in November 2013, as the precise sum set out in the proceeds of sale table to Middletons was sent some 2 weeks before completion from the Scheme's bank account. It is also clear that he must have been aware that the draft TR1 form he presented as evidence cannot be the final version of that document. The screenshot of the TR1 he has provided lists Individual 1 as a transferor. However, Individual 1 could not have been a transferor because he had passed away before 23 November and had been replaced with Individual 2. Again, it is inaccurate, at the very least, for Mr Williams to present this TR1 form as reliable evidence. In his Second Witness Statement, he admitted that the lease was not registered at the Land Registry.

467. Turning to the nature of the transaction itself, the email dated 23 November 2013, refers to Mr M and the other purchasers as "middle buyers", and the spreadsheet attached to that email refers to Focus as the "end buyer." Mr M is referred to in the documents as the middle buyer of 43.34% of the lease of Unit 1. The list of recipients of sale proceeds includes both Imperium and the listed buyers, which does not accord with Mr Williams' suggestion that the Scheme purchased the entirety of Unit 1 from the buyers. The use of the terms "middle buyer" and "end buyer" describe a single linked, or as Mr Quillan put it, a "back to back", transaction.

468. I consider that the transaction was structured on paper so that Imperium appeared to have sold Unit 1 to the buyers for £77,200 and the buyers in turn appeared to have immediately sold Unit 1 to the Scheme at an inflated value. In this context, it is notable that no party has been able to adduce any executed lease or contract documenting this process. I acknowledge that Mr Williams might argue that he was not a party to the lease or contract, in his capacity as the Original Trustee. However, this would provide him with no excuse as to why he has not provided an executed contract, or TR1 transfer between him, as the Original Trustee, and the purported sellers.

469. In his Second Witness Statement, Mr Williams submitted that he has not been able to obtain signed leases because Middletons and EAD are no longer trading, and both firms also failed to register leases with the Land Registry. I consider that it is inherently unlikely that two firms of solicitors would independently act negligently in precisely the same manner by failing to arrange the execution of leases, and for Middletons to additionally fail to register the Scheme's leasehold interest. I consider that it is more likely than not that individuals in each firm were complicit in facilitating the simultaneous back to back transaction described above. However, even if signed leases do exist, this does not fundamentally change the following analysis.

470. The purchase price of Unit 1 paid by the Scheme, not including the service charge, legal and disbursements, was stated to be £145,722. The spreadsheet lists the proceeds to Imperium as £77,200, and the remaining £68,522 appears to have been distributed to the "middle buyers" in accordance with their percentage interest. In Mr M's case, 43.34% of £68,522 equals £29,697.43, almost the exact sum that was paid into his bank account on 10 December 2013 (£29,694.43)[16]. The sum of £29,694.43 is also precisely equal to 20% of Mr M's transfer value into the Scheme minus the Scheme administration fee (£29,694.43 / £148,205 * 100 = 20.00%). As I set out in paragraph 16 above, the booklet from Pension Max stated that the investment opportunity guaranteed an instant capital gain of 20%.

471. I note that Mr Quillan has stated that, "I was also aware that Pension Max offered a structure to pension holders who were looking to make a capital gain." Again, I cannot impute Mr Quillan's knowledge to the Original Trustee at the time of the transaction. However, it would be quite extraordinary if the Original Trustee was genuinely unaware of this feature of the transaction given his stated awareness at the time of the involvement of Pension Max, and Pension Max directing its customers to send original forms to 3TC House.

472. On the balance of probabilities, I find that Mr M did not hold a genuine interest in Unit 1 prior to its sale from Imperium to the Scheme, nor was the payment of £29,694.43 a true capital gain arising from the sale of that interest. The transaction appears to have been structured so that the purported buyers under the contract with Imperium, including Mr M, appeared to purchase Unit 1 for £72,200 and then immediately to sell it to the Scheme for an uplifted figure £145,722, resulting in an uplift of £68,522, which

[16] Given that the table in paragraph 46262 states a completion amount of £29,697.43 was payable to Mr M, it is unclear why £3.00 appears to have been deducted from the amount transferred to Mr M's account.

was disbursed to the purported middle buyers as a capital gain. Even if it were the case that Unit 1 was genuinely sold by Imperium for £77,200, the Original Trustee has provided no explanation as to why he considered it plausible that Unit 1 could apparently be worth both £77,200 and £145,722 simultaneously.

473. But even on a cursory examination of the flow of payments, it is clear that Unit 1 was not genuinely sold by Imperium to the purported buyers for £77,200. The list of sales proceeds above show £77,200 was paid to Imperium and sums totalling £68,522 were paid at the same time to Mr M, the other individuals and Bright Limited in proportion to their purported ownership of Unit 1. That total sum amounted to £146,222, including fees and disbursements. This is precisely the same figure that was transferred by the Scheme to Middleton on 26 November. I consider that this was the sum paid to complete the transaction, and that it comprised members' transfers into the Scheme. Further, there was no capital gain because there was a single completed purchase by the Scheme for £145,722.

474. This finding is supported by the fact that previous ownership of 43.34% of Unit 1 by Mr M is plainly inconsistent with the payment flows set out in paragraph 458 above. If Mr M genuinely owned a 43.34% interest in Unit 1 prior to the sale, the sum attributable to that ownership and which ought to have been paid to him on completion would have been £63,155 (43.34% of £145,722). But the completion statement shows a payment of £29,697.43. This is entirely consistent with the proceeds of £72,200 being paid to Imperium and 43.34% of an illusory uplift of £68,522 being paid to Mr M (43.34% of £68,522 equals £29,697.43). Further, the Investment Selection form directs the Original Trustee to purchase a 68.19% interest in Unit 1, which is more than Mr M was purported to own.

475. In this context, I consider that the 43.34% ownership attributed to Mr M was simply a mechanism to engineer a payment to Mr M which at first glance might appear to represent a capital gain but was in reality a payment precisely equal to 20% of Mr M's transfer value to the Scheme. I am supported in this conclusion by the Pension Max brochure provided to Mr M in advance of the transfer, which explained that each investment will guarantee to provide a 20% instant capital gain. In his Second Witness Statement, Mr Williams admitted that the units were sold in a "back to back" transaction and appears to have largely abandoned his previous assertions that Unit 1 was genuinely purchased from the "middle" buyers including Mr M, or that Mr M owned an interest in 3TC House prior to 10 December 2013.

476. I have asked Bright Limited, the apparent joint owner, how it came to be involved in this arrangement. Mr Quillan confirmed that Bright Limited was a tenant in 3TC House from 2012 onwards. He stated that he had no direct dealings with the investors but that Bright Limited co-ordinated the transaction with Middletons.

477. Given my conclusions that the funds used to purchase Unit 1 came solely from the Scheme, it is very concerning that £28,121.44 appears to have been paid out of the Scheme to Bright Limited via this mechanism.

478. I have also considered the role of Middletons Solicitors. Brambles has confirmed that Middletons Solicitors acted for the Original Trustee in the purchase of the lease for the Scheme. The Original Trustee was its client, but it appears to have acted for the purported sellers to the Scheme. I would not ordinarily expect to see a solicitor acting for parties on opposite sides of a transaction, as their interests can hardly have been said to be the same. Further, I have seen no evidence that Middletons made any attempt to seek instructions from Mr M or its purported buyer clients.

479. The Original Trustee has submitted, in his Second Witness Statement, that he now understands that there was a distribution to members based on the value and investment of each member into 3TC House by Middletons, but at the time he was not aware that these payments were distributed by Middletons. However, the Original Trustee was sole signatory to the Scheme's bank account and must have authorised the transfer of the sum of £146,222 to Middletons prior to purported completion. So, on his own admission, if he had no knowledge of what this payment represented or provided no instructions to Middletons as to its distribution, and was genuinely unaware of how it was to be distributed, this in itself would amount to a highly reckless dispersal of Scheme assets and a breach of trust.

480. However, the Original Trustee has been directly implicated (as sole Director of SKW) in an alleged pension liberation arrangement previously, see paragraphs 155 and 156 above. I consider it highly unlikely that another liberation scheme could occur without his knowledge involving a small occupational pension scheme for a dormant company with no employees, of which he was, at this point, the sole trustee. I also take into account that Mr Quillan, also implicated in the same alleged pension liberation arrangement, has stated that he was aware of the key features of the 3TC House transaction at the time.

481. The Original Trustee has submitted that he was unaware of the term "pension liberation" until 2019, when his involvement in the scheme, described in the SIPPchoice case, was reported in the Times. I consider that this is inherently unlikely. Mr Williams has stated in a number of his submissions that he wanted to gain professional experience in the pensions industry. Pension liberation has been a leading subject of industry commentary and concern since before 2013.

482. Mr Williams was the sole director of SKW, and the SIPPchoice judgment referred to the following exchange:

> *"Our findings are, of course, confirmed by the evidence that the contact at SKW had rebuked Mr Bates for contacting SIPPchoice at all, telling him that he had jeopardised everything they were doing."*

483. I accept that the judgment did not refer to Mr Williams by name, and I make no finding as to whether it was Mr Williams personally who rebuked Mr Bates. However, it would be extraordinary if Mr Williams had no knowledge of this exchange or if it was made without his knowledge or approval.

484. Ultimately, whether or not Mr Williams had heard the precise term “pensions liberation” at the time of his involvement with SKW and Sippchoice is immaterial. Mr Williams acknowledged, in his second witness statement, that “the structure was explained to me by Mr Quillan… this structure was a way to allow SIPP owners to access the money in their SIPPs before they were 55 so that they could use that money for cash flow or other reasons.” This is a concise description of a pension liberation scheme. So, he has acknowledged that he was aware of the structure and intended purpose of this pension liberation scheme even if he had genuinely not heard the term commonly used to describe it.

485. I find, on the balance of probabilities, that the payment of £29,694.43 to Mr M was the product of a sophisticated pension liberation arrangement, by which the Original Trustee, through Middletons Solicitors, made an unauthorised payment purporting to be a capital gain to Mr M, but which was, in reality, a payment of 20% of his Scheme benefits before Mr M had reached the age of 55. I find that it is more likely than not that the Original Trustee was aware of the structure of the transaction explained to Mr M by Pension Max, and that he was aware that the payment made by the Scheme to Middletons Solicitors on 23 November 2013, would result in an unauthorised payment to Mr M.

486. Rule 19 of the Scheme Rules provides:

> *“19.1 Any Uncrystallised Fund of a Member shall:*
>
> *19.1.1 be applied to pay a pension commencement lump sum in accordance with Rule 21; and*
>
> *19.1.2 (as to any remainder) become designated as available for the provision of unsecured pension in accordance with Rule 22*
>
> *on the day before the Member's 75th birthday or on such earlier date as the Member may select, being not earlier than the earliest date on which:*
>
> *19.1.3 the Member reaches his normal minimum pension age (or any protected pension age); or*
>
> *19.1.4 the ill-health condition is met.”*

487. As would be expected for a scheme registered with HMRC, the Rules do not permit benefits to be paid before normal minimum pension age, in this case 55.

488. In facilitating this payment to Mr M, the Original Trustee acted in breach of trust by facilitating a payment to the Scheme which was an unauthorised payment under Section 165(1) of the Finance Act 2004, contrary to the Scheme Rules.

F.7 Administration of the Scheme

F.7.1 Trustees' duties toward Scheme administration:

489. The Trustees were required, under section 249A of the Pensions Act 2004, to "establish and operate an effective system of governance including internal controls". "Internal controls" is defined, by section 249A(5) as:

> *"(a) arrangements and procedures to be followed in the administration and management of the scheme,*
>
> *(b) systems and arrangements for monitoring that administration and management, and*
>
> *(c) arrangements and procedures to be followed for the safe custody and security of the assets of the scheme."*

490. Additionally, paragraph 168 of the 2013 Code[17], which was in force when the Original Trustee appointed Brambles as administrator of the Schemes, contained the following requirement concerning the appointment of service providers:

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

491. I have seen no evidence that the Trustees put in place adequate arrangements and procedures. I note that in the Original Trustee's initial formal response he stated that he had not retained any records regarding the Scheme. While he has since sought some information from other parties, it is not acceptable that he has not retained full records. It is also an obvious, but no less serious, failing of the Scheme's controls and processes, that Mr M was able to access 20% of his pension benefits before age 55 via the payment to Middletons Solicitors, particularly in light of Mr Williams' assertion that he was not aware of how Middletons had distributed Scheme funds.

492. There also did not appear to be proper procedures in place for the safe custody and security of the assets of the Scheme. The Original Trustee has provided, in the course of his later submissions regarding the payment made to Mr M, a draft TR1 form relating to the 3TC House investment. A TR1 form is required to be registered with the Land

[17] This is replicated under paragraph 56 of the 2016 version of the Code

Registry to ensure that the transfer of title is recorded accurately. It is a basic requirement of any property investment. For the reasons set out above in section F.6, I consider that the draft TR1 now located by the Original Trustee cannot be the final form of this document. However, it is concerning that the Original Trustee has not provided a final executed TR1 showing the Scheme as the owner of Unit 1. Similarly, the Original Trustee has provided no evidence to show that the sale of Unit 1 was completed or registered with the Land Registry. It appears from the excerpt from the Administrator's report, set out in paragraph 88 above, that the leasehold interest was not registered.

493. The Bank account ledger also shows a payment of £170,000 from the Scheme to CBFS on 28 February 2017. However, the 2018 CBFS Loan Agreement between the Scheme and CBFS was dated 10 July 2018. Although the purpose of the agreement was stated to be to consolidate previous lending between the parties, it is clear that large sums were transferred from the Scheme without even a loan agreement in place.

494. Brambles has stated that all communication between the Trustees and Brambles took place by telephone. I consider this statement from the perspective of Brambles below in paragraph 501, but it also demonstrates the lack of effective controls that the Trustees had in place. The Trustees appear to have taken no steps at all to document or monitor how Brambles delivered its services.

495. Consequently, by failing to operate an effective system of governance, I find that the Trustees acted in breach of section 249A Pensions Act 2004.

F.7.2 Administrator's duties toward Scheme administration

496. It is unclear what experience Brambles has in pension administration, besides its appointment to a number of the other schemes referred to in this decision. Having reviewed its communications with the Applicants it appears to have largely responded to member queries in a timely fashion. There were occasions when Brambles could have responded more quickly but I cannot see any evidence of any delays in responding which materially affected the Applicants' circumstances.

497. One area of concern with Brambles' actions relates to the restricted lines of communication between the Trustee and the Applicants. From what I can see Brambles has never offered the Applicants any direct line of communication with the Original Trustee or Focus, and in fact I cannot see that the Trustees' identity was disclosed to the Applicants prior to the appointment of Punter Southall.

498. In October 2018, Mr M specifically asked for the Trustee's contact details and was told that contact with the Trustee was through Brambles' email address. I consider that this was likely a deliberate attempt to obstruct the Applicants from making direct contact with the Trustee, and given the background to the Scheme, it appears that Brambles was appointed to reduce the Trustees' exposure.

499. I consider that it was not acceptable for Brambles to deny Mr M access to information regarding the Trustee and had this been made available to him it may have allayed

some of his concerns about his investments. I find that this failure on the part of Brambles is serious maladministration.

500. In respect of Mr Y's interactions with Brambles, I can see that the situation was no doubt very confusing and the timeline of his transfer into the Scheme is not consistent.

501. In respect of Brambles' administration of the Scheme more generally, it has made submissions which concern me. Brambles has said that it has retained no written communication between itself and the Trustees, and that all communication was by telephone. It also says that it no longer has access to the spreadsheet on which it recorded interactions with the Trustees. Brambles' claim that it has had no written communication with the Trustees in the nine years that Brambles has administered the Scheme is absurd. At the very least it is exceptional maladministration through failing to maintain adequate records. I also do not discount the possibility that the claim is a deliberate attempt to obstruct my investigation. I note in this context that despite the obvious irregularities with the Scheme and the breaches of law I have identified, Brambles appears to have failed to comply with its duty under section 70(2) of the Pensions Act 2004, by failing to report these irregularities to the Pensions Regulator.

502. Additionally, as Punter Southall has highlighted, there appear to have been failures on the part of Brambles to seek audited accounts for the Scheme, issue statutory money purchase illustrations or arrange for a Chair's Statement to be issued, as required by 2015.

503. Although this does not directly impact the level of financial loss suffered by the applicants, it does influence my consideration of the level of distress and inconvenience award directed against Brambles.

F.8 Member Consent and contributory negligence

F.8.1 Consent

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

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

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

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

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

507. Underhill and Hayton: Law of Trusts and Trustees,[18] [19]states that, for this principle to apply: the beneficiary must have: been "of full age and capacity at the date of such assent or release[20]"; "had full knowledge of the facts and knew what he was doing[21] and the legal effect thereof[22], though, if in all the circumstances it is not fair and equitable that, having given his concurrence or acquiescence, he should then sue the trustees, it is not necessary that he should know that what he is concurring or acquiescing in is a breach of trust (provided he fully understands what he is concurring or acquiescing in) and it is not necessary (though it is significant[23]) that he should himself have directly benefited by the breach of trust[24]"; and "no undue influence was brought to bear upon him to extort the assent or release."

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

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

509. In this case, I have seen no indication that any of the Applicants were acting under the undue influence of another, and none of the Applicants have stated that there was any external compulsion in their decision to transfer their funds to the Scheme. Despite the significant irregularities at the outset of each Applicant's transfer process, with Mr M initially transferring to the SHK Scheme and Mr Y believing his transfer was to the Flexihive Scheme, once each Applicant had become aware that their transfers had been made into the Scheme, neither sought to transfer out.

Mr Y

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[18] Paragraph 1 of Article 95 of the 19th edition.
[19] The same paragraph of the 1960 edition of Underhill and Hayton was referred to by Wilberforce J in *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 (on appeal [1964] Ch 303).
[20] *Lord Montford v Lord Cadogan (1816) 19 Ves 635; Overton v Banister (1844) 3 Hare 503 at 506.*
[21] *Re Garnett* (1885) 31 Ch D 1; Buckeridge v Glasse (1841) Cr & Ph 126; *Hughes v Wells* (1852) 9 Hare 749; *Cockerell v Cholmeley* (1830) 1 Russ & M 418; *Strange v Fooks* (1863) 4 Giff 408; *March v Russell* (1837) 3 My & Cr 31; *Aveline v Melhuish* (1864) 2 De GJ & Sm 288; *Walker v Symonds* (1818) 3 Swan 1
[22] *Re Garnett* (1885) 31 Ch D 1; Cockerell v Cholmeley (1830) 1 Russ & M 418; *Marker v Marker* (1851) 9 Hare 1; *Burrows v Walls* (1855) 5 De GM & G 233; *Stafford v Stafford* (1857) 1 De G & J 193; *Strange v Fooks* (1863) 4 Giff 408; *Re Howlett* [1949] Ch 767 at 775.
[23] *Stafford v Stafford* (1857) 1 De G & J 193 (benefits from breach of trust accepted for 15 years); *Roeder v Blues* [2004] BCCA 649, (2004) 248 DLR (4th) 210 at [33].
[24] *Holder v Holder* [1968] Ch 353 at 369, 394, 399 (CA) approving *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 at 108. Also *Re Freeston's Charity* [1979] 1 All ER 51 at 62, CA.

510. Mr Y ticked the box on the New Member Application Form instructing the Original Trustee to invest in "Mederco Student Accommodation". Shortly after Mr Y's transfer from the Flexihive Scheme, the Scheme entered into the 2016 Mederco Loan Agreement. However, I have seen no evidence that Mr Y was aware that he had instructed the Scheme to loan funds to Mederco (Huddersfield) Limited, or that he was aware that the student accommodation did not yet exist. The option on the form stating "Mederco Student Accommodation" suggests strongly that such accommodation already existed and the undated "Mederco Group information pack" states that "Mederco offers individuals the opportunity to invest in a strategic and carefully planned yet aggressive UK-based property portfolio." I have seen no evidence that Mr Y was informed that the Mederco student accommodation in fact did not exist and that the investment was via a loan to finance its development, or that he consented to this.

Mr M

511. I have found (see paragraph 485 above) that the payment of £29,694.43 received by Mr M was a payment of 20% of his transfer value to the Scheme, which is reflected in the remedy set out below. The Original Trustee has argued that Mr M was motivated to sell a leasehold interest in 3TC house that he already owned. Although, I have found, based on the evidence available, that Mr M was not truly the owner of part of the leasehold interest in 3TC house prior to the purchase of that interest by the Scheme, I must consider whether he nonetheless consented to the investment.

512. Clearly, Mr M consented to the receipt of the £29,694.43 sum, and it is deeply regrettable that he did not disclose the payment to me at the Oral Hearing when questioned. However, I am satisfied that the true nature of the transaction was not explained to him and that the Pension Max brochure purposefully obfuscated the nature of the payment he would receive, describing it as a "capital gain". He had been informed that the payment would not be taken from his pension, and I accept, on balance, that Mr M's failure to disclose the payment was the result of confusion rather than an attempt to mislead me in my investigation. After Mr Williams' evidence of the payment was put to him in writing, Mr M readily acknowledged that he had received a payment and was cooperative in providing his bank details and other correspondence. There is no indication that he would have consented to the transaction had he been aware of the risk that the "capital gain" was an unauthorised payment from his pension fund and the potential tax consequences.

513. Mr M did consent to the sale of his attributable interest in the Scheme's investment in 3TC House at a loss. However, I am satisfied that he did not know the full circumstances of the investment or transaction. No evidence has been adduced by the Trustees or Brambles as to how the offer was calculated. Mr Williams has explained that the buyer did not have the funds to pay for Unit 1 and accepted security from an associated company in lieu of payment. This was not explained to Mr M. Indeed, he was informed on several occasions that the payment would shortly be made to Aviva. So, again I find that Mr M was not able to freely consent to the sale, as he was not given the necessary information required to make an informed decision. Additionally, Mr M did not consent to the purported reinvestment of the sale proceeds in a bridging

loan, presumably made to CBFS. It was quite clear from correspondence with Brambles that he wished his funds to be disinvested and transferred to Aviva.

514. Regarding the Tennyson Investment, Mr M had been provided with the Investment Memorandum, had seen the risk factors and had been informed that "Any future investments into the company will be used to reduce the debt to the bridging finance company." However, there was no indication that Mr M was aware that the bridging finance company in question was CBFS, or that the Scheme had further increased its exposure to Tennyson via loans made to CBFS. I have also seen no evidence that Mr M was aware, at the time he signed the member directed investment form, that Gary Robinson was a director of both Tennyson and CBFS.

515. Further, Mr M's requests to "cash in" the Scheme's shareholding in Tennyson, attributable to his benefits, suggests that he was not aware that his ability to realise any value from the shareholding would require the Scheme to find a willing purchaser. I appreciate that the risk factors did draw his attention to the fact that unquoted shares are more difficult to value, but not to the fact that he would only be able to draw any benefits from the sum invested into the shares at all if a third party was willing to purchase the shares.

516. Mr M was consistent at the oral hearing and throughout my investigation that a key concern throughout was his ability to draw his benefits at 55, which is supported by his contemporary communications with Brambles. So, Mr M did not freely consent to the purchase of the shares in Tennyson, as he was unaware that the value of that shareholding might not be realisable at all at age 55.

517. Significantly, the Original Trustee stated, in his second witness statement, that "the information given [to Mr M] would not be such to suggest any concern or anything out of the ordinary. An income projection of up to 3% would not be seen as a risky investment." Clearly, an advertised yield is not remotely determinative of the actual risk of the underlying investment, but if the Original Trustee asserts that Tennyson was not a high risk investment based on its projected yield, I do not accept that Mr M could possibly have been in a position of greater knowledge than Mr Williams regarding the high risk nature of the Tennyson Investment at the time it was made.

518. I consider that neither of the Applicants had full knowledge of the facts or terms of the underlying investments and consequently did not concur or acquiesce to the Trustees' multiple breaches of trust. So, I find the Applicants are not prevented from taking action against the Trustees in respect of those breaches of trust.

F.8.2 Contributory Negligence

519. I have found the Trustees to have committed multiple breaches of trust, including the breach of the fiduciary duty to act honestly and in good faith, as set out in Sections F.4 and F.5 above.

520. In Underhill and Hayton: Law of Trusts and Trustees (19th edition), at paragraph 2 of Article 87, it is explained that, in cases such as this one, where a trustee has lost or

misapplied the trust's assets, "contributory negligence [as a defence against the requirement that the trustee restores those assets to the trust fund or pays the amount due to make the accounts balance] is inapt because of 'the basic principle that a fiduciary's liability to a beneficiary for breach of trust is one of restoration'"[25].

521. It is explained, in Underhill and Hayton, that "Where the trustee has acted fraudulently, a further reason for denying him the defence would be the rule that it is no excuse for someone guilty of fraud to say that the victim should have been more careful and should not have been deceived"[26]. I agree with this analysis and interpretation of the case law.

522. As I have stated in paragraph 418 above, duties imposed on the Trustees by case law required the Original Trustee and Focus to exercise the fiduciary power of investment for a proper purpose. The Trustees also had a fiduciary duty to act honestly and in good faith when dealing with members' funds. As I have already found, the Trustees have breached all of those duties.

523. Therefore, the Trustees are not entitled to rely upon any defence of contributory negligence against their personal liability for the consequences of their many breaches of trust.

F.9 The Original Trustee and Focus' Liability

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

F.9.1 Section 33 of the Pensions Act 1995

525. Section 33 prevents trustees of an occupational pension scheme from excluding or restricting their liability for breach of any duty imposed on them to take care and exercise skill in the performance of any investment functions:

> *"(1) Liability for breach of an obligation under any rule of law to take care or exercise skill in the performance of any investment functions, where the function is exercisable:*
>
> *(a) By a trustee of a trust scheme, or*
>
> *(b) By a person to whom the function has been delegated under section 34,*

[25] The following cases are cited: Alexander v Perpetual Trustees (WA) Ltd [2004] HCA 7, (2004) 216 CLR 109 at [44] and esp [104] and Bristol & West Building Society v A Kramer and Co (a firm) [1995] NPC 14, (1995) Times, 6 February; Nationwide Building Society v Balmer Radmore (a firm) [1999] Lloyd's Rep PN 241; De Beer v Kanaar & Co (a firm) [2002] EWHC 688 (Ch) at [92].

[26] Maruha Corpn v Amaltal Corpn Ltd [2007] NZSC 40, [2007] 3 NZLR 192 at [23], citing Standard Chartered Bank v Pakistan National Shipping Corpn [2002] UKHL 43, [2003] 1 AC 959.

cannot be excluded or restricted by any instrument or agreement.

(2) In this section, references to excluding or restricting liability include:

(a) making the liability or its enforcement subject to restrictive or onerous conditions,

(b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy".

526. Clause 6 of the Scheme's Rules sets out an indemnity and exoneration clause, (set out in Appendix 2). The Application Forms completed by Mr M and Mr Y both contain wording to specifically indemnify the Original Trustee from any claim in respect of investment decisions (set out in Appendix 3).

527. Section 33 prevents trustees of a pension scheme from excluding or restricting liability to take care or exercise skill in the performance of their investment functions by any instrument. It has been confirmed that section 33 applies both to breaches of statutory investment duties and breach of the equitable duty to exercise due skill and care in the performance of the investment functions (*Dalriada Trustees v McCauley* [2017] EWHC 202 (Ch)).

528. The wording of section 33 also does not confine its effect to exclusion clauses within a pension scheme's trust deed and rules; liability "cannot be excluded or restricted by any instrument or agreement". So, the scope of section 33 extends to any attempt, made outside a pension scheme's trust deed and rules, to exclude or restrict the pension scheme's trustees' liability to take care or exercise skill in the performance of their investment functions.

529. A purposive interpretation of Section 33 requires indemnities (particularly a member indemnity) to be included. The impact of any indemnity would prejudice the member in consequence of his pursuing his right or remedy (section 33(2)(b)). To allow an indemnity under Section 33, especially if, following the hearing, I find dishonesty, would render Section 33 open to circumvention and ineffective in practice. As a matter of public law policy where there has been dishonesty it cannot be correct to give effect to any indemnity.

530. In any event, clause 6.2 is expressed to be "subject to section 33 of the Pensions Act 1995" and so does not seek to exclude or restrict the operation of section 33.

531. I consider that the Application Forms to join the Scheme containing the indemnity clauses in this case can properly be regarded as forming part of the documents comprising the Schemes. "Pension scheme" for the purposes of section 1(5) of the Pension Schemes Act 1993 (**the 93 Act**), is defined as a "…scheme or other arrangements, *comprised in one or more instruments or agreements* (my emphasis) having or capable of having effect so as to provide benefits".

532. On that basis, I find that Section 33 applies to both the exoneration clauses under the Deeds and the indemnity given by members on joining their respective Scheme[27].

533. This renders both the exoneration clauses and the indemnity ineffective in preventing the Trustees from being held personally liable for any loss suffered by members in relation to the Trustees' breach of investment duties, imposed by statute (see Section F.4.3 and F.4.4) and/or common law (see Section F.4.5) by having committed the various breaches of trust that I have found the Trustees to have committed.

F.9.2 Exoneration Clauses under the scheme documentation

534. I have already found that the Trustees acted in breach of trust by: breaching their fiduciary duty to manage conflicts of interest (Section F.5.1); failing to have in place and operate the necessary internal controls to manage conflicts of interest, as required by section 249A of the Pensions Act 2004 (Section F.5.1); failing to comply with the requirement, under section 249A of the Pensions Act 2004, to have knowledge and understanding of the Scheme's documents or the law relating to pensions and trusts (Section F.7.1); failed to have regard to the 2013 Code and the 2016 Code, as detailed (Section F.7.1) and breaching the investment duties in the 1995 Act, the Investment Regulations and case law (Sections F.4.3 to F.4.6). All of these breaches of duty and findings of maladministration are intertwined and have led, directly or indirectly, to the loss of Scheme funds.

535. The exoneration clause in the Scheme Rules provides:

> *"Subject to section 33 of the Pensions Act 1995, no Trustee shall be liable for the consequence of any mistake or forgetfulness whether of law or fact of the Trustees, their agents, employees or advisers or of any of them or for any maladministration or breach of duty or trust whether by commission or omission except to the extent that it is proved to have been made, given, done or omitted in personal conscious bad faith (or negligence in the case of a professional Trustee) by the Trustee sought to be made liable."*

536. As I have set out in section F.9.1, the exoneration clause is ineffective in restricting the Trustees' liability for the breaches of duty and trust I have identified in sections F.4.3 to F.4.6. Nevertheless, I will consider the breaches identified in sections F.4.3 to F.4.6 below for the purposes of my analysis of section 61 of the Trustee Act 1925, in section F.9.3. With regard to the other breaches of trust and duty summarised at paragraph 534 above, the Trustees are exonerated from the breaches of duty and trust I have found unless "it is proved to have been made, given, done or omitted in personal conscious bad faith."

537. The leading case on the meaning of wilful default is *Re Vickery* [1931] 1 Ch 572, where Maugham J construed the words as meaning a "consciousness of negligence or breach of duty, or a recklessness in the performance of a duty". In *Armitage v Nurse*, Millet LJ

[27] It has also been acknowledged, in the Court of Appeal judgment of Robert Sofer v SwissIndependent Trustees SA [2020] EWCA Civ 699, that it is arguable that an indemnity must be subject to an implied term that it does not apply to any underlying transaction where the defendant has acted dishonestly.

said that wilful default meant "a deliberate breach of trust" and that to establish wilful default "nothing less than conscious and wilful misconduct is sufficient". Referring to *Re Vickery*, he said:

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

538. In Armitage, the relevant clause of the settlement stated, "No Trustee shall be liable for any loss or damage… unless such loss or damage shall be caused by his own actual fraud." Millet LJ noted that the clause had been taken from Hallett's Conveyancing Precedents (1965), and observed that "A more prolix clause **to the same effect** may be found in Key and Elphinstone's Precedents in Conveyancing *(15th edn, 1953)* " (my emphasis). This precedent clause referred to "personal conscious bad faith." So, Millet LJ regarded the phrases "actual fraud" and "personal conscious bad faith to have the same effect and drew no distinction between "actual fraud" and "wilful default". I consider that Millet LJ's conclusions regarding the meaning of "wilful default" apply equally to "personal conscious bad faith."

539. However, in considering the test of honesty in *Armitage*, which appears to be subjective, Millet LJ did not consider the House of Lords decision in *Royal Brunei Airlines v Tan* [1995] 2 AC 378. Lord Nicholls said (in the context of knowing assistance and constructive trusts) in *Royal Brunei Airlines* that an objective test of [dis]honesty is to be applied:

> *"… in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sights this may seem surprising. Honesty has a connotation of subjectivity as distinct from objectivity of negligence. Honesty, indeed does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated….However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour."* [322]

540. Under the heading "Taking Risks" Lord Nicholls said:

> *"All investment involves risk. Imprudence is not dishonesty, although imprudence may be carried recklessly to lengths which call into question the honesty of the person making the decision. This is especially so where the transaction services*

> *another purpose in which that person has an interest of his own. This type of risk is to be sharply distinguished from the case where a trustee, with or without the benefit of advice, is aware that a particular investment or application of trust property is outside his powers, but nevertheless he decides to proceed in the belief or hope that this will be beneficial to beneficiaries or, at least, not prejudicial to them. He takes a risk that a clearly unauthorised transaction will not cause loss. A risk of this nature is for the account of those who take it. If the risk materialises and causes loss, those who knowingly took the risk will be accountable accordingly."* [323]

541. In *Walker v Stones* [2001] 2 WLR 623, Sir Christopher Slade, giving the only full judgment said that, while there is a difference of emphasis between the judgments in *Royal Brunei Airlines* and *Armitage*, as far as they relate to the concept of dishonesty they were not irreconcilable and that he could see no grounds for applying a different test of honesty in the context of a trustee exemption clause from that applicable to the liability of an accessory in breach of trust. With regard to Millett LJ's dictum on a trustee's honest belief he said:

> *"I think it most unlikely that he would have intended this dictum to apply in a case where a solicitor-trustee's perception of the interests of the beneficiaries was so unreasonable that no reasonable solicitor-trustee could have held such a belief".*

542. Sir Christopher Slade restated the proposition - "at least in the case of a solicitor-trustee" - that honest belief would not be found where a trustee's perception of the interest of the beneficiaries was so unreasonable that, by an objective standard, no reasonable trustee-solicitor could have thought that what he did or agreed to do was for the benefit of the beneficiaries. He explained that he limited the proposition to trustee-solicitors because on the facts he was only concerned with a trustee-solicitor and because he accepted that the test for honesty may vary from case to case depending on the role and calling of the trustee. Lord Justice Nourse and Lord Justice Mantell agreed with his judgment without adding anything of their own.

543. In *Mortgage Express Limited v S Newman & Co* (a firm) (The Solicitors Indemnity Fund limited, Pt 20 defendant) [2001] All ER (D) 08 (Mar), Etherton J said:

> *"It is now well established that dishonesty, in the context of civil liability, embraces both a subjective and an objective element. The well known statement on this issue is that of Lord Nicholls in Royal Brunei Airlines v Tan … The inter-relationship between the objective and subjective standards can produce both conceptual and practical difficulties. I was referred, for example, to … Walker v Stones…".* [326]

544. Etherton J considered Sir Christopher Slade's dictum and said that he did not consider that Sir Christopher Slade could have been intending to abolish the critical distinction between incompetence and dishonesty – that incompetence, even if gross, does not amount to dishonesty without more.

545. In the later case of *Fattal v Walbrook Trustees (Jersey) Limited* [2010] EWHC 2767 (Ch)[28], it was accepted, at paragraph 81, that the law concerning the interpretation of exoneration clauses, as set out in *Walker v Stones*, was not confined to applying to solicitor-trustees. As set out in *Fattal v Walbrook*[29] the test for dishonesty, at least in the case of a professional trustee, seems to be that the trustee has committed a deliberate breach of trust and either: (a) knew, or was recklessly indifferent as to whether, it was contrary to the interests of the beneficiaries; or (b) believed it to be in the interests of the beneficiaries, but so unreasonably that no reasonable professional trustee could have thought that what he did was for the benefit of the beneficiaries.

546. In the case of *Ivey v Genting Casinos Ltd t/a Crockfords* [2017] UKSC 67, it was confirmed that there should be a common standard of dishonesty in both civil and criminal cases and that the civil standard, as considered in the cases of *Royal Brunei* and *Twinsectra* should be applied in the criminal, as well as in the civil, context (paragraph 62 of *Ivey*). *Ivey* emphasised, in line with *Twinsectra*, that, in considering whether an individual had acted dishonestly, it was necessary to make that judgment on the basis of the standards of ordinary decent people, not those of that individual.

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

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

548. The Original Trustee has stated that he received no remuneration personally or through Focus in respect of his office as trustee. Nevertheless, the Original Trustee's position could be regarded as analogous to that of a professional trustee. He was significantly involved in a complicated network of pension schemes and investee companies and acted as the trustee of the Business Way Pension Scheme.

549. Although the Original Trustee, by his own admission, lacked experience as a pension scheme trustee, I cannot see how the existence of a duty of care in relation to members' funds can reasonably have escaped his notice, particularly so given that he has stated that he wanted to build a career in the pensions industry and that he had passed

[28] which acknowledged, at para 81, that there had been "twists and turns in the legal definition of dishonesty", referring to the cases of Twinsectra Ltd v Yardley [2002] AC 164, Barlow Clowes v Eurotrust International Ltd [2006] 1 WLR 1476 and Abou-Rahmah v Abacha [2006] EWCA Civ 1492.
[29] and confirmed in the case of Sofer v Swiss Independent Trustees SA [2019] 2071 (Ch) and subsequently in Robert Sofer v Swiss Independent Trustees SA [2020] EWCA Civ 699.

several TPR online training courses. TPR has confirmed that the Original Trustee passed Trustee Toolkit modules on 8 November 2013 including "The trustee's role," "pensions law," "running your scheme" and "How a DC Scheme works." He also acted, and continues to act, as a director of multiple companies so would or should be aware of the concept of director's fiduciary duties, which are akin.

550. As I have explained, the applicable tests, which have been developed by case law since *Armitage*, are partly objective.

551. Although the nature of the objective test in *Walker v Stones*, which was accepted in *Fattal v Walbrook*, is in some respects unclear (and where the court did not have the benefit of the Supreme Court's decision in *Ivey*), I consider that there is a distinction between a trustee's conduct constituting a breach of trust and the belief he held at the time of the breach, which is supported by the test set out in *Ivey*[30]. For the reasons set out below, I consider that the breaches of trust committed by the Original Trustee were the result of a consistent pattern of co-ordinated high risk investment where multiple conflicts of interest were apparent.

552. I invited the Original Trustee to attend the oral hearing in order to explain the circumstances in which his multiple breaches of trust and acts of maladministration, which I had identified in my preliminary decision, were committed, and to explain his state of mind and knowledge at the time of those breaches. In the notice of hearing, I also outlined the relevant case law showing the court's approach to the effectiveness of an exoneration clause in a trust deed in circumstances where a trustee had acted, or been alleged to act, dishonestly rather than merely negligently or carelessly. The Original Trustee failed to attend the hearing and submit to questioning on these points. I infer from his failure to attend that the Original Trustee did not wish to submit to cross examination on the breaches of trust or acts of maladministration I had found him to have committed. In his submissions, following my second preliminary decision, the Original Trustee has objected to me drawing an adverse inference from his failure to attend the oral hearing, which I address in section F.12 below.

553. In considering whether, in entering into each of the 3TC House Investment, the Tennyson Investment, and the 2016 Mederco Loan Agreement, in breach of trust, the Original Trustee acted dishonestly I will apply the two stage test set out in *Ivey*:

<u>3TC House</u>

554. I have found that the structure of the investment made by the Scheme in 3TC House was intended to facilitate pension liberation and resulted in an Unauthorised Payment being made to Mr M and two other members of the Scheme. A common feature of pension liberation schemes is to permit a member to receive a percentage of their pension fund as an Unauthorised Payment before age 55. It is an equally common feature of the marketing of such schemes, and critical to their success, that the

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

opportunity to receive scheme benefits early is misrepresented to a member as a loan or capital gain, but the actual nature of the payment is obscured. That was the case here. Pension Max advertised the lump sum payment as a 'capital gain' and the 3TC Investment was structured to give the appearance of a capital gain. But the payment to Mr M was, in reality, and unknown to him, an Unauthorised Payment. Again, I note in this context that Pension Max appear to have operated from 3TC/ Venture House, the same business address used by Mr Williams' companies and the site of the 3TC Investment itself.

555. There is no specific prohibition under statute or case law against a pension scheme trustee facilitating an Unauthorised Payment. Such a payment can legally be made if a trustee and member agree to do so in full informed knowledge and acceptance of the onerous tax treatment such a payment will incur and, crucially, if the trustee is satisfied that facilitating such a payment would genuinely be in a member's best financial interests. However, where a member is not informed about the tax risks that such a payment represents, and a trustee facilitates that payment regardless, that trustee cannot be said to be acting in a member's best financial interests.

556. This is particularly so in circumstances where a trustee knows that a payment to a member from a scheme is likely to amount to an Unauthorised Payment but chooses not to inform the member of this risk and to facilitate the payment anyway. Where the scheme rules do not permit a payment to be made before age 55, the trustee commits a wilful breach of trust and wilfully breaches his fiduciary obligation to act in the member's best financial interests.

557. I consider that to be the case with the purchase of the lease of Unit 1 of 3TC House. I have found (see paragraph 485 above) that, on the balance of probabilities, the Original Trustee was aware that the true purpose of the 3TC Investment transaction was to facilitate an Unauthorised Payment to certain members but proceeded regardless. This was a wilful breach of his fiduciary duty to act in the members' best financial interests. Alternatively, if the Original Trustee's submission, see paragraph 479 above, that he did not know how the payment to Middletons would be distributed is correct (however unlikely), he has stated that he was aware that a payment had been made to Middletons. So, at the very least, on his own admission, he had actual knowledge that a substantial sum was paid away from the Scheme to be distributed in an unknown manner.

558. Although, he was not referred to by name in the SIPPChoice case, the Original Trustee was the sole director of SKW and it is inconceivable that he was unaware of the nature or purpose of the scheme in which SKW was a key participant. Whilst the Original Trustee denies knowing the term pensions liberation before 2019 I also found (see paragraph 484 above) that the Original Trustee had, on his own admission, contemporaneous knowledge that the effect of his and SKW's involvement in the SIPPChoice scheme was to allow members to access funds held within the SIPP before age 55.

559. Also, a result of the transaction was that £28,121.44 was paid to Bright Limited from the Scheme. I have seen no evidence that this represented a genuine commission payment, the level of which would, in any event, appear excessive. By facilitating such a payment, I consider a purpose of the transaction was to benefit Bright Limited and, by extension, Mr Quillan. At the time, Mr Quillan was the sole director of, and owner of 50% of the shares in, Bright Limited, with the remaining 50% of the shares held by Rachel Quillan. Quite clearly, there is no benefit to the Scheme beneficiaries in this payment being made. Based on the contemporaneous documentation provided by the Original Trustee, he had knowledge of Bright Limited's involvement in the transaction.

560. Based on the Trustee's actual knowledge, I find, on the balance of probability, that he did not genuinely believe that entering into the 3TC House investment was in the best financial interests of Scheme members. It follows that he acted dishonestly.

561. In the event that the Original Trustee did, despite his actual knowledge, maintain an unreasonable but subjectively genuine belief that the 3TC House Investment was in the best financial interest of Scheme members, I find that the objective standards of an ordinary decent person, in the Original Trustee's position, would have prompted that person to, before authorising the payment to Middletons:

    561.1. seek independent advice about the merits of investing Scheme funds in the leasehold of Unit 1 of 3TC House;

    561.2. seek confirmation of exactly what interest was being purchased by the Scheme;

    561.3. disclose to Scheme members the extensive conflicts of interest I have identified in section F.5.1;

    561.4. insist that an independent valuation was carried out addressed to the Original Trustee;

    561.5. query the nature and purpose of the "back to back" transaction, and the risk that the transaction would facilitate pension liberation or, at the very least, have informed members about the risk of receiving an Unauthorised Payment; and

    561.6. establish to whom Middletons intended to distribute Scheme funds prior to authorising the transfer.

562. Having sought this additional information and knowledge and taken these steps, I find that an ordinary decent person, in the Original Trustee's position, would more likely than not have flatly declined to proceed with the purchase of the leasehold of Unit 1, or to authorise the payment to Middletons, on the basis that it would not have promoted the purpose of the trust or been in the best financial interests of Scheme members.

563. Yet the Original Trustee proceeded regardless without taking any of the actions that an ordinary decent person would have taken. In doing so, I find that the Original Trustee did not meet the objective standards of ordinary decent people and, in proceeding to make the 3TC House investment in breach of trust, acted dishonestly.

Tennyson Investment

564. The only evidence of any due diligence conducted by the Original Trustee was his review of the Information Memorandum issued by Tennyson. I do not consider that the Original Trustee could possibly have believed that the Information Memorandum amounted to sufficient due diligence. It states at the outset that it was "issued… for the sole purpose of providing you with information you have requested about applying to make an investment… into the Company". It goes on to state that:

> *"Tennyson Property Investments Limited is not an authorised entity and this Memorandum has not been approved by an authorised person. You must ultimately rely on your own examination of the legal, taxation, financial and other consequences of an investment in Tennyson Property Investments Limited, including the merits of investing and the risks involved. You should not treat the contents of this Memorandum as advice relating to legal, taxation or investment matters and you are advised to consult your own professional advisors concerning the acquisition, holding or disposal of any interest in Tennyson Property Investments Limited. Before making any investment in Tennyson Property Investments Limited you are advised to consult an authorised person or company who specialises in advising on investments of this type and to conduct your own due diligence."*

565. The Information Memorandum is a promotional marketing document produced by Tennyson. It is addressed to prospective investors and explicitly directs the reader to consult professional advice before investing. The Original Trustee has given no indication that he sought independent advice on the merits or suitability of the investment for Scheme beneficiaries.

566. The "Risk Factors" include the following statement: "investment into unquoted shares and stock carries higher risks than investment into quoted stocks. An investment in unquoted shares or stock may be difficult to realise and proper information for determining the value of the shares may not be available." Under "expenditure" in the "Investment Appraisal" section, the highest projected expense after the purchase price of properties is listed as "commissions."

567. Under the terms of the Information Memorandum, Mr Robinson's remuneration as a director of Tennyson was stated to be "0.5% of total funds raised, per annum, with a minimum amount of £5,000 per annum, and a maximum of £10,000." The Information Memorandum also stated "Gary Robinson only holds 1 Ordinary Share [in Tennyson] and will be incentivised by the benefits he receives as director of the Company. So, it is clear that Scheme assets transferred from the Scheme to Tennyson would result in higher remuneration paid to Mr Gary Robinson. I note that the Original Trustee has denied knowing the principals of the investee businesses personally, and that all transactions were conducted on arms' length terms. Even if this was the case, it is obvious on the face of the Information Memorandum that the director of Tennyson was Gary Robinson, and that his remuneration was directly linked to the sum of money transferred by the Scheme.

568. It is also notable that other investors in Tennyson included the Business Way Pension Scheme. The Original Trustee was the sole director and shareholder of Business Way Limited. I understand that Brambles was also the administrator of the Business Way Pension Scheme.

569. The Original Trustee has given no indication that he sought any further information outside of that contained in the Information Memorandum.

570. Based on the contents of the Information Memorandum, which were known to the Original Trustee, I find that he did not genuinely believe that the Tennyson Investment was in the best financial interests of Scheme beneficiaries. It follows that he acted dishonestly.

571. In the event that the Original Trustee did maintain an unreasonable but subjectively genuine belief that the Tennyson Investment was in the best financial interests of Scheme members, I find that the objective standards of an ordinary decent person, in the Original Trustee's position, would have prompted that person to, before making the Tennyson Investment:

    571.1. Disclose to members the conflicts of interest I have identified in section F.5.1;

    571.2. Seek independent advice and conduct due diligence about the merits of the Tennyson Investment, particularly in light of the extensive risk factors identified in the Investment Memorandum; and

    571.3. query the appropriateness of a structure under which Gary Robinson's remuneration was directly linked to the sum of money transferred by the Scheme.

572. Having done so, I find, it is more likely than not, that an ordinary decent person, in the Original Trustee's position, would have declined to make the Tennyson Investment on the basis that it would not promote the purpose of the trust and was not in the best financial interests of Scheme members. Yet the Original Trustee proceeded regardless without taking any of the actions that an ordinary decent person would have taken. In doing so, I find that the Original Trustee did not meet the objective standards of ordinary decent people and, by making the Tennyson Investment in breach of trust, acted dishonestly.

2016 Mederco Loan Agreement

573. The Original Trustee signed the 2016 Loan Agreement, so I consider that he had actual knowledge of its contents.

574. Regarding the interest rate payable under the Loan Agreement, the Original Trustee has admitted that he had, "no knowledge as to the market rates at that time and so a 7% [sic] would not have seemed unusual." Without knowledge of the market rates of interest, and in the absence of having taken any professional advice, I cannot see how the Original Trustee was able to reach an informed decision about the appropriate rate of interest. The Loan Agreement also provided for rolled up interest to be paid along with the principal sum on the redemption date.

575. As set out above in paragraph 104 above, the agreement provided for 50% of the loaned sum to be paid to Bright Limited as an “arrangement fee”. At the time, the sole director of, and owner of 50% of the shares in, Bright Limited was Gary Quillan. The remaining 50% of the shares held by Rachel Quillan. While the arrangement fee was not paid directly by the Scheme to Bright Limited, it would have been plainly obvious to the Original Trustee, on reading the agreement, that 50% of the Scheme funds loaned to Mederco would not be available for Mederco’s use but were being paid to a company under the close control of Gary Quillan.

576. In subsequent submissions, the Original Trustee has provided a bank statement, of an account held by Bright Limited, showing that the level of commission paid to Bright Limited under the Mederco Loan Agreement was £12,000. Although I accept that the evidence suggests that £12,000 was paid to Bright Limited, I do not consider that the figure of £120,000 was a simple typographical error as the sentence in the Mederco Loan Agreement reads, “”Arrangement Fee” means a fee of 50% (£120,000) payable to Bright Limited.” In any event, the Original Trustee signed the Mederco Loan Agreement stipulating that an arrangement fee of £120,000 was payable. The fact that a lower sum of £12,000 might have been paid is largely immaterial. It is inconceivable that it could have escaped the Original Trustee’s notice that the consequence of signing an agreement stipulating a 50% arrangement fee would be that Bright Limited would be entitled to that level of fee, regardless of the fee that may or may not have been paid by Mederco.

577. The Original Trustee has relied on the fact that he sought the Mederco Personal Guarantee from Stewart Day but, as set out in paragraph 384 above, appears to have done so on the basis of a vague belief about Mr Day’s advertised wealth and a spreadsheet of unknown provenance listing his purported assets, which was accepted at face value by the Original Trustee.

578. Despite it being clearly unreasonable for the Original Trustee to have relied on the information and the personal guarantee, and to not have queried an excessive 50% commission payable to Bright Limited, it appears from the broad thrust of his Second Witness Statement, that he did maintain a subjectively genuine (albeit unreasonable) belief that the entry into the 2016 Mederco Loan Agreement was in the best financial interests of Scheme members at the time it was made. It follows that, measured against his own subjective belief, the breach of trust was not dishonest.

579. However, I find that the objective standards of an ordinary decent person, in the Original Trustee’s position, would have prompted that person to:

579.1. Seek further information and evidence about Stewart Day’s assets before accepting a personal guarantee as the Scheme’s only security;

579.2. Seek advice on the terms of the loan agreement and the interest rate, as well as the risks and merits of making the loan;

579.3. Query the apparently excessive commission payable to Bright Limited; and

579.4. Seek further information about the financial exposure of Mederco to other entities.

580. The Original Trustee took none of these actions before executing the Mederco Loan Agreement. So, although he may have been acting honestly by his own low subjective standards, I find that his own standards fell far below the objective standards of ordinary decent people. It follows that, by entering into the 2016 Mederco Loan Agreement in breach of trust, he acted dishonestly.

Other breaches of duty and maladministration

581. In addition to my specific findings of dishonesty in paragraphs 563, 572 and 580 above, I also consider that the other breaches of duty and acts of maladministration committed by the Original Trustee, that I have identified, were informed by improper motivation to act in the way he did.

582. At the time he became involved in the SKW and GBT schemes, the Original Trustee explained, in his Second Witness Statement, that "[his] association with Mr Quillan was purely one of friendship and from my desire to explore opportunities that could supplement my income made through the game of chess." He also explained, in his Second Witness Statement, that it is difficult to earn a primary income from playing chess as it involves competing to win prize money, and it was for this reason that he actively approached Mr Quillan to enquire about part time opportunities to earn money. So, on his own admission he was motivated to act as Original Trustee and director of Focus, as well as participating in the SIPPChoice Scheme, at least in part, by the prospect of personal financial gain.

583. Further, the Original Trustee submitted, in his Second Witness Statement, that after he had resigned as trustee and appointed Focus, and after he was suspended from acting as trustee of the Business Way Pension Scheme, "[he] was in fact relieved to no longer acting [sic] as a trustee because my online chess business was growing."

584. It is clear that he viewed the essence of his position as Original Trustee not as fiduciary, but as wholly transactional for his own benefit and the benefit of associates. The Original Trustee's pattern of investing Scheme funds can only reasonably be explained as a co-ordinated plan to disburse Scheme funds to the businesses of associates and Mr Quillan. On this basis, I cannot see how the Original Trustee could have maintained even a subjective genuine belief that he was promoting the proper purpose of the trust and acting in the best financial interests of Scheme members.

585. To the extent that he did maintain that belief, I find that an ordinary decent person in the position of the Original Trustee would have sought extensive further information and equipped himself with knowledge at the outset and throughout his trusteeship, regarding the duties incumbent upon him as trustee, and then to act strictly in accordance with those duties. The Original Trustee did indeed complete the sections of the Trustee toolkit, set out in paragraph 549 above, yet when it came to decision making, repeatedly ignored or disregarded his duties. So, in committing the acts of

maladministration and breaches of duty I have identified throughout this Determination, I find that the Original Trustee acted dishonestly.

586. If, despite my findings in paragraphs 563, 572 and 580 above, the correct test to determine whether the Original Trustee acted dishonestly is that set out in *Fattal v Walbrook*, I will also consider if the Original Trustee was: (a) recklessly indifferent as to whether the investments were contrary to the interests of the beneficiaries; or (b) if his genuine belief about the investments was so unreasonable that no reasonable trustee could have thought that what he did was in the best financial interests of Scheme members.

587. Counsel for Mr Williams has submitted that recklessness ought not to be equated with dishonesty and that, if Mr Williams did act recklessly, it is not possible to draw an inference of dishonesty from such recklessness on the grounds that his motive was to act on the advice and instruction of Brambles, and that he did not enrich himself at the expense of Scheme members.

588. I acknowledge that on the evidence Mr Williams and Punter Southall have provided, it has not been established that he did enrich himself directly from Scheme funds, but I have not been provided with copies of Mr Williams' bank statements from the period in which he acted as Original Trustee or as director of Focus, only a spreadsheet showing payments to him from SKW and GBT, and I have not been provided with Focus' bank statements. So, I make no finding of fact as to whether or not Mr Williams was enriched directly through his role as Original Trustee or director of Focus. However, while I would consider direct evidence of personal enrichment from Scheme funds (where not clearly provided for under a scheme's trust deed and rules) to be a strong indication of dishonest conduct, conversely, I do not consider that the lack of evidence of direct personal enrichment from Scheme funds has significant weight as a positive indication of honesty given the multiple breaches of trust and maladministration I have identified.

589. I consider that Counsel's submission that Mr Williams' primary motivation was to act on Brambles' advice and instructions, which is denied by Brambles, is in any event an aggravating rather than mitigating factor in assessing whether Mr Williams was recklessly indifferent to the interests of beneficiaries.

590. In assessing whether the Original Trustee was recklessly indifferent to the interests of beneficiaries, it is significant that he repeatedly fettered his discretion regarding investment of Scheme funds. He closed his eyes and ears to information which would have established that he was not promoting the purpose of the trust or acting in the best interests of the Scheme's members. On his own admission, as quoted at paragraph 288 above, he considered his role to be one of merely "processing" member investments and instructions from Brambles and to "simply sign off on investments as the Scheme's trustee". Referring to the use of the term "handled" in my preliminary decision, the Original Trustee has submitted that "[he] had no involvement in handling investments for Focus, however, did facilitate them on instruction only by signing the necessary paperwork as directed." Referring to the rates of interest payable on the 2016 Mederco, the 2018 CBFS and the 2018 Bright Loan Agreements, the Original

Trustee has submitted, “I have no knowledge as to the market rates at that time and so a 7% interest [sic] would not have seemed unusual.” Referring to the role of Bright Limited, “he was not privy to the inner workings of the deals”. By fettering his discretion to this unacceptable degree he prevented himself from being able to have proper regard to the interests of beneficiaries.

591. Further, the Original Trustee submitted, in his second witness statement, that, “I read the trust deed which included a trustee indemnity clause at clause [16]. I was satisfied with what I read and the position I would be taking and did not believe I had any risk as I was acting strictly on instruction.” It was observed by Lord Millet in *Armitage v Nurse* that:

> *“a trustee who relied on the presence of a trustee exemption clause to justify what he proposed to do would thereby lose its protection: he would be acting recklessly in the proper sense of the term.”*

I consider that the Original Trustee’s statement reveals that he only acted in the manner he did because he thought himself protected from the consequences of his actions by the presence of the exoneration clause in the trust deed. In so doing, he acted recklessly.

592. I found above at paragraphs 560 and 570, that the Original Trustee did not genuinely believe that the 3TC House or Tennyson Investments were in the best financial interests of beneficiaries. I found at paragraph 578 above that the Original Trustee appears to have maintained a genuine belief that the 2016 Mederco Loan Agreement was in the best financial interests of beneficiaries, but that he acted dishonestly by the standards of ordinary, decent people. I also find that any belief he managed to maintain that the 2016 Mederco Loan Agreement was in the best financial interest of Scheme members, to be so unreasonable that no reasonable trustee could have maintained such a belief, for the reasons set out in paragraphs 574 to 577 above.

593. To conclude my analysis of the test set out in Fatal v Walbrook, and in the alternative to my findings at paragraphs 563, 572 and 580 above, I find that the Original Trustee was recklessly indifferent as to whether his multiple breaches of trust and maladministration were contrary to the interests of Scheme members. I also find that any such belief he might have maintained that the investments were in the best financial interests of Scheme members, was so unreasonable that no trustee in his position could have maintained such a belief. It follows that he acted dishonestly.

594. As explained above, I consider that the case law establishes an objective standard of honesty by which a trustee’s subjective belief and knowledge is measured. I consider that the Original Trustee did not genuinely believe that he was acting in the best financial interests of the Scheme beneficiaries (aside from the 2016 Mederco Loan Agreement) and acted in personal conscious bad faith. Alternatively, his actions amount, at the very least, to reckless indifference regarding his duties and obligations as a trustee. However, I will also consider the subjective test set out in *Armitage*.

595. It is established at paragraph 29 of *Armitage* that, "The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries, is the minimum necessary to give substance to the trusts". A trustee's duty to act honestly and in good faith are part of the, "irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust". The Original Trustee was willing to:

595.1. invest Scheme assets in a small number of high-risk investments in circumstances in which extensive conflicts of interest were apparent, or would have been apparent had the Original Trustee made even basic enquiries of Mr Quillan or Brambles;

595.2. facilitate Unauthorised Payments to members in circumstances where I have found that the Original Trustee was aware that the intended purpose of the 3TC House Investment was to facilitate pensions liberation, or at the least was aware that the intended purpose was to permit members to access funds before age 55 and sought no independent advice as to the likely tax consequences for members;

595.3. continue to act as director of Focus after he had been suspended by the Pensions Regulator from acting as a trustee of the Business Way Pension Scheme. I acknowledge that Mr Williams had resigned as Original Trustee prior to this point, but he remained the sole shareholder and director of Focus and continued to facilitate Focus entering into the 2018 Bright Loan Agreement and 2018 CBFS Loan Agreement; and

595.4. to repeatedly fetter his discretion and close his eyes and ears to information which would have established that he was not acting in the best financial interests of the Scheme's members, as set out in paragraph 590 above.

I find that these factors demonstrate that the Original Trustee cannot be said to have been subjectively acting honestly or in good faith.

596. I note that the broad thrust of the submissions in Mr Williams' second witness statement is that he agreed to act as Original Trustee and as a director of Focus, on the basis of his trust in explanations provided by Gary Quillan and Brambles. To the extent that Mr Williams now considers that trust to have been misplaced, I would certainly agree that it was. However, I do not consider any reliance Mr Williams placed on Mr Quillan or Brambles to be in any way exculpatory of his conduct. As set out above in paragraph 582, on Mr Williams' own admission, he actively and voluntarily sought association and involvement with Mr Quillan and his stated motivation in doing so was, at least in part, for personal financial gain.

597. Therefore, in the alternative to my findings at paragraphs 563, 572, 580 above, and to my findings at paragraph 592 above, I find that the Trustee's beliefs about his duties and obligations were not held honestly and in good faith, and he cannot rely on the exoneration clause in the Trust Deed to excuse him for the breaches of trust that he has committed.

F.9.3 Section 61 of the Trustee Act 1925

598. If and to any extent that the Original Trustee is unable to rely on the exoneration provisions under the Trust Deed and Rules, there remains for consideration Section 61, under which I may direct relief to the Original Trustee wholly or partly of that personal liability if, following investigation, it appears to me that: (1) the Original Trustee acted honestly and reasonably; and (2) it would be fair to excuse the Original Trustee from personal liability, having regard to all the circumstances of the case.

599. Having already found, in Section F.9.2 above, that the Original Trustee failed to act honestly or reasonably, I cannot see that the criteria set out in Section 61 can apply to the Original Trustee's acts and omissions. Therefore, I find that the Original Trustee is unable to rely on Section 61 for any relief from personal liability for the various breaches of trust and maladministration that I have found.

F.10 Accessory Liability

600. For the reasons set out above in Section F.9, I consider that Mr Williams is personally liable for the breaches of trust and maladministration committed while he was appointed as the Original Trustee of the Scheme. However, Focus was appointed as the sole corporate trustee, on 26 August 2016, with Mr Williams as its only trustee-director; and Mr Williams resigned as Original Trustee on the same day. Accordingly:

- the Scheme's purchase of shares in Fleet Street;
- entry into the 2018 Bright Loan Agreement; and
- entry into the 2018 CBFS Loan Agreement

took place after Focus had been appointed as sole corporate trustee. A trustee director will generally be able to shelter behind the corporate veil in relation to any acts or omissions they carry out on behalf of the corporate trustee unless a director is found to be liable as a dishonest accessory to a breach of trust. This is a distinct legal concept from piercing the corporate veil which, despite Mr Williams' submissions, I have not done.

601. The test for accessory liability was set out by Lord Nicholls in *Royal Brunei v Tan* as follows:

> *"A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation."*

602. So, broadly: (1) there must be a breach of trust by the trustee of a trust; (2) the trustee director must have *procured or assisted* in the breach of trust; and (3) the trustee director must have acted dishonestly. It is not in dispute that the Scheme was constituted as a trust by deed dated 21 March 2013.

603. I have already found that, the 2018 Bright Loan Agreement, the loans made to CBFS later recorded in the 2018 CBFS Loan Agreement (which included the sum

representing Mr M's transfer value from the proceeds of the sale of 3TC House), and the purchase of shares in Fleet Street, all amounted to breaches of trust (section F.4).

604. It is clear from the evidence that Mr Williams procured Focus to commit the breaches of trust. Focus committed the breaches of trust through Mr Williams' assistance. Assistance in this context means conduct which in fact assists the commission of the breach of duty[31] and must enable the breach by the trustee, (i.e. Focus) to be committed[32].

605. Mr Williams executed both the 2018 Bright Loan Agreement and the 2018 CBFS Loan Agreement. As the sole trustee director of Focus, he was the only person with authority to execute those agreements on behalf of Focus and without his assistance, those breaches of trust could not have been committed. He was also the only authorised signatory to the Scheme's bank account, so must also have authorised the transfer of funds. I conclude that Mr Williams' actions assisted Focus in committing those breaches of trust.

606. I have already found that Mr Williams acted dishonestly in his capacity as Original Trustee in section F.9. The relevant test to establish dishonesty in respect of procuring the breaches of trust committed by Focus, is set out in *Royal Brunei v Tan*, summarised in *HR & Ors v JAPT & Ors* [1997] EWHC Ch 371:

> *"It is Royal Brunei dishonest for a person, unless there is a very good and compelling reason, to participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of beneficiaries or if he deliberately closes his eyes and ears or chooses deliberately not to ask questions so as to avoid his learning something he would rather not know and for him then to proceed regardless (paragraph 61)."*

607. In assessing dishonesty, it was held in *Royal Brunei* per Lord Nicholls at 107g that:

> *"When called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party such as his experience and intelligence, and the reason why he acted as he did."*

608. In relation to each breach of trust committed by Focus, in finding that Mr Williams acted dishonestly, I set out below the circumstances known to Mr Williams at the time each breach of trust occurred.

609. I have also had regard to Mr Williams' knowledge and understanding of pensions. For example, his completion of the TPR Trustee knowledge and understanding toolkit modules, see paragraph 549 above. Moreover, I have taken into consideration Mr Williams' personal financial motivation in agreeing to participate in the SIPPChoice

[31] *Madoff Securities International v Raven* [2013] EWHC 3147 (Comm)
[32] *Goldtrail Travel Ltd v Aydin* [2014] EWHC 1587 (Ch)

pension liberation scheme through SKW and to act as Original Trustee and director of Focus, set out at paragraph 582 above.

Shares in Fleet Street

610. I understand that the purchase of shares in Fleet Street for total consideration of £33,297, was made by the Scheme in March 2018. At this time, Mr Williams knew (or, if he genuinely did not know, would have known if his conduct had been that of a trustee director acting according to the objective standards of ordinary decent people), the following:

610.1. Fleet Street filed micro company accounts on 7 December 2017 for the year up to 31 March 2017. The balance sheet shows fixed assets of £754,694 and current assets of £909,826 but amounts due to creditors falling due within one year of £1,061,495 and amounts falling due after more than one year of £701,173. Fleet Street had net liabilities of £98,898.00.

610.2. Confirmation statements filed at Companies House confirm that Mark Roberts held 12.5%, and Rachel Quillan held 12.5%, of the issued share capital in Fleet Street.

610.3. A debenture was filed on 14 September 2017 in favour of Amicus Finance plc registering a fixed charge over freehold property in Fleet Street, Liverpool, and a floating charge over all the property of the company. The debenture also contained a negative pledge, the terms of which were to prevent the company from incurring further indebtedness over the property.

611. There is no evidence that any due diligence was carried out by Mr Williams before funds were invested by Focus.

612. Following the investment by the Scheme into Fleet Street, subsequent confirmation statements filed by the company do not show the Scheme as a shareholder.

613. I conclude that Mr Williams assisted Focus in purchasing shares in Fleet Street, knowing that the investment would be in a recently incorporated company with no net assets, into which he did not carry out any due diligence, and whose other shareholders included a relative of Gary Quillan and an associate who had been involved in the Scheme's 3TC House Investment. Despite these obvious risks, Mr Williams proceeded regardless to purchase shares in Fleet Street on behalf of Focus. Knowing what he knew at the time (or would have known if his conduct had been that of a trustee director acting according to the objective standards of ordinary decent people), I conclude that Mr Williams chose to participate in a transaction involving a misapplication of the Scheme's funds which he knew to be to the likely detriment, and indeed was so, of the Scheme's beneficiaries. This was not acting in the best financial interests of the Scheme's members. I find that, by assisting Focus in its purchase of shares in Fleet Street, Mr Williams acted dishonestly.

The 2018 Bright Loan Agreement

614. The 2018 Bright Loan Agreement was executed after the Scheme had already loaned £240,000 to Mederco, under the terms of the 2016 Mederco Loan Agreement. Under the 2016 Mederco Loan Agreement, interest was rolled up and due to be paid on the redemption date, defined as the date 24 months after completion, that is by 8 July 2018. Evidence from Punter Southall suggests that a further agreement was entered into between the Scheme and Mederco, by which the original 2016 Mederco Loan Agreement was extended, so that £270,565.00 was re-loaned to Mederco, this being the sum representing the original loan amount (£240K), plus accrued but unpaid interest. It is clear from this transaction that Mederco was unable to repay on the redemption date the principal sum and interest due under the 2016 Mederco Loan Agreement.

615. The 2018 Bright Loan Agreement provides for a sum of £89,510 to be loaned by the Scheme to Bright Limited. The purpose of the loan is stated to be “to provide loans to Mederco Block A Limited for the development of student housing at a maximum LTV of 80%." The Agreement also states that “it is intended that the Loan shall be a short-term means of finance to assist in the running of the business [that is, Bright Limited].” This is, clearly, internally inconsistent within the document, but it appears that the loan sum might have been subsequently loaned to Bright Limited.

616. Mr Williams signed the 2018 Bright Loan Agreement with knowledge that the Scheme had already loaned £240,000 to Mederco (under the 2016 Mederco Loan Agreement), which had not been repaid by the redemption date under that agreement. Mr Williams was also aware that the sums loaned under the 2018 Bright Loan Agreement were intended to be loaned in turn to another Mederco entity (Mederco Block A Limited). The shareholders of Mederco Block A Limited included Stewart Day, Mark Roberts and Rachel Quillan. It is clear that this would magnify the risk of such a loan, as it exposed the Scheme to the creditworthiness of two companies (Bright Limited and Mederco Block A Limited) rather than one.

617. In the context of the knowledge Mr Williams had about the Scheme’s investments, particularly its existing exposure to Mederco entities, I consider that the terms of the 2018 Bright Loan Agreement raise obvious questions about the suitability and risk of the investment. However, Mr Williams chose to participate in a transaction on behalf of Focus which, knowing what he knew at the time (or would have known if his conduct had been that of a trustee director acting according to the objective standards of ordinary decent people), involved a misapplication of the Scheme’s funds which he knew would likely be, and indeed was, to the detriment and not in the best financial interests of, the Scheme’s members. By executing the 2018 Bright Loan Agreement on behalf of Focus, I find that Mr Williams acted dishonestly.

<u>The 2018 CBFS Loan Agreement</u>

618. The 2018 CBFS Loan Agreement states that it “consolidate[d] all previous lending between the two parties. At the date of this agreement the balance of the loan facility is £381,892.00.” I have seen no preceding loan agreements between CBFS and the Scheme, and Mr Williams has asserted in his second witness statement that, contrary

to the wording of the loan agreement itself, the principal was in fact a conversion of debt owed by CDWL. However, he has provided no detailed explanation as to when or in what circumstances the principal was loaned to CDWL. The principal sum far exceeds the sum owed by CDWL to the Scheme for the purchase of Unit 1 of 3TC House. As at 10 July 2018 (the date the CBFS Loan Agreement was signed), Mr Williams knew, (or would have known if his conduct had been that of a trustee director acting according to the objective standards of ordinary decent people) the following:

618.1. Focus took no professional advice before entering into the 2018 CBFS Loan Agreement (this is not in dispute as it is admitted by Mr Williams in his Second Witness Statement).

618.2. Mr M had explicitly requested that the sale proceeds of the Scheme's interest in Unit 1 be transferred by the Scheme to Aviva.

618.3. As at 10 July 2018, the date the 2018 CBFS Loan Agreement was signed, there were accounts filed in respect of CBFS at Companies House for the year ending 31 January 2017, and amended accounts for the year ending 31 January 2016. The amended accounts show secured creditors of CBFS totalling £6,923,909 and total net assets of only £98,608. The 2018 CBFS Loan Agreement provided for the sum to be loaned on an unsecured basis, so would be subordinate to secured loans in the priority order on an insolvency.

618.4. There was also security already in place in respect of CBFS' guarantee of CDWL's purchase of Unit 1 of 3TC House. Presumably this equalled the sale amount of approximately £65,000.

618.5. Mr Dalton was, from 21 March 2016, also a director of Tennyson. CBFS had previously loaned substantial sums to Tennyson. See also paragraph 621 below.

618.6. The CBFS Investment Memorandum stated that the interest rate payable under loans to CBFS would be 6% per annum, however, the 2018 CBFS Loan Agreement stipulated a rate of only 5.5% per annum.

619. I conclude, on the basis of the factors set out in the preceding paragraph, that Mr Williams entered into the 2018 CBFS Loan Agreement on behalf of Focus knowing that this was a misapplication of the Scheme's funds and that it was not in the best financial interests of the Scheme's members. Despite knowing what he knew about the 2018 CBFS Loan Agreement, CBFS, and the Scheme's other investments, Mr Williams chose to participate regardless in the transaction which would likely to be, and indeed was, detrimental to the Scheme's members. I find that, by executing the 2018 CBFS Loan Agreement on behalf of Focus, Mr Williams' acted dishonestly.

620. In the event that the 2018 CBFS Loan Agreement did consolidate previous lending between the Scheme and CDWL at unspecified dates, Mr Williams knew, (or would have known if his conduct had been that of a trustee director acting according to the objective standards of ordinary decent people) the following:

620.1. There was no adduced documentary evidence of the terms or security on which Scheme funds were loaned to CDWL.

620.2. CDWL had been recently incorporated and no accounts were filed with Companies House until 18 July 2018.

621. Mr Williams has referred to a personal guarantee given by Mr Paul Dalton, the sole director of CDWL was Mr Dalton. But I have seen no evidence that he made any enquiries into Mr Dalton's financial status or assets. No evidence has been provided that Mr Williams made any enquiries as to the financial strength of Mr Dalton's personal guarantee.

622. So taking paragraphs 620 and 621 above together, I conclude that the previous lending of Scheme funds to CDWL was a misapplication of the Scheme's funds that was not in the best financial interests of the Scheme's members. Mr Williams chose to facilitate undocumented loans to CDWL, a recently incorporated company with no trading history, which would likely be, and indeed was, detrimental to the Scheme's members. By facilitating undocumented loans to CDWL on behalf of Focus, Mr Williams acted dishonestly.

623. It follows, having regard to paragraphs 603 to 622 above, that Mr Williams is liable personally to account in equity in respect of the breaches of trust by Focus. In a finding that Mr Williams was a dishonest accessory to breaches of trust, he is, in his personal capacity, jointly liable with Focus for the breaches. Mr Williams does not have the benefit of the exoneration clause as exoneration clauses are ineffective in cases of dishonesty (see section F.9.2).

Jurisdiction relating to trustee directors under the 1993 Act (constructive trustee) – second concept[33]

624. Mr Williams acting as a trustee-director of Focus falls within my jurisdiction as a person responsible for the management of the scheme as a trustee (section 146(3) of the 1993 Act). This is because a person who has procured or assisted a breach of trust is liable to account in equity for the breach of trust as though he were a trustee, this is known as a constructive trustee, in the second sense as described in the case of *Williams v Central Bank of Nigeria* [2014] UKSC 10. Their lordships considered that the phrase "constructive trustee" refers to two distinct concepts:

> *"The first comprises persons who have lawfully assumed fiduciary obligations in relation to trust property, but without a formal appointment. They may be trustees de son tort, who without having been properly appointed, assume to act in the administration of the trusts as if they had been; or trustees under trusts implied from the common intention to be inferred from the conduct of the parties, but never formally created as such. These people can conveniently be called de facto trustees. They intended to act as trustees, if only as a matter of objective construction of their acts. They are true trustees, and if the assets are not applied in accordance with the trust,*

[33] I have considered the second concept described in *Williams v Central Bank of Nigeria* first for ease of analysis. The first concept is considered at paragraph 625 below.

equity will enforce the obligations that they have assumed by virtue of their status exactly as if they had been appointed by deed.

Others, such as company directors, are by virtue of their status fiduciaries with very similar obligations. In its second meaning, the phrase "constructive trustee" refers to something else. It comprises persons who never assumed and never intended to assume the status of a trustee, whether formally or informally, but have exposed themselves to equitable remedies by virtue of their participation in the unlawful misapplication of trust assets. Either they have dishonestly assisted in a misapplication of the funds by the trustee, or they have received trust assets knowing that the transfer to them was a breach of trust. In either case, they may be required by equity to account as if they were trustees or fiduciaries, although they are not." (my emphasis)

625. Their Lordships also referred to the statement made by Ungoed-Thomas J in *Selangor United Rubber Estates Ltd v Craddock (No. 3)* [1968] 1 WLR 1555:

"It is essential… to distinguish [between] two very different kinds of so-called constructive trustees: (1) Those who, though not appointed trustees, take upon themselves to act as such and to possess and administer trust property for the beneficiaries, such as trustees de son tort. Distinguishing features for present purposes are (a) they do not claim to act in their own right but for the beneficiaries, and (b) their assumption to act is not of itself a ground of liability (save in the sense of course of liability to account and for any failure in the duty so assumed), and so their status as trustees precedes the occurrence which may be the subject of claim against them.

(2) Those whom a court of equity will treat as trustees by reason of their action, of which complaint is made. Distinguishing features are (a) that such trustees claim to act in their own right and not for beneficiaries, and (b) no trusteeship arises before, but only by reason of, the action complained of." (My emphasis)

Jurisdiction relating to trustee directors under the 1993 Act (constructive trustee) – first concept

626. Mr Williams dishonestly assisted in the misapplication of the Scheme's assets and so is liable to account in equity as if he was a trustee. But additionally, as a matter of objective construction and on the evidence, Mr Williams also acted as a de facto trustee within the meaning of the first concept (see paragraphs 624 and 625 above). Mr Williams continued as trustee director to possess the Scheme's assets and to make investment decisions. He inter-meddled with those assets. He continued to carry out the same actions as when he was the Original Trustee, and indeed he was the only person who could act on behalf of Focus as he was sole director and shareholder. His status as the Original Trustee precedes the occurrence of the complaints against him. Moreover, when Focus was incorporated, Mr Williams was its sole trustee-director. I see no apparent reason why Focus was appointed other than perhaps as a shield for Mr Williams from liability. Mr Williams has declined to offer any substantive explanation

for his resignation and Focus' appointment, which he was able to execute as sole trustee and as sole director and shareholder of Focus.

Jurisdiction relating to trustee directors under the 1993 Act (administrator)

627. If my conclusion in paragraph 623 above is incorrect, I find that Mr Williams' as trustee-director was, from 26 August 2016, an administrator under section 146(4A) of the 1993 Act. He is a person concerned with the administration of the Scheme as he was a person responsible for carrying out an act of administration concerned with the Scheme, for example, his execution of the loan agreements entered into by Focus. His actions involved running the fund, investing and managing the Scheme's assets and inducing Focus to commit multiple breaches of trust. Accordingly, in that capacity he is (personally) liable for the losses arising.

F.11 Confidentiality

628. Brambles has requested that individuals named in the determination are anonymised, affording them the same rights as the applicants. Every individual that I have referred to above, and their connection to the Scheme, is a matter of public record. With the exception of Brambles and Mr Williams, I have made no adverse findings against any individual.

629. In respect of Brambles' director, Mr House, Brambles is a separate legal entity and is a respondent to the complaint. Where I have mentioned Mr House by name that is because it is relevant to the background to the complaint. In any event, he would be easily identified from publicly available records as the sole director of Brambles and it is apparent that the individuals from whom he has allegedly received threats are already aware of him. In these circumstances I have decided not to anonymise the Determination in this respect.

F.12 Procedure

630. Mr Williams has complained of procedural unfairness in relation to my decision to hold an oral hearing on 8 June 2022 and my refusal to grant him an extension of time to prepare and seek advice. He has also complained generally that he has been treated unfairly throughout the investigation process.

The oral hearing

631. Under Regulation 10(1) of the Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995 (the 1995 Regulations),

> "*Where the Pensions Ombudsman considers it appropriate for an oral hearing to be held in connection with any investigation conducted by him, he shall, with due regard to the convenience of the parties to the investigation, fix the time and place of any such hearing and, not less than twenty-one days before the date so fixed (or such shorter time as the parties agree), send to each party a notice of the time and place of such hearing.*"

632. The Notice of Hearing (**Notice**) was issued to the parties on 18 May 2022, which fixed the hearing date for 8 June 2022, 21 days after the notice.

633. On 20 May 2022, my first preliminary decision was issued to the parties with a list of issues on which I intended to question Mr Williams at the oral hearing. In that preliminary decision, I was able to find, on the papers, clear evidence that the Trustees had breached their investment duties. The purpose of sending a preliminary decision to the parties prior to the oral hearing, was to set out the factual background and to give parties the opportunity to comment on the findings I had been able to reach on the papers. It also indicated clearly which aspects of the case could and would be decided on the basis of the documentary evidence received before and after the Hearing (and therefore did not need to be addressed at the Hearing) and which would be decided following consideration of any oral evidence given to supplement the parties' written submissions.

634. However, in the first preliminary decision I made no finding regarding the dishonesty or personal liability of Mr Williams, simply stating that I intended to explore these issues further at an oral hearing.

635. In the list of issues, which accompanied the preliminary decision and which was referred to in the Notice, Mr Williams' attention was specifically drawn to:

- the extent of any protection available to Mr Williams under the Scheme's exoneration clause or under section 61 of the Trustee Act 1925, in respect of the breaches of trust that had been identified in my first preliminary decision; and

- the extent to which Mr Williams was responsible for the activities of Focus after 26 August 2016, and his potential liability for the breaches of trust carried out after Focus was appointed as trustee, by way of assisting Focus as a dishonest accessory or otherwise.

636. At Appendix 1 to the list of issues the wording of the exoneration clause in the trust deed was provided, along with an illustrative summary of case law relevant to the effectiveness of exoneration clauses. At Appendix 2, the Royal Brunei test for establishing liability as a dishonest accessory liability was set out.

637. On 25 May 2022, Mr Williams replied to the notice requesting the oral hearing and other deadlines set out in the notice be deferred for three months, stating that he did not believe the timescales set out in the notice were fair and reasonable and that he intended to seek suitable advice.

638. I carefully considered Mr Williams' request for an extension, taking into account the potential that he would face personal liability and the need to ensure a fair, proportionate and accountable process for all the parties. I decided that it was reasonable to refuse the request for the following reasons:

638.1. The notice of hearing was sent 21 days before the hearing date, in compliance with the statutory notice period required under Regulation 10(1) of the 1995 Regulations;

638.2. When paying due regard to the convenience of the parties to the investigation, I considered the severity of the complaints from Mr M and Mr Y and took into account the significant period in which the applicants have been unable to access their benefits under the Scheme;

638.3. I do not require parties to submit written representations or witness statements in advance of an oral hearing and parties may make further written representations following an oral hearing; and

638.4. Under Regulation 10(2)(a)(i) of the 1995 Regulations, Mr Williams was notified of his right to be represented at the hearing. However, under the Regulations there is no statutory period which provides for additional time to be granted to a party to make written representations or witness statements, or to seek representation.

639. My refusal and reasons were communicated to Mr Williams on 26 May 2022.

640. Mr Williams was also informed in the Notice that he was not required to make written representations or prepare witnesses or witness statements in advance of the hearing unless he wished to do so. I do not require parties to seek legal representation. Mr Williams was also informed that he would have the opportunity to make further written representations following the oral hearing. Mr Williams was asked to confirm if he intended to attend the oral hearing on 8 June 2022. In subsequent correspondence, Mr Williams did not confirm whether he intended to attend the hearing or not, and he did not attend on 8 June 2022.

641. On 27 May 2022, Mr Williams submitted his first witness statement, the material points of which are summarised in section E above. Referring to my decision to refuse an extension, Mr Williams stated:

> "TPO has sought to justify this [my refusal to grant an extension] by saying that I am not required to make representations or prepare a witness statement but that is not the point. The point is that I should have the right to have enough time to read and understand the documents sent to me and enough time to seek legal advice in advance of the deadline. By refusing me time to adequately prepare my witness statement, the Pensions Ombudsman is prejudicing my right to a fair hearing and breaching my human rights."

642. I have assumed that Mr Williams' reference to a fair hearing and his human rights is to his rights under Article 6 of the European Convention on Human Rights, the relevant section of which provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

643. Mr Williams' allegation that his human rights have been breached is refuted. It was precisely to ensure a fair and public hearing (given the severity of the nature of the complaints made against him) that I decided to hold an oral hearing under Regulation 10(1), in order for me to put questions to Mr Williams, particularly regarding his potential personal liability, and to test his evidence, as well as to give Mr Williams the opportunity to explain his conduct and to put his own questions to the applicants. Following the hearing, a video recording of the hearing was shared with Mr Williams and, as set out above, he provided further written submissions regarding Mr M and the Scheme's investment in 3TC House.

644. I note Mr Williams' comments in his second witness statement, dated 1 February 2023, summarised in section E above, that he found the receipt of the notice and bundle a stressful and daunting experience, and that he is taking medication for anxiety. For these reasons he concluded that it was better not to attend and he opted to put his position in writing instead.

645. I note that this explanation has only been offered retrospectively and Mr Williams has presented no medical evidence of this condition. He gave no indication that this was his reason at the time for not attending the oral hearing. In the notice, parties were informed that I conduct hearings in an informal manner where possible. Mr Williams also made no attempt to contact my office to ask if alternative arrangements might be made to accommodate his anxiety. Further, it was not open to Mr Williams to 'opt' to engage with my investigation and present evidence in a manner of his choosing. I explained in the Notice why I considered it necessary to obtain evidence at an oral hearing.

General complaints about TPO processes

646. Mr Williams has alleged that audio recordings between my office and the applicants, provided to Brambles following a request from Mr House, appear one-sided and suggest that his liability was a foregone conclusion. I have reviewed the recordings in question and the allegation is refuted. In any event, any opinion Mr Williams or Mr House have inferred from my office staff in a phone call is not relevant to my decision. Under section 145(4C) of the 1993 Act, only I may determine a complaint, and I have determined the applicants' complaints on the basis of all the evidence submitted by all the parties.

647. Mr Williams' allegation that "[TPO] is running this investigation on behalf of the applicants" is similarly refuted. I act impartially and determine complaints in accordance with established legal principles[34]. Regarding Mr Williams' comments about inequality of arms, I note that Mr Williams has had legal representation from Ai law and from counsel, who submitted representations on his behalf.

648. Mr Williams' claim that he has not been given the opportunity to give his own account of what happened until after my second preliminary decision is demonstrably false.

[34] *Arjo Wiggins v Ralph* [2009] EWHC 3198 (Ch), *Henderson v Stephenson Harwood* [2005] Pens LR 209 (§ 12); *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862, 899; *Wakelin v Read* [2000] Pens LR 319.

He was asked to respond to the complaints formally on 5 October and 26 November 2021, to which he provided brief submissions but no underlying Scheme documentation. He was able to make representations, and did so, in response to the oral hearing notice and my first preliminary decision. He was provided with recorded footage and audio of the hearing, and he submitted further written comments and documents in relation to the investment in 3TC House. My second preliminary decision was issued on 10 November 2022 and Mr Williams' representative, Ai law, requested two short extensions, both of which were granted. So, between 5 October 2021 and 1 February 2023, Mr Williams had abundant opportunity to make any submissions he wished. If he did not make the full submissions he wished to make earlier, that is entirely uncorrelated to his ability to have done so. In any event, he has suffered no disadvantage by the late submission of his account of events. I have determined this complaint on the basis of all the evidence submitted by the parties up to the date of this Determination.

Decision

649. The Trustees have committed multiple breaches of trust and acts of maladministration, which have caused the loss of the members' pensions.

650. Mr Williams, in his capacity as the Original Trustee, cannot rely upon any exoneration provisions or indemnity, as explained in Section F.9.2 above, and is afforded no relief from personal liability for the consequences of those breaches of trust and acts of maladministration I have found he has committed. In respect of those breaches of trust committed by Focus, I have found in paragraph 623 above that Mr Williams is personally liable to account to the Scheme as a dishonest accessory to those breaches of trust. I have also found in paragraph 627 above that he would in any event be personally liable for his actions as an administrator.

651. For the reasons set out in paragraphs 655 to 660 below, I consider that the Scheme's investments have no monetary value. Mr Williams, and counsel on his behalf, have submitted that I ought not to consider the loss suffered by the Scheme due to the failure of the Scheme's investments with the benefit of hindsight, but whether these were reasonable investments for the Scheme to make at the time. As set out in Section F.4 above, I have found that the Scheme's investments were made in breach of trust. I have found that, from the information available at the time of each investment, it was foreseeable that each investment was unsuitable at that point. However, even if those losses were not foreseeable, the point at which the loss resulting from a breach of trust ought to be calculated was considered by Lord Browne-Wilkinson in *Target Holdings v Redfern* [1995] 3 All ER at 796 g:

> *"A trustee who wrongly pays away trust money, like a trustee who makes an unauthorised investment, commits a breach of trust and comes under an immediate duty to remedy such breach. If immediate proceedings are brought, the court will make an immediate order requiring restoration to the trust fund of the assets wrongly distributed or, in the case of an unauthorised investment, will order the sale of the*

unauthorised investment and the payment of compensation for any loss suffered. But the fact that there is an accrued cause of action as soon as the breach is committed does not in my judgment mean that the quantum of the compensation payable is ultimately fixed as at the date when the breach occurred. The quantum is fixed at the date of judgment at which date, according to the circumstances then pertaining, the compensation is assessed at the figure then necessary to put the trust estate or the beneficiary back into the position it would have been in had there been no breach.

652. His Lordship went on to quote with approval the judgment of McLachlin J in *Canson Enterprises Ltd. v. Boughton and Co.* (1991) 85 D.L.R. (4th) 129, in the Supreme Court of Canada, on the measure of loss to be awarded as equitable compensation for breach of trust:

"A related question which must be addressed is the time of assessment of the loss. In this area tort and contract law are of little help. . . . The basis of compensation at equity, by contrast, is the restoration of the actual value of the thing lost through the breach. The foreseeable value of the items is not in issue. As a result, the losses are to be assessed as at the time of trial, using the full benefit of hindsight." (emphasis added).

…

"In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach, i.e., the plaintiffs loss of opportunity. The plaintiffs actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach." (emphasis added).

Commenting on the approach set out by McLachlin J in *Canson*, Lord Browne Wilkinson held that:

“In my view this is good law. Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common sense, can be seen to have been caused by the breach.”

653. Lord Browne Wilkinson’s endorsement of the approach in Canson was considered further and affirmed in *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58. In his judgment, Lord Toulson clarified Lord Brown Wilkinson’s statement regarding Canson in Target Holdings as:

Monetary compensation, whether classified as restitutive or reparative, is intended to make good a loss. The basic equitable principle applicable to breach of trust, as Lord Browne-Wilkinson stated, is that the beneficiary is entitled to be compensated for any loss he would not have suffered but for the breach.

Lord Reed held at paras 133 to 135:

> *"Notwithstanding some differences, there appears to be a broad measure of consensus across a number of common law jurisdictions that the correct general approach to the assessment of equitable compensation for breach of trust is that described by McLachlin J in Canson Enterprises and endorsed by Lord Browne-Wilkinson in Target Holdings."*
>
> *…*
>
> *The measure of compensation should therefore normally be assessed at the date of trial, with the benefit of hindsight. The foreseeability of loss is generally irrelevant, but the loss must be caused by the breach of trust, in the sense that it must flow directly from it. Losses resulting from unreasonable behaviour on the part of the claimant will be adjudged to flow from that behaviour, and not from the breach. The requirement that the loss should flow directly from the breach is also the key to determining whether causation has been interrupted by the acts of third parties.*

654. Drawing these strands together, I consider that the correct approach to directing a remedy in this case is to assess the actual loss flowing from the investments made by the Trustees, without regard to the foreseeability of loss at the time the investments were made in breach of trust. By analogy to the date of trial, I consider a reasonable date to assess loss is the date of this Determination. I assess the loss of each of the investments made by the Trustees in paragraphs 655 to 660 below.

655. An Order to wind up Tennyson was issued by the High Court on 24 March 2021. In the latest liquidator's progress report filed at Companies House dated 1 June 2023, it appears that the only reported asset owned by Tennyson at that date was a leasehold interest in a number of student pods at Hockney Court, Bradford. Due to the low value of the asset and the disproportionate cost of realising any value from a sale, the liquidator has disclaimed any interest in the pods. The report states that no further assets have been identified and the only funds currently expected to be realised total £14,964. CBFS is a secured creditor for £712,726[35] and there is an unsecured creditor claim for £721,538. As the Scheme's ranking in the proceeds of liquidation as a shareholder is below secured and unsecured creditors, I find that the Scheme's shareholding in Tennyson has no monetary value.

656. Fleet Street is currently in administration. In the Administrator's progress report dated 10 June 2022 "it is anticipated there will be insufficient funds realised after defraying the expenses of the Administration to pay a dividend to creditors, other than to the secured creditors and the relevant UN1 holders and as a result, it is anticipated the Company will move to dissolution once the Administrators' work is complete." The report identifies approximately £9 million in secured and unsecured creditors. The latest Administrator's progress report dated 13 June 2023 confirms that "as previously highlighted there will be no distribution to the secondary preferential creditor or the

[35] Liquidators' progress report dated 6 June 2022.

unsecured creditors." On this basis, I find that the Scheme's shareholding in Fleet Street, and its ranking below creditors in the administration, has no monetary value.

657. Mederco (Huddersfield) Limited is currently in administration. I note from the most recent Administrator's Report filed at Companies House dated 4 May 2023 that there are four secured creditors, including CBFS, owed a current estimated total of £27,538,155. Secured creditors rank ahead of unsecured creditors, including the Scheme. The report states that: "it is currently anticipated that Saving Stream Security Holding Limited [one of the secured creditors] will suffer a shortfall on their lending following the sale of the property. It is therefore anticipated that there will be no distribution to any class of creditor other than Saving Stream Security Holding Limited following the sale of the property based upon the claims received to date." I find, on the evidence available, that the 2016 Mederco Loan has no monetary value.

658. CBFS is currently in a creditors' voluntary liquidation process. According to Appendix F of the Joint Liquidator's Progress Report dated 26 May 2022, the amount due to unsecured creditors is currently stated to be uncertain. However, the amount due to fixed charge holders is £4,910,002 and the amount due to unsecured creditors is £8,238,662. The quantum and timing of any dividend is stated to be uncertain. This assessment was not amended in the latest Progress Report dated 26 May 2023, which also stated that further returns to the main secured creditor appear to be unlikely. Therefore, I find, on the evidence available, that the 2018 CBFS Loan Agreement has no monetary value.

659. The Original Trustee stated that the Scheme's leasehold interest in 3TC House was sold to CDWL but that, as CDWL did not pay the purchase price, he sought security from CBFS, CDWL's sister company and a personal guarantee from Mr Paul Dalton. CDWL is currently in a Company Voluntary Arrangement so is unlikely to be able to transfer any funds until, at least, that process has completed. On the balance of probability, I find that the prospect of any recovery is remote and that the Scheme will receive no monetary consideration for its purported sale of its interest in 3TC House.

660. I acknowledge that certain payments have been made to Punter Southall under various personal guarantees in respect of the investments referred to in paragraphs 655 to 659 above. Punter Southall may also be able to recover further funds and I have factored this into my directions below.

661. My power to award redress, including those to recognise distress and inconvenience, comes from s151(2) of the 93 Act:

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

662. A number of appeals have considered the exercise of this power in relation to non-financial injustice, commenting that the effect of inflation should be reflected in the level of the awards made in respect of distress and inconvenience. In the High Court

case of Baugniet v Capita Employee Benefits Ltd [2017] EWHC 501 (Ch), HHJ Simon Barker QC suggested an increase from £1,000 to £1,600 as being broadly in line with inflation. In Smith v Sheffield Teaching Hospitals NHS Foundation Trust [2017] EWHC 2545 (Ch), Norris J made similar comments in relation to the effect of inflation, adopting £1,600 as the upper limit and going on to increase the award made by the then Deputy Ombudsman from £500 to £2,750. The judge highlighted several instances of maladministration, occurring over a long period, which was material to the likely level of distress.

663. In the Smith judgment, Norris J specifically discussed (at para 31) the Ombudsman's then current Factsheet 'Guidance on redress for Non-Financial Injustice' and awarded £2,750 to reflect the severity of the maladministration (i.e. that it fell above the non-exceptional level).

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

665. A review of the Factsheet and the Determination clearly shows that a high number of 'severe' and 'aggravating' factors are present in this case. By any standard, this is an 'Exceptional' case even without/before considering the specific individual circumstances of the pension scheme members affected by the Appellant's actions over a number of years.

666. The circumstances of the complaint have clearly caused the Applicants an exceptional level of distress and inconvenience. In considering the appropriate level of award, I have taken into account the submissions made by Mr M at paragraphs 174 to 175 above, and by Mr Y at paragraphs 188 to 194 above. I have also taken into consideration the comments made by Brambles in paragraphs 250 and 251 above, submitted in response to the award directed in my second preliminary decision. Both Applicants have had to significantly delay their plans for retirement as neither has substantial alternative pension provision outside the Scheme. Mr M has had to continue in employment to support dependants and debt and remortgage repayments, and has submitted that he and his wife were impacted in their ability to undergo IVF treatment. Mr Y submitted that he has had to continue in employment to pay his mortgage as he was unable to consider redeeming part of his mortgage early. Mr Y submitted that his wife is also dependant on his pension provisions. Both Mr M and Mr Y have submitted that they have suffered reduced mood and mental wellbeing. So, the awards below in paragraph 669, made within my jurisdiction under section 146(1)(a) of the 1993 Act, are in recognition of the injustice suffered in consequence of the maladministration by Mr Williams and Brambles. I find that this maladministration has had a severely deleterious and, at least regarding the

Applicants' inability to retire when they intended, irreversible, effect on both Applicants' lives and wellbeing, which is separate to the financial loss suffered by the Scheme or the Applicants.

Putting things right

667. Within 28 days of the date of this Determination, Mr Williams shall pay into the Scheme;

667.1. The sum of £738,768.60, which represents the Total Transfer Sum less:

667.1.1. the sums paid to members which have been evidenced (£29,694.43);

667.1.2. the sums recovered from Gary Quillan and/or Bright Limited under the terms of the 2018 Bright Limited Loan Agreement and the Bright Limited Personal Guarantee (£55,000);

667.1.3. the sums recovered from Stewart Day under the terms of the Mederco Personal Guarantee and the terms of any other agreement between Punter Southall and Stewart Day (£8,220)

667.1.4. the sums recovered from Paul Dalton under the terms of:

667.1.4.1. the CBFS Personal Guarantee (£0); and

667.1.4.2. the 3TC House Personal Guarantee (£0)

667.1.5. the current value of:

667.1.5.1. the 2016 Mederco Loan Agreement (£0)

667.1.5.2. the 2018 CBFS Loan Agreement (£0)

667.1.5.3. the shareholding in Tennyson (£0); and

667.1.5.4. the shareholding in Fleet Street (£0); plus

667.2. interest on the above sum at the rate of 8% per annum simple from the date of this decision to the date of payment.

668. To prevent double recovery, after the sum above (plus applicable interest) has been paid into the Scheme, Mr Williams shall be entitled to recover from Punter Southall subject to Punter Southall recovering its outstanding administration fees from the Scheme:

668.1. any further sums paid under the terms of:

668.1.1. the Mederco Personal Guarantee;

668.1.2. the Bright Limited Personal Guarantee; and

668.1.3. the CBFS Personal Guarantee;

668.2. any sums recovered in respect of the Scheme's shareholdings in Tennyson and Fleet Street;

668.3. any sum paid by CDWL as consideration for its purchase of the Scheme's interest in 3TC House; and

668.4. any other sums paid to members which he is able to evidence.

669. For the exceptional maladministration causing injustice, within 28 days of the date of this Determination, Brambles and Mr Williams shall, on a joint and several basis, pay £6,000 to each of the Applicants.

Reporting to TPR

670. On issuing the Determination of this complaint and referral, I intend to pass a copy of it to TPR in relation to both Mr Williams' actions as Original Trustee and accessory to Focus, and to Brambles' actions as Scheme administrator.

Anthony Arter CBE

Deputy Pensions Ombudsman
21 September 2023

Appendices

Appendix 1

Relevant extracts from the Establishing Deed

"Parties

1 Focus Administration Limited… (in this deed called the 'Principal Employer')

2 Simon Kim Williams… (in this deed called the 'Trustees')

Rectials [sic]

1 The Principal Employer wishes to establish a pension scheme to be known as THE FOCUS ADMINISTRATION PENSION SCHEME (in this deed called the 'Scheme)[sic] intended to qualify as a registered pension scheme for the purposes of Part 4 of The Finance Act 2004.

2 The Trustees have agreed to be the Trustees of the Scheme.

Operative Provisions

1 The Principal Employer establishes the Scheme and appoints the Trustees as the first Trustees of the Scheme.

2 The scheme shall be governed by the attached rules…

3 The provisions of this deed shall have effect from its date.[21 March 2013]"

Appendix 2

Relevant extracts from the Scheme Rules

"**1 Interpretation**

1.1…

"Fund" means all contributions, gifts and transfer payments made to and received by the Scheme and any other monies, investments, policies, property or other sums or assets for the time being held by the Trustees upon the trusts of the Scheme. The allocation of any part of the Fund to any Individual Fund or to the General Fund shall be notional and for the purpose of calculating benefits only.

"General Fund" means any part of the Fund which is not an Individual Fund.

"Individual Fund" in relation to a Member or Dependant means that part of the Fund which the Trustees determine is attributable to him having regard to:

(in the case of a Member only) any contributions made by him and by any other person in respect of him;

(in the case of a Member only) any reduction agreed with the Member as necessary to obtain Enhanced Protection;

(in the case of a Dependant only) any part of the Individual Fund of a Member designated as available for the provision of income withdrawal in accordance with the Rules following the death of that Member;

any transfers made to the Scheme in respect of him;

any allocation or reallocation of any part of the Fund in accordance with the Rules;

any pension credit or pension debit applicable to him; any income, gains or losses (whether realised or not), fees, costs and expenses borne by the Fund and any actual or prospective liabilities of the Trustees (other than liabilities to pay Benefits) or of the Scheme Administrator attributable to the Fund.

The Trustees may for this purpose determine that a specific asset of the Fund, or a specific proportion thereof, shall be attributed to a specific Individual Fund (either for a fixed period or indefinitely) and may vary or revoke any such determination, but in each case only with the consent of any person whose Individual Fund is affected.

…

2 Constitution of Scheme and Fund

2.1 The Scheme is governed by the trusts, powers and provisions contained in the Rules. The Trustees hold the Fund upon irrevocable trusts and with and subject to the powers contained in the Rules and may do anything expedient or necessary for the support and maintenance of the Fund and for the benefit of the Members and those claiming under them.

…

5 Trustees: Powers, duties and discretions:

5.1 The Trustees are granted all the powers, rights, privileges and discretions they require for the proper implementation of the Scheme, including the performance of all duties imposed on them by law.

5.2 The Trustees shall not be required to consult, or act upon the wishes of, Beneficiaries and section 11(1) of the Trusts of Land and Appointment of Trustees Act 1996 shall not apply to the Scheme.

…

5.4 The Trustees have power:

5.4.1 to employ and to remunerate any agent or agents (including any of themselves or one or more of the Participating Employers) in the transaction of any business of the Scheme including the payment of Benefits;

5.4.2 to appoint and obtain the advice of any actuary, solicitor, accountant, auditor or other adviser upon such terms as to duties and remuneration as they think fit;

5.4.3 to appoint and to remove (or to arrange for the appointment and removal of) any clerical or executive officers or staff as they consider desirable and to utilise the services of any officers or staff as any of the Participating Employers may make available for this purpose;

5.4.4 to appoint an investment manager or investment managers in relation to the whole or any part of the Fund;

5.4.5 to accept for the purposes of the Scheme or renounce any gifts, donations or bequests.

5.4.6 to pay fees and commissions to introducers or other intermediaries, financial or otherwise, on such terms as the Trustees think fit.

…

5.6 The Trustees have full powers of investment and application of any monies and other assets which form part of the Fund including all such powers which they could exercise if they were absolutely and beneficially entitled to the Fund. In particular and without prejudice to the generality of the foregoing the Trustees may invest or apply all or any part of the Fund in any part of the world:…

…

5.7 The Trustees may lend monies to any person upon such security and subject to such terms as they consider fit.

…

6 Trustees: Liability, indemnity and remuneration

6.1 The duty of care under section 1 of the Trustee Act 2000 shall not apply to any Trustee in relation to the Scheme.

6.2 Subject to section 33 of the Pensions Act 1995, no Trustee shall be liable for the consequence of any mistake or forgetfulness whether of law or fact of the Trustees, their agents, employees or advisers or any of them or for any maladministration or breach of duty or trust whether by commission or omission except to the extent that it is proved to have been made, given, done or omitted in personal conscious bad faith (or in negligence in the case of a professional Trustee) by the Trustee sought to be made liable.

6.3 The Trustees shall, to the extent permitted by section 256 of the Pensions Act 2004, be indemnified out of the Fund against any losses, liabilities, costs, charges or expenses or other amounts any of them may suffer or incur as a Trustee in connection with:

6.3.1 any proceedings brought in order to comply, or procure compliance by any Trustee or Beneficiary or other person, with any obligation imposed by law or by this deed or any agreement made under it;

6.3.2 any proceedings brought by or on behalf of a Beneficiary;

6.3.3 any other proceedings;

6.3.4 any liability to tax or other imposition of any kind in respect of any payment to be made to or in respect of a Beneficiary;

6.3.5 the execution of the trusts of the Scheme except to the extent that such amounts:

6.3.6 are recoverable by the Trustees under any policy of insurance and would not be recoverable but for this exception, or

6.3.7 are suffered or incurred as a result of the personal conscious bad faith (or negligence in the case of a professional Trustee) of the Trustee concerned.

…

6.8 In this Rule 6:

6.8.1 references to Trustee(s) shall be taken to include any former Trustee and any present or former officer of a present or former corporate Trustee.

6.8.2 references to proceedings shall be taken to include any investigation by the Pensions Ombudsman and any other form of action, proceeding or claim.

18 Multiple Individual Funds

18.1 The Trustees may at any time treat any existing part of a Member's Individual Fund or any new contribution in respect of a Member as if it were a separate Individual Fund, in which case it:

18.1.1 shall constitute a separate Individual Fund for the purposes of the Rules (including without limitation this Rule 18.1); but

18.1.2 shall not constitute a separate arrangement for the purposes of the Act unless the Member and Trustees expressly agree.

Appendix 3

Relevant extracts from the Membership Application Forms

Application form wording signed by Mr M on joining the Scheme in 2013:

"I understand that the Trustees of the Scheme shall have the right to make all investment decisions relating to the sale and purchase of the investments forming part of the Scheme. I understand that I have the right to request that the Trustees invest the funds held on my behalf in accordance with my instructions but that such requests shall not be binding on the Trustees. I agree to hold the Trustees fully indemnified against any claim in respect of any investment decisions."

The investment form signed by Mr M included the following:

"Office Units at 3TC House

The Scheme will purchase a 68.19% shareholding in the 250 year lease on the following office unit situated on the ground floor of 3TC House, 16 Crosby Road North, Waterloo, Liverpool:

Unit '1' Purchase price: £145,722.00 (This includes a discount of 0.66% to account for lost rent whilst the build is in the completion stage. Expected completion of the build is 18th November 2013)

In addition to the purchase price there is a Service charge of £2238.34 p/a.

The transaction also involves legal fees of £360 (£300 + VAT) & disbursements of £140

The Service Charge will be paid to cover one year in advance. The contribution of my pension funds towards the purchase of the above unit equates to £101,235.11 (68.19% of £148,460.34)

Tennyson Property Investments Limited

I also instruct the trustees to invest £46,970.00 in Ordinary shares in Tennyson Property Investments (TPI) Limited. TPI Ltd has invested in UK property portfolios, as per the Information Memorandum provided by the company.

The investment amounts detailed above represent a proportion of the £151,000 transferred into the scheme from my previous pension providers and is specifically attributable to my pension benefits held within the scheme. £3,000.89 has been set aside to cover additional costs such as annual scheme administration fees.

I acknowledge that the value of my pension will be reflected in the performance of the above office units and the assets held in Tennyson property investments limited and that part of the investment may be tied up for several years if I am unable to find a buyer for the office units. I can confirm that I have received no financial advice or investment guidance from the trustees of the scheme. I accept that it is my own responsibility to seek guidance from a suitably qualified professional such as a financial advisor as to whether this investment is suitable to my future needs."

Application form wording signed by Mr Y in July 2016:

"I confirm that I have not been paid or offered any financial or other incentive in relation to joining the Scheme or transferring existing pension benefits to it."

"**Advice**

The Trustees recommended that I take Independent financial advice from an appropriately qualified Financial Advisor or Pension Wise regarding my membership of the Scheme and I accept full responsibility for my decision whether or not to do so. The Trustees and all other parties associated with the scheme are not authorised to give, and have not given me any financial advice. I also am aware that some types of transfers will not proceed without financial advice."

"I shall instruct the Trustees from time to time regarding the investments that I prefer to be made within the funds in my account, from the selection of available investments."

"**My Account**

The Scheme is a Defined Contribution pension scheme all monies received by the Scheme in respect of my membership will be held in an account designated for my benefit ("My Account"). The value and level of benefits that I received from my Account will depend on a number of factors, including the overall amount invested and future investment returns, none of which are guaranteed.

The Scheme will levy fees against my Account, including the Setup Fees and Annual Management Charges. I have read the Schemes Schedule of Fees and authorise the Trustees to deduct the relevant fees from my Account for such time as I am a member of the scheme."

"**Investments**

I shall instruct the Trustees from time to time regarding the investments that I prefer to be made within the funds in my Account, from the selection of available investment alternatives.

The Trustees are responsible for the purchase, retention and sale of any investments in my Account. I indemnify the Scheme, the Trustees and their agents fully against any claim in respect of such actions.

The value of my Account at retirement or on transferring my benefits to another scheme may be less than the amounts originally transferred in or contributed to the Scheme, due to the effects of charges, falls in the value of investments or the costs of realising investments (which may be a liquid)."

"I understand that it is in my best interests to seek advice from me an appropriately qualified Financial Advisor regarding my future financial retirement planning. However, I hereby confirm that I'm comfortable in taking my own decisions and do not require advice in this respect.

CAS-27569-X0V0 & CAS-73885-Q6V9

I understand that the Trustees of the Focus Administration Pension Scheme did not provide advice regarding the suitability of this Pension for my circumstances and that they will establish the pension on a “No Advice” Execution Only Basis.

I understand that the Trustees of the Focus Administration Pension Scheme do not give Financial Advice and their ongoing service as detailed in the Terms & Conditions document does not include any investment, pension or financial advice. Investment decisions within my pension will remain under my control or with my Financial Advisor/Investment Manager if/as appointed by me.”

Appendix 4

Details on investments made by the Focus Administration Pension Scheme included in Punter Southall's letter to Mr M of 26 September 2019

1. Bright Limited ("Bright")

The Scheme made a loan of £89,510 to Bright Limited on 15th October 2018 which is repayable on 15th October 2021. Interest is payable at an annual rate of 5.75% with all interest being paid on 15th October 2021, not on a regular basis. The Director of Bright has given a personal guarantee for the loan.

The reason given for the loan was to provide a loan to Mederco (Huddersfield) Limited for the development of student housing. Mederco (Huddersfield) Limited has gone into administration and Bright have informed us that they have a charge over property with Mederco (Huddersfield) Limited and hence, we assume, should be repaid.

Most of the information we have on Bright is from the Companies House website and as Bright takes advantage of the small companies' exemption not to file full or audited accounts, the information we currently have on Bright is limited. The website shows that its business is "Combined office administrative service activities". We have asked the company for financial information in order that we may gauge whether the loan is likely to be repaid but to date none has been forthcoming.

At this stage the Trustee has nothing to indicate that the loan will or will not be repaid.

2. Capital Bridging Finance Solutions Limited ("CBFS")

The business of CBFS is to lend to property developers with most of its lending being secured against properties. We understand that it has around £13m out on loan. In order to lend, CBFS needs to borrow and the Scheme made a loan of £381,892 to CBFS at an interest rate of 5.5% payable half yearly on 10th January and 10th July. All interest payments due have been received albeit a few weeks late. The loan is due for repayment on 10th July 2020.

From discussions with CBFS there is currently no reason to suppose the loan will not be repaid.

3. Fleet Street Liverpool Limited

Fleet Street Liverpool is a company in which the Trustee hold shares with a purchase cost of £29,535. It was set up to develop a property site in Liverpool. Its initial aim was to construct student apartments and from figures the Trustee has been shown this is now unlikely to be profitable. However, it is optimistic that planning consent will be obtained for a change of use to aparthotels which are currently expected to have a greater sale value. If planning consent is granted then the shares should have a value when the project has been completed.

The Company's aim is therefore to get change of use planning consent, complete the building, sell it and return profits to shareholders. It is expected that this should be

achieved within 18 months.

4. Mederco (Huddersfield) Limited (MHL)

The Scheme rolled over a loan to MHL on 15th October 2018. At that time it amounted to £270,565 and was repayable on 15th October 2021. MHL has now gone into administration and the Trustee is liaising with the administrator in relation to being a creditor of the company.

Until the administrators advise otherwise the Trustee believes it would be appropriate to assume this investment has no value.

5. Tennyson Property Investments Limited ("Tennyson")

Tennyson is a small property investment company which aims to buy undervalued properties and wait for them to increase in value. Rental income is received from the properties and there is expenditure in the form of paying interest on loans. The Scheme has an investment of £88,218 in Tennyson in the form of ordinary shares which are illiquid; i.e. there is no ready market to buy and sell them. Tennyson's Director has been made aware that the Trustee would like to sell the shares if a buyer can be found. No dividends have been paid.

The Trustee has no view on the current value of the shares in Tennyson. We have agreed with Tennyson that we will be supplied with management accounts on a regular basis so we will then have more information. To date the only information has been from the Companies House website and Tennyson takes advantage of the small companies' exemption not to file full or audited accounts. The information we currently have on Tennyson is therefore limited.

Appendix 5

Member transfers into the Scheme

Date	Sum	Member
07 November 2013	£ 80,000.00	Mr M
08 November 2013	£ 71,206.00	Mr M
18 November 2013	£ 50,221.29	[Member 2]
20 January 2014	£ 70,000.00	[Member 3]
21 January 2014	£ 61,808.62	[Member 4]
08 July 2016	£ 3,956.25	[Member 5]
08 July 2022	£ 26,547.04	[Member 6]
08 July 2022	£ 33,851.78	[Member 7]
08 July 2016	£ 53,933.24	Mr Y
08 July 2016	£ 100,000.00	[Member 9]
08 July 2016	£ 20,848.37	[Member 9]
24 November 2016	£ 85,796.56	[Member 10]
02 December 2016	£ 2,000.00	[Member 10]
24 February 2017	£ 171,513.88	[Member 11]
Total Transfer Sum	**£ 831,683.03**	