



Ombudsman's Determination

Applicant	Ms T & Ms Y and Mr N (together the Additional Applicants)
Scheme	Grosvenor National Ltd Retirement Benefits Scheme (the Scheme)
Respondent	Mr Robin Kench, Trustee of the Grosvenor National Ltd Retirement Benefit Scheme

1. Ms T's and the Additional Applicants' complaints are upheld and, to put matters right, the Trustee shall comply with the directions set out in paragraphs 212 and 213 of this Determination.

Complaint Summary

2. Ms T has complained that the Trustee invested the Scheme's funds inappropriately, which has resulted in members' benefits and rights in the Scheme being lost.
3. Two 'Additional Applicants' have complained on what I consider to be identical issues. Those complaints have been associated with Ms T's complaint by my office. This means that the conclusions reached in respect of Ms T's case apply equally to the associated cases.
4. Throughout this Determination I have referred to Mr Kench, in his role as the trustee of the Scheme, as the "**Trustee**". Where I have referred to Mr Kench in any other capacity, for example as an employee of Pension Assist Limited (**Pension Assist**), I have referred to him as "**Mr R Kench**".

Oral Hearing

5. I held an oral hearing on 15 December 2020 (the **Oral Hearing**), as part of my investigation. I considered it necessary to do so because it appeared to me, from the evidence that I had received, that the Trustee might be held personally liable for his acts and omissions.

6. The Trustee did not attend the Oral Hearing, which was combined with one relating to the Grovesnor Solutions Limited Retirement Benefits Scheme, as the facts and issues were closely interrelated. The Trustee's brother, Mr Darryl Kench (**Mr D Kench**), attended the Oral Hearing: in his capacity as trustee of the Grovesnor Solutions Limited Retirement Benefits Scheme (the **Solutions Scheme**); on behalf of Pension Assist Ltd; and also as the Trustee's representative. The Solutions Scheme was set up and run in the same way as the Scheme. My office has tried to contact the Trustee to obtain confirmation that he had instructed and authorised Mr D Kench to represent him at the Oral Hearing, but has received no response either denying or confirming that this was the case. In the absence of any response from the Trustee, and having received no suggestion that he wished to add or correct anything (having been offered a copy of the recording), I issued a Preliminary Decision on the basis that Mr D Kench's submissions given at the Oral Hearing were made on the Trustee's behalf as well as on his own behalf. The Trustee did not respond to the Preliminary Decision or challenge my reliance on Mr D Kench's submissions as having been made on the Trustee's behalf. Mr D Kench confirmed that he and the Trustee had received the Preliminary Decision.
7. The Oral Hearing was attended by Ms T and the Additional Applicants.

Summary of the Ombudsman's decision and reasons

8. Having fully considered the evidence and submissions presented on the papers, and those provided at the Oral Hearing, I uphold Ms T's and the Additional Applicants' complaints. My reasons are as follows:
 - 8.1. the Trustee has acted in breach of trust by:
 - 8.1.1. breaching his fiduciary duty to manage conflicts of interest and his duty not to profit from his position as Trustee;
 - 8.1.2. 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;
 - 8.1.3. failing to comply with the requirement, under section 247 of the Pensions Act 2004, to have knowledge and understanding of the Scheme's documents or the law relating to pensions and trusts;
 - 8.1.4. transferring large sums of money into his brother's company, Pension Assist, of which Mr R Kench was an employee at all material times;
 - 8.1.5. investing all of the Schemes' assets that remained after the payments to Pension Assist and to the members in Realsave's preference shares; and
 - 8.1.6. providing false information to members, in breach of the Trustee's fiduciary duty to act honestly and in good faith.

8.2. The Trustee has committed acts of maladministration, by:

8.2.1. failing to have regard to the Pensions Regulator's (TPR) Code of Practice number 13; and

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

9. I have concluded that the Trustee is not excused from liability by the terms of any exoneration or indemnity clause in the Scheme's documents, or by section 61 of the Trustee Act 1925. I have further concluded that the Trustee's liability is not reduced or extinguished by any defence of member consent or contributory negligence.

Jurisdiction

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

11. I have the power to direct the Trustee 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 Trustee to the Scheme is to put it back into funds as if there had been no breach of trust.

12. Any money recovered by the Scheme as a result of my directions is available for the general benefit of any member, including Ms T and the Additional Applicants, to the extent that they have been adversely affected. In *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862, Knox J quoted Lord Browne-Wilkinson at p 434 (House of Lords) in *Target Holdings v Redfems* [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."

13. 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).

Detailed Determination

A. Material facts

A.1. Background

14. On 12 May 2011, Pension Assist was incorporated by Mr D Kench, the sole Director and Shareholder. Pension Assist was an unregulated introducer. Mr R Kench was an employee of Pension Assist. Mr D Kench has said that Pension Assist used “lead suppliers”, which purchased details of potential clients from “lead producers”. Pension Assist would then contact those potential clients, with a view to referring them to a pension scheme or to an independent financial adviser (IFA).
15. When I asked Mr D Kench, at the Oral Hearing, which lead producer he had received Ms T’s and the Additional Applicants’ details from, he could not recall which one it had been. He was able to recall the name of one lead producer, Clarity, that Pension Assist had used from time to time, but not whether that had been the lead producer that had supplied Ms T’s and / or the Additional Applicants’ details to Pension Assist. In fact, I have noticed that at least one of the members received a letter from Pension Assist, informing them that they could themselves become an introducer to Pension Assist, though I have received no evidence that any did or that this should affect any of the findings I make in this Determination.
16. When I questioned which other pension schemes Pension Assist had referred individuals to, Mr D Kench was unable to recall any specific scheme, other than one that Mr D Kench referred to as “Five Rings”¹. Later in the Oral Hearing, I asked whether Mr D Kench had been aware that the “Five Rings” pension scheme had been a pension scam. Mr D Kench said that another company had dealt with the investments in relation to that scheme and that, while he was aware that the scheme’s assets had been frozen, he had not known that it had been officially classed as a “scam”.
17. Mr D Kench recalled that, normally, a “master introducer” or other person connected with the pension scheme would approach Pension Assist and would provide literature to supply to its clients. However, there were various means by which a scheme or advisor would be advertised. In some cases, Pension Assist would pass its clients directly to IFAs to handle the transfer.
18. Mr D Kench was also unable to recall how Pension Assist would have become known to IFAs. Mr D Kench was unable to provide any details of any specific IFA to whom Pension Assist had made introductions, although he considered that there were likely to have been fewer than ten such IFAs.

¹ The trustee of the Five Rings Limited Pension Scheme was suspended by the Pensions Regulator, and replaced by an independent trustee, in 2014, as an investigation by the Pensions Regulator had revealed that the Five Rings scheme’s funds had been misappropriated: <https://www.thepensionsregulator.gov.uk/-/media/thepensionsregulator/files/import/pdf/dn2857403.ashx>

19. Mr D Kench said that Pension Assist did not provide financial advice and, until his involvement with the Scheme, Pension Assist had been solely an introducer.
20. At the Oral Hearing, Mr D Kench recalled that Mr R Kench had introduced him to Mr Stuart Stone, in 2011 or 2012. Mr D Kench could not recall exactly how Mr R Kench had met Mr Stone, but speculated that they might have become acquainted through a mutual business connection, possibly three to four years before the Scheme was established. Prior to the Scheme's establishment, Pension Assist had referred clients to one of Mr Stone's prior investments, which Mr D Kench was unable to name precisely although he recalled that its name included the word "Sustainable"².
21. Mr D Kench said, at the Oral Hearing, that Mr Stone had appeared successful, owning a large house and expensive cars. He does not recall making any checks on Mr Stone's regulated status but believed he was an IFA at the time they met³.

A.2. Investment of Scheme members' funds

22. Mr Stone proposed an investment arrangement involving the establishment of a pension scheme which would invest in a finance company, Realsave Business Solutions Limited (**Realsave**). It seems, from the Trustee's written submissions, that he was under the impression that Mr Stone owned Realsave. In fact, Realsave had been established by Mr Stone's wife, Laura Challiner, on 2 July 2012. Ms Challiner was Realsave's sole director at all times. Mr Stone was never appointed as an officer of, or held shares in, Realsave.
23. According to Mr Stone, Realsave would provide short term finance to businesses which could not otherwise get credit, at a monthly interest rate of 2.5% to 3%, while holding goods in a warehouse as security. Mr Stone said he had contacts in banks who would refer potential clients to Realsave and would personally provide security for the investments. Mr Stone also offered assurances that if, for any reason, the investment in Realsave was not profitable, he had access to other investments that could cover the returns needed, even if this meant that Mr Stone's⁴ own profit would not be as good.
24. The Trustee did not investigate the validity of those assurances or carry out any due diligence in relation to Realsave, although I understand, from the Trustee's written submissions and from Mr D Kench's submissions at the Oral Hearing, that the Trustee and Mr D Kench had visited Realsave's warehouse, which he said was empty. At the time, Realsave had no annual returns or accounts, had received no

² Mr Stone, along with another individual, Gary West, was convicted of fraud and bribery offences in 2014, in relation to selling and promoting investment products offered by Sustainable AgroEnergy plc, primarily via self-invested pension plans: <https://www.sfo.gov.uk/cases/sustainable-agroenergy-plc-sustainable-wealth-investments-uk-ltd/>

³ Mr Stone had, in fact, ceased his role as a regulated financial adviser with Pengwern Wealth Management LLP on 7 March 2011, a position he had held since 23 June 2010: <https://register.fca.org.uk/s/individual?id=003b000000LVkT5AAL>

⁴ I understand that, while Realsave was in fact owned by Ms Challiner, Mr Stone referred to Realsave as being his own business and Mr D Kench understood this to be the case.

existing investments, had lent no money and had no contracts in place with banks for clients to be referred to it, although the Trustee and Mr D Kench believed that Realsave had “arrangements” with banks in place. When I asked Mr D Kench, at the Oral Hearing, on what basis he and the Trustee had considered Realsave to be a suitable investment, he replied that he had viewed the investment as a “game-changing opportunity to make a great deal of lolly”. The Trustee had previously submitted, in writing, that “from a personal point of view [the investment in Realsave] also would help to build on the working relationship we had with [Mr Stone] for projects that might come up in the future.”.

25. On 19 October 2012, Grosvenor National Limited was incorporated by Mr R Kench, apparently so that it could be appointed as the Scheme’s sponsoring employer.
26. I understand that the Scheme is a small self-administered scheme (a **SSAS**) and that Mr R Kench, although not a member of the Scheme, was appointed as the Trustee.
27. Mr Stone set up and registered the Scheme with HMRC, he also provided the necessary documentation, which Mr R Kench signed. Mr Stone, along with another individual, carried out the administration of the Scheme and wrote the “Key Features” document (see Section A.3.5 below). Realsave was the only investment available within the Scheme, despite statements to the contrary in paperwork provided to prospective members (see Section A.3.5 below).
28. None of Realsave’s Statements of Capital, filed at Companies House, show any investment by the Scheme.
29. On questioning, at the Oral Hearing, concerning the role of a pension scheme trustee and the responsibility imposed by that role, Mr D Kench answered that he had not been aware of the duties that were imposed on pension scheme trustees by statute. Mr D Kench had not been aware of the Pensions Regulator’s website or the guidance for pension scheme trustees available via that website. Mr D Kench had taken no steps whatsoever to educate himself in respect of his role or responsibility as a pension scheme trustee and had seen no reason to do so. He had simply signed the paperwork presented to him by Mr Stone. As I have explained in paragraph 6 above, these statements by Mr D Kench also appear to apply to the Trustee, who declined to attend the Oral Hearing and give evidence himself, if he had any evidence, to the contrary.
30. Mr D Kench informed me, at the Oral Hearing, that Mr Stone, together with an individual, Ms E, who Mr D Kench said was an IFA and who had worked for Mr Stone at the time, but who he now thought worked for HMRC, had carried out all of the Scheme’s administration. The Trustee had not attempted to verify Ms E’s IFA qualifications.

31. In November 2012, Ms T contacted Pension Assist Limited (**Pension Assist**) to enquire about transferring her pension away from her former employer's pension scheme. Ms T informed me, at the Oral Hearing, that she had no investment experience herself and, understanding the serious nature of a pension scheme especially in light of the Robert Maxwell scandal, she considered it necessary to consult a regulated body on the matter of transferring her pension fund. Ms T had understood Pension Assist to be a regulated body, as it was made out to be such on its website, although Mr D Kench disputed that that was the case at the Oral Hearing.
32. Ms T subsequently met with Mr D Kench, and has described the meeting as follows:-

“Back in February 2013 [sic] I was searching the internet for a pension review and Pension Assist called me to discuss it and arranged a home visit. Darryl Kench director of Pension Assist came to see me and ran me through some options. Given the law he advised I would not be able to cash in my pension as I was under 55 but talked me through a scheme whereby my transfer value of current pension would be put into a 5 year scheme called Grosvenor National Ltd Retirement Benefits Scheme. Upon transferal I would get 24% of the transfer figure in cash (transfer value was 175,606 GBP) and the rest (133,460) would go into the Grosvenor scheme for 5 years commencing 1st February 2013 to 31st January 2018. On the 31st January 2018 the payment to me would be 175,605. Which I could then transfer again into any scheme of my choosing.”
33. At the Oral Hearing, Ms T said that she and Mr D Kench had spent two hours discussing the detail of the Scheme and related matters. Also, that she had not been aware that her pension fund was to be invested in Realsave, or that any third party would be involved, when she made the decision to transfer her pension fund into the Scheme; Ms T had thought that her funds were to be invested in Grosvenor National Limited.
34. On 16 November 2012, Ms T signed an Application form to join the Scheme.
35. Around this time, Ms T signed an undated agreement appointing her as a consultant for Grosvenor National Limited. However, Ms T has submitted that she does not recall signing this document and that she was not aware that she had been appointed as a consultant to Grosvenor National Limited.
36. On 3 January 2013, the value of Ms T's previous company pension, £175,605, was transferred to the Scheme.
37. On 20 March 2013, Pension Assist wrote to Ms T, enclosing an unsigned “Certificate of Investment”. The letter from Pension Assist was signed by Mr D Kench in his role as Director of Pension Assist. This certificate stated that £133,460 had been invested in Real Save Business Solutions for a five-year term commencing on 1 February 2013. The maturity value would be £175,605.

38. Mr D Kench confirmed, at the Oral Hearing, that 50% of the sum transferred into the Scheme by each member was invested in Realsave. Of the remaining 50%, approximately 30%⁵ was paid to Pension Assist, as commission for introducing the member to the Scheme, and the remainder was paid to the member, as a “fee”. Mr D Kench admitted that members were not made aware of either: the commission arrangement; or the conflict of interest that arose from it on account of the Trustee’s involvement in Pension Assist as Mr R Kench.
39. The Trustee has informed my office that the Scheme had 7 members, who had “invested” a total of £615,000. I have seen no evidence that any of those funds were actually applied to purchase preference shares in Realsave, as available copies of documents filed at Companies House do not show the Scheme or the Trustee to have been a shareholder of Realsave at any point during Realsave’s existence. When I questioned Mr D Kench about this in the Oral Hearing, he confirmed that only 50% of members’ funds had been paid to Realsave. However, this explanation does not account for the complete lack of evidence that any of the Scheme’s funds were paid to Realsave at any point.
40. I understand that, following Ms T’s and others’ investments in Realsave, the Trustee received no contact from Mr Stone, or any further documentation, concerning Realsave’s performance.
41. In August 2013, Mr Stone was arrested and charged with fraud in relation to a separate investment arrangement. Mr D Kench recalled that Mr Stone had informed him that he was being investigated. However, Mr Stone had told Mr D Kench that he need not be concerned about that. The Trustee has submitted, in writing, that Mr Stone had been “confident that he would be cleared”.
42. On 14 October 2014, Realsave was dissolved.
43. In December 2014, Mr Stone was sentenced to six years in prison⁶. The Trustee attended a later Court hearing, on 27 to 28 July 2016, at which Mr Stone received a confiscation order to pay £1,141,680 within three months or face a default sentence of a further seven years. The Trustee and Mr D Kench have both submitted that the Trustee had argued that the funds should be returned to the Scheme. However, the funds were used to meet the confiscation order issued against Mr Stone⁷ which was paid in full. It seems, from the Trustee’s written submissions, that the Trustee was unaware that Realsave had been dissolved some weeks prior to the Court hearing, as the Trustee has stated that “the accounts of Realsave remained frozen” when Mr Stone was sentenced in December 2014.

⁵ Mr D Kench was unable to provide me with the precise figures at the Oral Hearing.

⁶ <https://www.sfo.gov.uk/2014/12/08/city-directors-sentenced-28-years-total-23m-green-biofuel-fraud/>

⁷ <https://www.sfo.gov.uk/cases/sustainable-agroenergy-plc-sustainable-wealth-investments-uk-ltd/>

44. At the Oral Hearing, Mr D Kench confirmed that the Trustee took no steps, on hearing of Mr Stone's later conviction, to ensure that the Scheme's administration was being taken care of in Mr Stone's absence. Mr D Kench was unable to confirm whether the Scheme returns had been filed annually with HMRC.
45. The Trustee has submitted, in writing, that he reported his concerns to TPR regarding Realsave, the loss of Scheme money and how he should best communicate with members in respect of these issues. He said that TPR had responded to him by confirming that he had acted correctly in reporting the situation to it and that it would carry out an investigation. The Trustee also said that TPR informed him it could not advise him on what he should say to members about the matter until it had concluded its investigation.
46. However, at the Oral Hearing, Mr D Kench said that he had reported his concerns regarding Realsave to the Financial Conduct Authority (**FCA**) and had asked the FCA several times for an update. I queried whether Mr D Kench had actually reported the situation to TPR, not to the FCA, as he had referred previously to TPR in correspondence sent to my office in connection with these complaints. Mr D Kench responded that he had contacted whichever he was supposed to contact, having made enquiries to find out whom that was. However, Mr D Kench was not certain whether that had, in fact, been the FCA or TPR.

A.3. Relevant provisions of Scheme documents

A.3.1 Trust Deed and Rules

47. I have not been provided with a copy of the Scheme's Trust Deed and Rules and the Trustee has confirmed that he does not have a copy in his possession. I have instead been given a copy of a separate scheme's trust deed and rules (**the Stirling Deed**), which the Trustee has said will have been identical to the Scheme's version in all but date and name. Mr D Kench informed me, at the Oral Hearing, while speaking on the Trustee's behalf as well as his own, that he had not seen the Scheme's Trust Deed and Rules. Mr D Kench had not considered it necessary to see the Trust Deed and Rules, as he believed that the document was merely a "mass of literature, like a phone book, that wouldn't make a lot of sense to a lay person."

A.3.2 Scheme application forms

48. On 16 November 2012, Ms T signed a Grosvenor National Limited Retirement Benefit Scheme Application form (the **Application Form**). She provided details of her existing pension and confirmed that she wished to transfer into the Scheme. The Application Form included the following declaration:

"I confirm that by completing this application I agree to become a member of this Employer's Small Self-Administered Scheme and to be bound to the Trust Deed and Rules.

I authorize [sic] my previous company, any insurer or other pension provider and Her Majesty's Revenue and Customs to disclose to Grosvenor National Limited Benefits any details they request about the benefits for me.

I agree to the appointment of Grosvenor National Limited Retirement Benefits as independent trustee and scheme administrator⁸."

A.3.3 Scheme terms and conditions

49. An additional document entitled Grosvenor National Limited Retirement Benefit Scheme Terms and Conditions (**Terms and Conditions**) has been provided. Mr D Kench has stated that this was provided to all members. That document contains the following statements:

"We are not authorised by the FSA to provide you with advice in relation to your SSAS and we recommend that you obtain advice where required from a qualified financial adviser. Nothing in any communication to you should be construed as financial or investment advice within the meaning of the Financial Services and Markets Act 2000.

...

SSAS Bank Account

Your SSAS has an individual bank account with HSBC, and the SSAS members and R M Kench of Grosvenor National Limited are joint trustees of the account.

...

Payments out of the account are made by Grosvenor National Limited acting on your written authority.

...

Investments

Investments are made at your direction or that of your appointed advisers. Grosvenor National Limited do not give investment advice, are not required to assess the suitability of investments and accept no liability for the choice or performance of individual investments or of your chosen advisers.

...

⁸ While the form referred to Grosvenor National Limited Retirement Benefits as the Scheme's trustee, enquiries made of the Pensions Regulator by this office have shown Mr R Kench to be the sole trustee of the Scheme and Mr R Kench has corresponded with this office as trustee during this investigation. On that basis, I have concluded that Mr R Kench is, and has been at all material times, the sole trustee of the Scheme.

R M Kench Trustee will be a registered owner or co-owner of all investments, unless arrangements are made with our consent for them to be held in nominee accounts.

...

Grosvenor National Limited may receive payments from third parties in connection with investments or insurances arranged for the SSAS. We will ensure that any such payments are on normal commercial terms and will not be to the financial detriment of the SSAS or lead to a conflict of interest.”

A.3.4 Services Agreement

50. Around this time, Ms T signed an undated Services Agreement, which made her an employee of Grosvenor National Limited.

A.3.5 Key features document

51. One of the Additional Applicants has supplied a document that appears to be contemporaneous to their application to join the Scheme, entitled “Key Features of the Grosvenor National Limited Retirement Benefit Scheme SSAS”. It includes the following statements:

“This document sets out important information about the Grosvenor National Limited Retirement Benefit Scheme SSAS, to help you make an informed decision about whether to proceed. Please read it carefully.

...SSASs are not suitable for everyone and you should speak to an Independent Financial Adviser before proceeding.

Aims of the SSAS

...

- Being able to choose from a wide range of investment opportunities, to build up your pension fund.

...

Your Commitment

...

- To act as a trustee of the SSAS with the other SSAS members, to operate the SSAS effectively.
- Not to draw benefits until you are at least 55.

...

- To take responsibility as a trustee for the management of the investments in the SSAS. The trustees can manage them, or appoint an investment manager.

...

Risk Factors

- Some investments are higher risk than others and you should understand the risk profile and diversity of the investments you hold.

...

What is the Grosvenor National Limited Retirement Benefit Scheme SSAS?

- It is a self-invested company pension scheme set up by your employer, which operates as a Trust and is governed by a set of Rules. You have a Personal Account within the Trust, which is your own share of the fund, and you, the other SSAS members and our trustee company are the trustees of the fund and hold the assets. The trustees act unanimously and invest the fund and a wide range of investments is available.”

52. I note that this document refers to there being a “wide range of investment opportunities”. However, when I questioned Mr D Kench on this at the Oral Hearing, he confirmed that the Realsave investment was the only investment that had been available to members under the Scheme and under his own pension scheme.

53. When I asked Mr D Kench, about the statement in this document that members would “take responsibility as a trustee for the management of the investment in the SSAS”, he responded that he could not recall if members were trustees or not, but that he was not aware of any instrument appointing them if they were trustees. He informed me that he did not even know how to register an individual as a trustee.

A.3.5 Introductory Letter

54. On 6 December 2012, Pension Assist wrote to Ms T. The letter confirmed that Ms T had opted to join the Scheme, stating:

“Thank you for choosing to discuss your pension review with Pension Assist Ltd.

Further to our conversation today I can confirm that you have opted to enter into the Grosvenor National retirement Benefit Scheme.

How it Works?

You become a consultant to Grosvenor National Limited - allowing you to become a member of the registered company pension scheme.

Grosvenor National Retirement Benefit Scheme submits a formal request for a pension fund transfer from your current provider.

Once the funds are received into the pension scheme it would then make a loan to the limited company. This would enable the Limited company to pay you a consultancy fee, **equivalent to 24% of your transfer figure.**

The balance of the pension fund would be invested with a specialist short term loan company. The company specializes in **underwritten** short term loans to small and medium size businesses in the UK and would look to invest the pension fund over a fixed 5 year period.

You are guaranteed a return of 100% of your initial transfer value upon completion of the 5 year term. This can be transferred into any scheme of your choosing.”
[original emphasis]

A.4 Communications with Scheme members

55. On 1 May 2014, Ms T received an annual report. This confirmed that she had joined the Scheme on 1 February 2013 and had invested £133,460 to date. The investment had a five year minimum commitment, with the expiry date being 31 January 2018, at which time Ms T would have a predicted transfer value of £175,605 (having already received a lump sum payment at the outset). The annual statement did not mention Realsave, but included the statement:

“All funds are invested at the discretion of the trustee and all reasonable measures will be taken to reach projected targets.”

56. The letter was signed by Mr R Kench, “Trustee of Grosvenor National Retirement Benefits Scheme”.

57. Ms T received no further formal communication, despite requesting further statements from Pension Assist over the course of 2015. However, Mr N received an annual report from Grosvenor National Ltd, dated 12 May 2015, containing the same statement that had been contained in Ms T’s annual statement of 1 May 2014 (see paragraph 55 above).

58. The letters containing the annual statements were signed by Mr R Kench as “Trustee of Grosvenor National Retirement Benefits Scheme”. Mr D Kench confirmed, at the Oral Hearing, that the annual reports sent to Scheme members had been prepared by Pension Assist. When I asked Mr D Kench why Pension Assist had continued to send annual reports to members, showing a financial position that he knew was very unlikely to be true following Mr Stone’s conviction, he was unable to answer my question, but said that he had been hoping that the matter would be resolved and that the money would be recovered.

59. In September 2016, on speaking to Pension Assist, Ms T was informed of a possible “problem with the scheme”. Pension Assist advised Ms T that it could not provide details at that point and that she should call back a few weeks later.

60. When Ms T followed this up a few weeks later, in November 2016, Ms T was informed by Mr D Kench that her fund had been invested in RealSave, which she had not been aware of previously, and that Realsave's director was Mr Stone. In response to Ms T's query as to how her pension fund had come to be invested in an investment of that nature, Mr D Kench advised her that Mr Stone was "a millionaire with good profit results" and that he had "checked out their offices". Ms T commented to Mr D Kench that she was unable to understand how the investment of her pension fund in Realsave could have accorded with UK law. Mr D Kench advised Ms T to call TPR, to see whether she "could find out anything".
61. On 26 September 2017, less than a year before the members' funds were due to mature, the Trustee wrote to the Scheme's members and informed them that there was a possible problem with the investment and that the matter had been referred to TPR.
62. On 5 June 2018, Pension Assist was dissolved. Mr D Kench stated, at the Oral Hearing, that he did not inform Scheme members of this, as Pension Assist was not a trustee of the Scheme so he did not consider Pension Assist's dissolution to be relevant to the Scheme's members.

B. The Trustee's submissions

63. The Trustee has provided a number of submissions outlining his position. My office has received written submissions, on a number of occasions, from Mr D Kench's email address, but signed off by "Robin Kench" or signed off jointly by Mr D Kench and "Robin Kench". When I queried this with Mr D Kench at the Oral Hearing, he informed me that any emails signed off by "Robin Kench" would in fact have been written and sent by the Trustee. Earlier in this investigation, I issued a Preliminary Decision on the basis that only Mr D Kench, not the Trustee, had responded to the complaints made to my office against the Trustee. The Trustee did not seek to correct me on that point. Nevertheless, on the basis of Mr D Kench's assurance, made under oath at the Oral Hearing, that those emails from his own email address that had been signed off by the Trustee had in fact been written by the Trustee, I shall regard them as such.
64. The Trustee's submissions are summarised here:-
- Mr Stone had apparently already set up his own SSAS in order to invest in Realsave and offered Mr R Kench the opportunity to do the same. Mr Stone would establish the Scheme and deal with the administration. He would then pay commission equivalent to what Pension Assist was receiving from other schemes.
 - Clients would obtain benefit from investing in a "legitimate program that had been very well planned out and was being run by Mr Stone."

- “From a personal point of view this would also help to build on the working relationship we had with [Mr Stone] for projects that might come up in the future.”
- Mr Stone offered assurances that he would cover the returns needed for the clients if Realsave was not successful.
- Mr R Kench set up Grosvenor National Limited and Mr Stone established the Scheme and provided the paperwork.
- The investment, and the five-year commitment, was explained to clients.
- Clients’ paperwork was forwarded to Mr Stone, who dealt with arranging the pension transfer.
- Once the funds had been transferred into the Scheme, the clients were paid their agreed commission, Pension Assist was paid its fee and the balance was transferred to Realsave, as agreed.
- After the funds had been invested in Realsave, Mr Stone informed the Trustee and Mr D Kench that he had been charged with fraud in relation to another scheme that he had been involved in. Mr Stone was confident that he would be cleared of those charges. However, he was convicted and was sentenced to six years’ imprisonment.
- Although Realsave was registered in Mr Stone’s wife’s name, its assets were frozen by the courts. As Realsave was not registered to Mr Stone, the Trustee and Mr D Kench assumed that funds would be returned to the Scheme once Mr Stone had been sentenced. Unfortunately, when Mr Stone was sentenced in December 2014, the accounts of Realsave remained frozen.
- “While Mr Stone had made the commitment to the pension scheme to return 100% of initial funds regardless of RealSave’s [sic] activities, given his position we did research other investment opportunities.
- “It was not until [2017] that Mr Stone was brought back to court to sort out his finances. I attended the court in an attempt to clarify the position regarding returning funds to the pension scheme.
- “It came up that Mr Stone had been issued with a confiscation order for over £1m. While I was at court Mrs Stone took the stand and confirmed to the court that money held in RealSave’s [sic] accounts were their private money and could be used to repay his order. I protested to both defence and prosecution representatives that this money was investment from pension funds and in no way the property of Mr and Mrs Stone. In short I was ignored.”
- All of the above was reported to TPR immediately, the Trustee’s concern being the retrieval of the money and what he and Mr D Kench should say to the Scheme’s members in the circumstances. TPR confirmed that the Trustee had

acted correctly in reporting the situation to it and that it would conduct an investigation. However, TPR said that it could not advise what the Scheme's members should be told until TPR had concluded its investigation.

- The Trustee and Mr D Kench have still not received a response or an update from TPR concerning its investigation, despite having chased TPR several times. TPR had informed the Trustee that it would not provide any update until it had finished its investigation. This has been relayed to the Scheme's members.
- A Trust Deed and Rules was prepared for the Scheme, but copies are not available to the Trustee at this time as they were kept by Mr Stone. Copies of those documents had been requested by members' ceding schemes and provided to them by Mr Stone. The Stirling Deed and Rules⁹ are available, which the Trustee believes to be a duplicate of those for the Scheme in all but name and date.
- The Trustee had visited Realsave's large warehouse which, Mr D Kench confirmed at the Oral Hearing, was empty at the time of his visit but which was intended to secure property held as security on the loans, and he had seen how Realsave would find its clients. Mr Stone was seen as a highly qualified and successful IFA and Mr D Kench was impressed by him.
- Mr Stone had explained the mechanism for paying members through the company from the pension fund and said it was legal and did not constitute pension liberation. Mr R Kench accepted Mr Stone's word, on the basis that Mr Stone was a qualified IFA and pension / investment specialist.
- Mr Stone said that, as trustees Mr R Kench and Mr D Kench were given the trust of the members to invest the funds at their discretion. Neither Mr D Kench nor Mr R Kench was an IFA or a professional investor, and it was not up to them to act in each client's best interest. The clients made their own decision on whether to invest in Realsave and they were not offered tax advice. It was stressed that the income received should be recorded for their personal tax calculations. The members were told to seek professional advice if they required it.
- The Terms and Conditions document provided to the members stated that no advice had been provided and it was recommended that the members seek regulated financial advice.

⁹ I have seen no information concerning the Stirling Scheme and have received no explanation of how that scheme, if it is indeed a valid pension scheme, relates to the Scheme. A search of the Government's tracing website has brought up no record of the Stirling Scheme.

- Additionally, as set out in the Terms and Conditions, Grosvenor National was “not required to assess the suitability of investments and accept no liability for the choice or performance of individual investments or of your chosen advisers.”
- Mr Stone was charged with fraud in relation to a separate scheme and received a six-year custodial sentence. The Realsave funds were frozen by the courts. The Trustee attended the Court and argued that the funds should be returned to the Scheme, but these arguments were ignored. The funds were used to meet a £1million confiscation order issued against Mr Stone¹⁰.
- The situation was reported to The Pensions Regulator (TPR) immediately, the major concern was the recovery of the members’ funds.
- The Trustee says he was not a professional trustee and was carrying out the role of Trustee to the best of his limited knowledge.
- There was no financial benefit to being a trustee of the Scheme.
- The expectation was that Realsave would return 105% of the transfer value, the additional 5% being a bonus intended to cover administration costs of running the Scheme.
- He believed the investment would be a success and the members would be happy and reinvest in an alternative product available at that time.
- He accepted that as trustee he would have control of funds and that was a potential risk.
- As a pension introducer, Mr R Kench believed that becoming a trustee was a “step forward” and would provide him with a better understanding of the pension market, knowing where the funds were going and providing him with security of getting paid where investments went ahead.
- There were clear indemnities in the documents provided to the members which protected him even if the investment went wrong.
- Mr R Kench said in relation to his involvement (in an email signed off by both Mr R Kench and Mr D Kench, in relation to the Scheme and the Solutions Scheme respectively):

“We do understand that as trustees we had certain responsibilities to the scheme and its members.

Please understand that if any of our obligations in this regard were breached it was not done knowingly or purposefully.

¹⁰ <https://www.sfo.gov.uk/cases/sustainable-agroenergy-plc-sustainable-wealth-investments-uk-ltd/>

This is not to use naivety as an excuse, in as much as we didn't bother to find out.

We took advice from Mr Stone, a qualified professional specialist (who was also a friend) in regard to everything we did.

The introducer commission paid to Pension Assist Limited that was offered by Mr Stone was exactly equivalent to what was being offered by other schemes that Pension Assist Ltd were working with at the time.

There was no direct financial benefit to Pension Assist Ltd in introducing clients on the Grosvenor route as opposed to other schemes.

As trustees we received no remuneration.

The principal reason [sic] as for our involvement were:-

We believed it offered a simple and transparent system for the financial growth required to meet [sic] its obligations.

It was something different and allowed us to have a greater involvement in the process.

We were working directly with someone we knew, respected and trusted.

It was easy to explain to clients.

It was always our intention to act in the best interest of the clients.

It genuinely appeared to be a great deal for the clients, a good deal for Pension Assist and a good deal for Mr Stone."

- Additionally, in an email to this office in which he used the same wording to respond to the complaints made against him by Ms T and the Additional Applicants that Mr D Kench had used previously in relation to the Solutions Scheme, Mr R Kench said:

"I feel the main point in this is not that my actions as a trustee of the scheme were completed, although naively, with the best of intentions, but that all scheme members were aware that I was an unregulated introducer (with no capacity or claim to provide any advice) who was openly providing them with a route to make an investment into Realsave at their discretion.

In no way was there any suggestion that in any capacity I was providing any advice or assurance, or indeed that I was in any position to do so.

If any potential client was interested in the Realsave proposal arranged by Mr Stone and presented by Pension Assist Ltd it was explained that no-one connected to Pension Assist Ltd, Grovesnor Solutions [sic] Ltd or

Realsave were in any position to provide financial advice. There was no deviation from this with any client at any point. It was explained that any potential member had the right to seek professional financial advice from a regulated advisor of their choice.

The answer to why would people invest their pensions into this scheme with no securities or assurances is not that they were lied to or tricked. People were offered a deal that seemed to tick all the boxes. I do not mean this to be derogatory to members in anyway.

It is very easy for me to look back at the potential minefield I was getting myself into and feel embarrassed that for the reasons listed above there are many parts to this which I would have done very differently or in the most part not done at all.

I am sure with hindsight the members of the scheme would feel the same.

In my defence the actions I took were under the advice of a professional financial advisor. Also through the scheme paperwork I was able to make it clear that I was in no way advising people, that it was their right to (and indeed the scheme paperwork advises them to) seek professional financial advice in this regard. It was made very clear in the paperwork that this decision was there [sic] choice and that in no way was there any assurance given that they would be able to make a claim against a potential loss.

The indemnities signed by each client are in no way ambiguous or hidden in small print.

My capacity as a non-professional to provide them with a vehicle to make an investment at their own discretion and at their own risk is obvious and I believe undisputed.

I am incredibly sorry that the members of the scheme have suffered financially and indeed the ongoing process of trying to get this situation resolved.

From the offset [sic] I have tried to assist the members and any organisation concerned in this regard. I made a full report to The Pensions Regulator the instant it became apparent that Mr Stone would not be honouring the commitment of Realsave to the scheme.

The main emphasis of the report to TPR was that Mr Stone was apparently using the invested funds to pay a proceeds of crime penalty. This was 50% of the clients [sic] total fund and yet to the best of my knowledge no action has been taken to even look into this claim or indeed to identify where the remaining funds are.

I am available to assist this or any investigation in regard of Grovesnor Solutions [sic] to help achieve a speedy resolution.”

65. At the Oral Hearing, Mr D Kench made the following additional points, on behalf of the Trustee:-

- Pension Assist made it clear that it was not regulated and this was also stated on the Scheme’s documentation. It confirmed no parties involved were regulated and recommended that clients seek advice from an IFA. This was not hidden in small print but was on the front page.
- It was made clear to clients that the ultimate investment would be Realsave and every member received brochures.
- Pension Assist’s commission was not discussed with the clients. Occasionally an individual might ask what he as the Trustee received but said that he would get nothing until the end of the investment when there might be a small bonus. As a Trustee he received nothing.
- He was unaware of the idea of diversification.
- On Mr Stone’s conviction no legal action was taken because he was unaware that the Scheme’s funds would be used to meet the confiscation order and could not afford to take legal action.
- Mr Stone had come across to the Trustee as “a very rich, successful, well-connected, astute, smart, switched-on guy”.
- The annual statements issued to the members were produced by Pension Assist.
- The annual statements did not mention Realsave because the money was invested by Grosvenor National Limited and not the member directly.
- He knew that pensions could not be accessed until age 55 but believed Mr Stone’s explanation that the company (Grosvenor National Limited) could take a loan from the Scheme and make a payment to the member as an employee. He sought no separate legal advice on this information.
- At the time he did not consider he had any personal responsibility for the Scheme.
- He did not understand the role of a pension scheme trustee or the gravity of what it meant to be a trustee and believed it was just a requirement for the Scheme. He trusted Mr Stone’s guidance on this and Mr Stone was responsible for all the paperwork, telling him where to sign.

- He accepted the role of Trustee to ensure the money would be directed to the right place. Another trustee could have just taken the money without making the investment.
- He did not see the Trust Deed and Rules and understood it to be a mass of literature that he would not have understood as a layperson.
- He took no steps to understand trusteeship and did not know of TPR's training and guidance resources. If he had known of his potential personal liability, he would not have taken on the role of a pension scheme trustee.
- As the Trustee he did not promote the Scheme as a good scheme; the members made their own decision.
- Prior to the establishment of the Scheme he had only been an introducer. Pensions were viewed as a new business opportunity and so he transitioned from an existing business into Pension Assist.
- Annual returns were submitted for Grosvenor National Limited, but he was unaware of the need to submit returns for the Scheme.
- Members had Mr D Kench's direct contact number and, when concerns were raised, he referred them to TPO. He has assisted TPO where possible and in good time.
- He is very sorry for his involvement and he would not have been involved if he had known that people would lose their money.
- In response to Ms T's submissions (see Section C below), Mr D Kench made the following further submissions:
 - The members were not told that their pension funds would be insured.
 - Pension Assist was clear that it was not regulated, and this was communicated in the Service Agreement. The members were informed that none of the parties that were involved were regulated, that no advice was provided and that they should seek independent financial advice.
 - It was made clear to the members that Realsave was the final investment and each member received the Realsave brochure.
 - As trustee of the Scheme, he received no remuneration, although Pension Assist did receive a fee.

C. Ms T's submissions

66. Ms T has made the following submissions:

- Ms T was unaware that Mr Stone could use a pension fund to pay his private debts and has queried how Mr Stone was allowed to use Realsave's funds in

this way, despite the Trustee being in court and stating that those funds were pension funds, not private funds. She has queried why Pension Assist did not instruct a lawyer to represent investors.

- On discovering, during a telephone call with Mr D Kench in 2016, that her pension fund had been invested in Realsave, Ms T was “appalled to find this out and questioned [Mr D Kench] on how my pension was put into this type of investment and how he was able to do this. He advised that Mr Stone was in fact a millionaire with good profit results and had checked out their offices. I reinforced my dismay as I thought the pension would have been in a more reputable and established company and could not believe he has been able to do this under UK law.”
- On being asked by Mr D Kench, in 2016, if she could call TPR to see whether she could find anything out about the Scheme herself, Ms T has said that she was “completely dumbfounded that as a pension guy [Mr D Kench] does not know what to do.”

67. During the Oral Hearing, Ms T made the following further submissions:-

- She had been searching online for an alternative pension provider, as her pension fund investments were performing badly at the time, and received a telephone call from Pension Assist, which offered her a pension review, following a generic Google search.
- She did not conduct any checks of her own when Mr D Kench explained the investment to her. However, she did look at Pension Assist’s website, which said that Pension Assist was regulated by the Financial Services Authority (FSA).
- During the two-hour meeting at Ms T’s home, Mr D Kench referred to himself as a “pensions adviser”. Ms T believed him, as he had a pension company. with a website that stated that Pension Assist was a regulated body.
- She had no prior investment experience and she believed that Mr D Kench represented a regulated body. Understanding the serious nature of pensions, especially in light of the Robert Maxwell scandal, it was particularly important to Ms T that she was dealing with a regulated body, which she understood Pension Assist to be.
- Ms T had no concerns over the arrangement and did not detect any “alarm bells”.
- She understood the investment would be in the Grosvenor National Scheme. After five years, she would receive the same amount back as had been transferred. She considered that this was acceptable as she was concerned her pension was diminishing in the existing scheme.

- She recalls an email referring to RealSave and rang Mr D Kench to discuss this, as she believed it would be invested in Grosvenor National but was told it was just a way of moving the money. She did not research or check RealSave.
- She was told that there was no risk, and her investment was 100% assured as there was insurance in place to cover any liability.
- She had believed that her existing pension provider would only transfer to a genuine scheme, having carried out checks on the receiving scheme.
- She had trusted Mr D Kench, as a pension expert and consultant, when he told her that she could receive a cash payment with no tax liability. The upfront, legal release of funds without tax implications was attractive to her, as she was unemployed at that time and needed to pay her mortgage. She would not have proceeded if she had known that it was illegal, but she was reassured, by Mr D Kench, that it was a legitimate approach.
- She did not understand what a pension scheme trustee's role was, she merely understood that her money would be paid into the Scheme and that she would get it all back after five years, as though she were giving it to someone to look after legally for that period.
- She did not realise that she was a consultant to Grosvenor National Ltd and does not recall signing the Services Agreement.
- She only recalls signing the transfer documentation to release the funds and simply did as she was instructed to do. She was later provided with the share certificate showing the investment. She questioned the value shown on the share certificate, as it was less than the amount of her transferred fund, but she was informed that this was just the industry standard and that she would be refunded.
- Her understanding had been that Mr D Kench and the Trustee were handling the transfer and managing the Scheme.
- She was not aware of Mr Stone's involvement until Pension Assist told her of the problems with the Scheme.
- Pension Assist's commission was never discussed. When the remuneration was raised, he explained that the trustee would receive nothing until the five years had elapsed, at which point they might receive a small amount.

D. The Additional Applicants' submissions

68. Ms Y and Mr N both attended, and were questioned at, the Oral Hearing.
69. Ms Y made the following submissions:

- She first heard of the Scheme by text message, at a time when she was struggling financially, asking her if she had a pension fund that she wished to transfer.
- She received £16,000 in cash, in two instalments paid a few days apart. Mr D Kench had explained that the money had to be paid in two instalments to avoid being subject to tax charges. In her naivety, Ms Y did not question that advice.
- Ms Y had no prior investment experience.
- She did not know that her pension fund would be invested in Realsave. She was told instead that her money would be invested in an off-shore company.
- She first became aware of Realsave on turning 55 and attempting to access some of her pension fund as a lump sum. She was then informed of the circumstances, including the fact that Mr Stone had used the pension fund to “pay his victims” in 2017. While the Trustee knew of this, he still sent her annual statements, which did not represent the actual position regarding her fund.
- She did not understand the risk posed to her pension fund on transferring it to the Scheme. She had thought that Pension Assist would bear the risk. In any case, she had not expected the investment to fail, as she had considered the Trustee and Mr D Kench to be reputable people.
- She did not consider herself to be a trustee of the Scheme or to have any responsibility for the investment of Scheme funds.
- She had not been aware of the Services Agreement, under which she had signed up to be a “consultant” to Grosvenor National Limited. Ms Y accepted that she probably had signed such an agreement. However, she is dyslexic, needed funds urgently and believed honestly that investing in the Scheme would provide access to her funds.
- She is concerned that the Trustee and Mr D Kench changed Pension Assist’s address without telling the Scheme’s members.
- She has lost money that she had worked hard for before her son was born and, as a consequence, is now in financial hardship. She now does not have enough money for her son to organise her funeral when she dies.
- On hearing of her financial situation, Mr D Kench offered some of his own money to Ms Y. However, she has heard nothing from the Trustee. Mr D Kench had apologised by text, informing her that she had been in the wrong place at the wrong time. However, Ms Y queried why Mr D Kench had not informed her, at the outset, that Mr Stone and Realsave were involved.
- Mr D Kench’s claims of ignorance at the Oral Hearing were insulting and patronising.

- With hindsight, knowing that her hard-earned money has been used in the criminal justice system, she finds it “chilling” that Mr D Kench visited her in her own house to promote the Scheme. Ms Y considers that she could have been at risk and is concerned for her personal safety, given that the Trustee and Mr D Kench know where she, and other Scheme members, live.
- Ms Y would like to see the Trustee and Mr D Kench prosecuted.

70. Mr N made the following submissions at the Oral Hearing:

- Mr N queried why the Trustee has not responded to any of Mr N’s queries concerning the Scheme and his fund, noting that Mr D Kench has always responded instead. He considers that Mr D Kench might be “covering up” for the Trustee.
- Mr N considered that Mr D Kench’s performance at the Oral Hearing, in place of the Trustee, was “dreadful” and he had clearly failed to prepare adequately for the Oral Hearing.
- He queried why the Trustee himself was unable to attend the Oral Hearing.
- He does not believe Mr D Kench’s claim that he and the Trustee were completely ignorant of the duties and requirements imposed on them as pension scheme trustees.
- He had never heard of Realsave until he received a letter from the Trustee on 26 September 2017, informing him of the concerns regarding Realsave and that the situation had been reported to TPR. No literature concerning Realsave was provided to him when Mr D Kench visited him at his home and the investment certificate he received referred to the Scheme, not to Realsave. He had been told that the investment was “safe and covered” and that he would get his money back. He had not heard of Mr Stone until he received my first Preliminary Decision, which I issued on 9 July 2019. He queried why Scheme members were not told of Realsave and why it was not mentioned in any of the annual statements.
- Mr N was told that he was allowed to receive his cash payment at the outset, despite not having reached age 55 at that point; by allowing his pension fund to be used as a loan for five years, he was entitled to a payment which he was allowed at the beginning of that period, because he would not actually receive his fund back until 2018, at which point he would be aged 58 and therefore would have passed minimum pension age. This seemed to make sense to him at the time and he accepted that, if it turned out that the payment was not legitimate, he would have to “hold [his] hand up”.
- Mr N did not have any prior investment experience when he transferred his funds into the Scheme. He had two pension funds prior to the transfer: one with

Standard Life and the other with Phoenix Life. Pension Assist came across to him as reputable advisors.

- Mr N had made it clear to Mr D Kench that he wanted to know what the “catch” was concerning the Scheme. However, he was told that there was no catch, as he was entering into a loan, not an investment. He had understood that securities would be held against the loan, so that there would be no risk.
- Mr N considers himself to be quite “tight” with his money and is very careful as to where it goes and what he does with it, so would not have “given it away on a wing and a prayer”.
- Mr N had not heard of Realsave until he received a letter, dated 26 September 2017, from the Trustee, which mentioned Realsave.
- The only document that Mr N recalls signing was the letter of authority, granting Pension Assist permission to liaise with the scheme within which his pension fund was held prior to the transfer. The only documents he has copies of are the Key Features document, the Terms and Conditions document and a schedule of fees. He has not seen any Services Agreement.
- Mr N understood Pension Assist to be operating the Scheme and that Grosvenor National Limited was the vehicle which lent the money held by the Scheme to the various companies and ensured that the money was repaid by those companies. Mr N considered that that was why he had a certificate from Grosvenor National Limited. As far as he was concerned, the Trustee and Mr D Kench were the Scheme’s investment managers.
- Initially, he had had contact only with the Trustee, not with Mr D Kench. However, once things started to go quiet, the Trustee became uncontactable and Mr N heard nothing from either the Trustee or Mr D Kench.

E. Conclusions

The missing Trust Deed and Rules

71. Before I consider the Trustee’s actions, I will first address the issue of the missing Trust Deed and Rules. In his role as Trustee, I would expect Mr R Kench to have retained a copy of the Trust Deed and Rules. The absence of the Trust Deed and Rules is problematic as it, to an extent, limits my ability to assess whether the Trustee has met his duties as a pension scheme trustee under the Scheme, albeit not those under general trust law, and whether he might be able to rely upon any indemnity or exoneration clause in that deed.

72. However, as Trustee, it is his responsibility to have a copy of the Trust Deed, understand it and act in accordance with it. The Trustee is lawfully required to have become conversant with the Trust Deed and Rules during his period of office¹¹. Should there be specific indemnity and exoneration provisions within the Trust Deed and Rules, it is the Trustee who needs to identify them and evidence why those provisions should provide him with protection in these circumstances.
73. The Trustee has provided the Stirling Deed and argued that this is identical to the Scheme's Trust Deed and Rules in all but name. That may be the case, but I cannot rely on the Stirling Deed's provisions on the basis that the Trustee believes them to be identical. Subtle differences can have significant implications in these circumstances. Further, Mr D Kench informed me at the Oral Hearing that the Trustee had never had sight of the Trust Deed and Rules, so it is clear that he was not familiar with that document.
74. In the absence of the Trust Deed and Rules, I will have to rely principally upon the wider statutory duties placed upon the Trustee, before then going on to consider any potential protection provided by the Trustee Act 1925.

Order of conclusions

75. I will consider Ms T's and the Additional Applicants' complaints under the following headings, to determine whether the Trustee has committed any breach of trust and / or acted in maladministration:

- E.1 The Scheme's status**
- E.2 The Scheme's trustees**
- E.3 Mr R Kench's roles as Trustee and in relation to Pension Assist**
- E.4 Investment of the Scheme's funds**
- E.5 Information provided to members**
- E.6 Member consent**
- E.7 The Trustee's liability**

E.1 The Scheme's status

76. It is not in dispute that the Scheme is an occupational pension scheme. I am informed that the Scheme is a small, self-administered scheme (**SSAS**) and I shall proceed on that basis.
77. I have seen no suggestion that Scheme assets were segregated. Therefore, I shall proceed on the basis that the Scheme's assets were pooled amongst its members.

¹¹ Section 247 of the Pensions Act 2004 imposes this requirement on pension scheme trustees, after an initial period of grace of six months from the date of appointment conferred on trustees by Regulation 3 of The Occupational Pension Schemes (Trustees' Knowledge and Understanding) Regulations 2006.

E.2 The Scheme's trustees

78. A SSAS often has a professional or independent trustee, such as Mr R Kench, in addition to member trustees. If Ms T was a member trustee, her being so may have implications on the outcome of the complaint, and therefore I need to make a finding on her status.
79. Having reviewed the evidence, I am not persuaded that Ms T is a trustee of the Scheme. The Key Features document does suggest that the members would also be trustees. However, the only documents that the members signed in relation to joining the Scheme were the Services Agreement and the Application Form, the latter of which only carries the limited declaration set out in paragraph 48 above.
80. There is no indication in that declaration that Ms T was taking on the role of a Scheme trustee and I have seen no evidence that Ms T accepted such a role. I have seen no deed appointing Ms T as a Scheme trustee and there is no evidence that any such deed exists. I would also expect a Deed or similar instrument to have been signed formally appointing the members to the role of trustee but there is no evidence of this. At the oral hearing Mr D Kench was asked about this and he confirmed that he was unaware that the members were trustees and there was no instrument appointing anyone else as a trustee.
81. I have seen no document under which Ms T or the Additional Applicants were appointed as trustees of the Scheme. Therefore, my conclusions are reached on the basis that Ms T is a member, not a trustee, of the Scheme and that the Trustee is, and has been at all times, the sole trustee of the Scheme.

E.3 Mr R Kench's roles as Trustee and in relation to Pension Assist

82. As explained in paragraphs 78 to 81 above, Mr R Kench was the sole trustee of the Scheme. Mr R Kench was also an employee of Pension Assist, his brother, Mr D Kench, being Pension Assist's sole director and shareholder. Clearly, Mr R Kench's interests, in his capacity as employee of Pension Assist and brother of Pension Assist's sole director and shareholder, conflicted with his duties to the Scheme's beneficiaries in his capacity as Trustee.
83. The Trustee was under a fiduciary duty not to profit from his position in relation to Pension Assist at the expense of the Schemes' beneficiaries and not to be in a position of conflict of duty or interests.
84. The Trustee was also under a common law duty to act with prudence, requiring him to take such care as an ordinary prudent man of business would take in managing his own affairs¹². Case law¹³ has further established that the standard of prudence is to be determined by reference to the actions of an ordinary man of business, who was under a moral obligation to provide for others.

¹² *Speight v Gaunt* [1883] EWCA Civ 1.

¹³ *Re Whiteley* (1886) 33 ChD 347. See Section E.4.4 below for further detail.

E.3.1 TPR's Code of Practice no.13

85. 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 code¹⁴ in July 2016 (the **2016 Code**).
86. 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 my Office.
87. Paragraph 143 of the 2013 Code also states that the statutory requirement under section 249A of the Pensions Act 2004, to have in place an effective system of governance, includes a requirement for pension scheme trustees to ensure that they have processes in place to manage their conflicts of interest.
88. 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 controls¹⁵ 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."
89. The Trustee has admitted that he was not aware of any of the requirements imposed on pension scheme trustees by statute, case law or TPR's publications. By his own admission, he has not even retained a copy of the Scheme's Trust Deed and Rules, let alone become conversant with them. He was therefore clearly unaware of the above governance requirements, or of the requirement, under section 247 of the Pensions Act 2004, to have acquired knowledge and understanding of the law relating to pensions and trusts within six months of

¹⁴ Code of practice no: 13: 'Governance and administration of occupational trust-based schemes providing money purchase benefits'.

¹⁵ i.e. in accordance with section 249A of the Pensions Act 2004.

becoming Trustee of the Schemes¹⁶. I have seen no evidence that any steps were taken to manage any conflict of duty or interests in relation to the Scheme or that any policy was in place to do so.

E.3.2 Payments to Pension Assist

90. As explained in paragraph 38 above, when members joined the Scheme, only half of their pension fund was invested in Realsave, while approximately 30% was paid to Pension Assist and approximately 20% was paid to the member. These payments to Pension Assist of nearly one third of each member's pension fund constituted an obvious conflict of interest in Mr R Kench's role as the Scheme's Trustee, in breach of his fiduciary duty.
91. In knowing that he would receive this payment in his capacity as Mr R Kench, being an employee of Pension Assist and the brother of Pension Assist's director and shareholder, the Trustee was incentivised to invest members' funds into Realsave, and so cannot have been objectively assessing the suitability of the investment for the Scheme. Additionally, at the oral hearing, Mr D Kench admitted that members were not made aware of either the commission arrangement or the conflict of interest. Further, the Trustee has submitted in writing that he considered that working with Mr Stone to set up the Schemes and invest in Realsave would benefit Pension Assist, by building on the working relationship that it already had with him for potential future projects (see paragraph 24 above).
92. I cannot see how such a flagrant breach of the Trustee's duty to avoid conflicts of interest could have been addressed, and I have seen no evidence that any steps were taken to manage the conflict of interest.
93. The Trustee has submitted that he has not, at any point, received payment in respect of his position as Trustee. However, Mr R Kench clearly profited from the receipt of a large percentage of members' funds at the time when they were admitted to the Scheme. Such a level of commission is completely disproportionate with the level of service provided by Pension Assist and far in excess of typical commission levels paid to regulated financial advisers. Mr R Kench's role in relation to Pension Assist clearly created a conflict of interest with his role as Trustee.
94. As a consequence of the payment of approximately 30% of members' funds to Pension Assist, members' funds were diminished by a significant amount at the outset, with part of the remainder being invested in one investment only and the rest paid direct to the member which, constituted an unauthorised payment (see paragraph 98 below). As I have explained in Section E.4 of this Determination, investing the Schemes' funds in their entirety in one investment cannot be said to have been a reasonable or prudent manner of investing those funds.

¹⁶ Section 247(3)(a) Pensions Act 2004 contains an express requirement that the trustee of a pension scheme becomes conversant with the scheme's trust deed and rules.

95. The Trustee's submissions that he was unaware of any duties or requirements imposed on him as a pension scheme trustee are not in dispute. However, they do not assist him in relation to the complaints made against him.
96. The Trustee cannot have been oblivious to the fact that, as Trustee, he was responsible for large sums of money transferred into the Schemes by members, which those members would rely upon to sustain themselves during their later years. However, the Trustee did not make enquiries regarding the requirements imposed upon him in his role as Trustee. I cannot see that any reasonable pension scheme trustee would have assumed their role without having at least enquired as to the existence of any specific duties to which they were subject.
97. The Trustee has breached the requirements of sections 247 and 249A of the Pensions Act 2004, and has acted in breach of his fiduciary duties not to be in a position of conflict of duty or interests and not to profit from his position as Trustee. The Trustee also failed to act in accordance with the 2013 Code, and I find that such failure to have regard to the 2013 Code amounts to maladministration on the Trustee's part.

E.3.3 Payments to Scheme members

98. I understand that Ms T received approximately 24% of the transferred fund value as a lump sum payment from the Scheme. As Ms T was younger than the minimum pension age of 55 at the time of the transfer, this was an unauthorised payment under Section 160(2) Finance Act 2004 (**Unauthorised Payment**), and a form of pension liberation. The payment of any tax charges arising from that payment is a matter for HMRC, and not for me, to investigate further and to determine. However, the Trustee's actions and omissions in entering into this arrangement, under which Unauthorised Payments were made, fall within my jurisdiction.
99. The Trustee has said that he was aware of pension liberation as a concept but was reassured by Mr Stone that the arrangement was legitimate and was not pension liberation.
100. I cannot see how the Trustee, being aware of pension liberation, could have failed to identify that the payment to Ms T would be an Unauthorised Payment. Further, regardless of whether the Trustee was aware that the payment would constitute an Unauthorised Payment, there were requirements imposed on the Trustee, by case law, which he clearly did not meet on deciding to pay a significant proportion of members' funds from the Scheme to the members. Those requirements are discussed further in Section E.4.4 below. In particular, the Trustee was required to act as an "ordinary prudent person", investing "for the benefit of other people for whom he felt morally bound to provide"¹⁷. By merely taking Mr Stone's word that paying Scheme funds to members before their 55th birthday would not constitute an Unauthorised Payment, without even taking written advice from Mr Stone to confirm

¹⁷ *Whiteley* (see Section E.4.4).

that point and given that the Trustee was aware of the concept of pension liberation, the Trustee clearly failed to meet those minimum standards of prudence.

101. Mr D Kench's failure to make adequate enquiries as to the legitimacy of the payments to members and his act of making the payments themselves amounted to maladministration and a breach of trust.

E.4 Investment of the Scheme's funds

102. I consider, in this section: to what extent the investment of the Scheme's funds in Realsave satisfied the statutory and common law requirements in relation to investing pension scheme funds; and the extent to which the Trustee has committed maladministration in connection with his investment acts and/or omissions.

E.4.1 Investment powers and duties

103. The duties imposed on pension scheme trustees in relation to investments are contained in: the pension scheme's documents, such as the scheme's trust deed and rules; Part I of the 1995 Act; and case law, as set out below.
104. As I have explained in paragraphs 71 to 74 above, no copy of the Scheme's Trust Deed and Rules is available to me. Therefore, I can look only at the statutory and common law requirements.

E.4.2 Statutory investment duties under the Pensions Act 1995 (the 1995 Act)

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

E.4.2.1 The Investment Regulations

107. The Investment Regulations, which set out specific requirements in relation to pension scheme trustees' exercise of their investment powers under Section 36(1) 1995 Act, are restricted in their application to the Scheme, by virtue of Regulations 6(1) and 7(1), on the basis that the Scheme has fewer than one hundred members.
108. However, despite the above restrictions, Regulation 7(2) of the Investment Regulations still requires trustees of schemes with fewer than 100 members to "have regard to the need for diversification of investments, in so far as appropriate to the circumstances of the scheme".

109. It is not disputed that there was no diversification of investment of Scheme funds whatsoever; the Trustee has not claimed to have invested any Scheme funds anywhere other than in Realsave. Mr D Kench has submitted, on the Trustee's behalf, that he was unaware of, and therefore had not considered, the requirement to have regard to the need for diversification of the Schemes' investments in accordance with Regulation 7(2) of the Investment Regulations, at any point leading up to his purported investment of the Schemes' funds in Realsave.
110. However, the Trustee's ignorance of these requirements provides him with no excuse. Knowing, as Mr R Kench did, that he would be directly involved in the investment of other people's pension funds in his role as Trustee, had he acted reasonably he would have made, at the very least, basic enquiries about the role and the responsibilities that accompanied it. A simple internet search would have brought up TPR's guidance, which is aimed specifically at new pension scheme trustees. Perhaps this knowledge would have dissuaded Mr R Kench from accepting the trustee role. But at the very least, assuming he was acting with the best financial interests of the members in mind, as he says he was, he would have become aware of the requirement to have some diversification in the Scheme's portfolio. Instead, Mr R Kench accepted Mr Stone's guidance and ignored the common-sense conclusion that trusteeship would be subject to obligations and duties.
111. Despite the statement, in the Key Features document, that "a wide range of investments" was available under the Scheme (see Section E.3.5 above), Realsave was the sole investment offered by the Scheme. In fact, there is no evidence that Scheme members' funds were ever invested in Realsave, although Mr D Kench assured me, at the Oral Hearing, that they had been (see paragraph 38 above). While the Trustee may have passed the funds to Mr Stone for Realsave's use, I have seen no evidence that the Trustee received share certificates documenting any investment of those funds in Realsave. I shall discuss this point further in section E.4.4 below. In any event, the Trustee has not submitted that he invested any Scheme funds anywhere other than in Realsave.
112. It is clear, therefore, that there was no attempt to diversify the Scheme's investments whatsoever. As I have found in paragraphs 127 to 128 below, the purported investment in Realsave would have been high-risk in nature and, as set out in Section E.4.4 below, the Trustee had carried out no due diligence in relation to that purported investment. On that basis, I find that the Trustee acted in breach of the requirements of Regulation 7(2) by failing to have regard to the need to diversify investments taking into account all of the circumstances of the Schemes.

E.4.2.2 Section 36(3) and (4) (Choosing investments: requirement to obtain and consider proper advice)

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

“(3) Before investing in any manner...the trustees must obtain and consider proper advice on the question whether the investment is satisfactory having regard to the requirements of regulations under subsection (1), so far as relating to the suitability of investments...”

“(4) Trustees retaining any investment must –

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.”

114. Proper advice is defined by Section 36(6) of the 1995 Act as advice given by: a person with the appropriate FCA authorisation; or, where FCA authorisation is not required, a person who is “reasonably believed by the trustees to be qualified in his ability in and practical experience of the management of the investments of trust schemes”.
115. Under subsection (7) of Section 36 of the 1995 Act, pension scheme trustees will not be regarded as having complied with subsections (3) or (4) unless the advice that they have obtained is in writing.
116. The Trustee has explained that he relied on Mr Stone’s advice regarding the purported investment in Realsave, on the understanding that Mr Stone was an IFA. However, the Trustee took no steps to verify Mr Stone’s purported IFA qualification or experience. The Trustee has conceded that he undertook no due diligence on Mr Stone’s background through, for example, reviewing the Financial Services Authority’s (as it was at the time) register.
117. Mr R Kench appears to have made his assessment of Mr Stone’s “experience” and “success” as an IFA on the basis of Mr Stone’s apparent wealth and his expensive lifestyle. I cannot see how any reasonable pension scheme trustee would have reached the conclusion that an individual was “qualified in his ability and practical experience of the management of the investments of trust schemes” without at least having sought independent verification of that individual’s ability or experience.
118. However, it is not in dispute that, if the Trustee invested members’ funds in Realsave, he did so without having taken any written investment advice whatsoever. Given the statutory requirement, imposed by Regulation 7(2), to diversify Scheme investments, it seems more likely than not that, had the Trustee obtained investment advice in accordance with Section 36 of the 1995 Act, he

would have been advised against investing the Scheme's assets solely in Realsave's preference shares.

119. I find, therefore, that the Trustee has acted in breach of the requirement to obtain written advice under subsections 36(3) and (4) section 36 of the 1995 Act.

E.4.3 Delegation of the Trustee's power of investment

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

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

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

E.4.4 Duties under case law

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

- Pension scheme trustees are required, in investing scheme assets, to take such care as an ordinary prudent person would take if he invested "for the benefit of other people for whom he felt morally bound to provide" (*Re Whiteley* [1886] UKHL).
- Pension scheme trustees must act in members' best financial interests (*Cowan v Scargill* [1984] 2 All ER 750).
- A distinction has been drawn by the House of Lords between investments made by a business person and those made by trustees, the requirement of trustees being that trustees must avoid "all investments attended with hazard" (*Learoyd v Whiteley* [1887] 12 AC 727).

124. 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.'

125. 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. Deliberately not taking advice is a reckless breach of trust.'
126. I find that, in attempting to invest the entirety of the Scheme's assets in Realsave without taking investment advice and in failing to obtain any formal documentation showing that the investment had actually been made, the Trustee cannot be considered to have met the above requirements. I find that the Trustee failed in his equitable duty to exercise due skill and care in the performance of his investment functions. Attempting to invest all of the Scheme's assets in Realsave was high-risk in nature and there was a complete lack of diversification of investment, showing a lack of regard for members' financial interests and a failure to avoid hazardous investments, contrary to the requirements imposed on trustees by *Cowan v Scargill* and *Learoyd v Whiteley*
127. Regarding the purported investment itself, I have made the following observations:
 - 128.1. Realsave had no history, it was a start-up company with no proven track record of profitability;
 - 128.2. the purported investment was unregulated and without any means of Regulatory redress; for instance, via the Financial Services Compensation Scheme;
 - 128.3. Realsave proposed to provide short term finance without the typical credit checks used by mainstream lenders; and
 - 128.4. the purported investments proposed a high level of return 2.5 – 3% per month, which was well above typical investment returns for that time.
128. Bearing in mind the above, the purported investment would most likely have been classed as high-risk by any competent financial adviser.

129. The only evidence that the Trustee conducted any due diligence on the purported investment is: Mr D Kench's account of visiting the warehouse which would be used to store goods but was, at that time, empty; the 'due diligence pack', or company brochure, issued by Realsave and therefore self-serving; and the Trustee's personal impression of Mr Stone's integrity, which has been demonstrated to be palpably wrong.
130. In respect of the due diligence pack, it contains only generic, high-level information. It provides no meaningful detail that I consider a pension scheme trustee investing scheme assets should have considered and, in most cases, sought independent advice in relation thereto. For example, there was no detail of: the investment or its expected returns; or the terms of the investment agreement such as costs, fees or how the Trustee might withdraw from the investment agreement. There also appears to be no formal confirmation of the terms of the investment. Further, I note that the company brochure contains a statement that "We don't require your home or any other personal assets as security". I find it interesting that the Trustee appears not to have noticed, or queried, that statement, given that he had been informed that Realsave would be holding assets securely in its warehouse as security for the loans that it issued.
131. The Trustee has submitted that Mr Stone verbally assured him that he had investments available to him to personally secure the assets of the Scheme. However, the Trustee saw no documentary evidence of the security Mr Stone had said would be provided and took no steps to formalise Mr Stone's assurances. These steps that Mr D Kench said he took to minimise the risk of investment loss were wholly inadequate, especially given the high-risk nature of the investment in Realsave.
132. As a further observation in respect of Mr R Kench's reliance upon Mr Stone's advice, I have seen no evidence that Mr Stone was appointed in any way as an adviser to Mr R Kench as Trustee. Essentially, Mr R Kench has relied upon the personal faith that he placed in Mr Stone's apparent knowledge, experience and ability, making no enquiries himself into the legitimacy or suitability of the Scheme, the investment of Scheme members' funds or the payments made to him and Pension Assist from those funds. I cannot see that Mr R Kench's reliance upon Mr Stone's advice and failure to make his own enquiries accord with the duty imposed upon him by the case of *Re: Whiteley*
133. Finally, as explained in paragraph 39 above, while the Trustee has said that he invested the Scheme's funds in Realsave, no such investment is shown in the records available at Companies House and I have seen nothing to suggest that the Trustee received, or even requested, evidence from Mr Stone that shares had in fact been purchased in Realsave using those funds. Clearly, the Trustee has not demonstrated that he has met any of his investment duties in relation to any of the Scheme's funds.

134. I find that the Trustee has failed to meet the minimum standards imposed on him by case law, outlined above in paragraphs 123 to 125, regarding his investment of the Scheme's funds. The Trustee has failed to discharge his equitable duty to exercise due skill and care in the performance of his investment functions, which constitutes a breach of trust on his part.

E.5 Information provided to members

135. The benefit statements, which I understand were issued to members on an annual basis (see Section A.4 above), gave the impression that members would be due to receive back the amount of their fund that had been transferred into the Scheme when the investment matured on the fifth anniversary of their joining the Scheme (members having additionally received a cash payment on joining the Scheme). As I have explained in paragraph 58 above, these benefit statements, which Mr R Kench had signed, apparently in his capacity as Trustee, continued to be issued after Mr Stone's conviction and Realsave's dissolution, despite the Trustee's having received no information concerning the performance of the investment in Realsave.
136. Mr D Kench explained at the oral hearing that these annual benefit statements had been prepared and sent out by Pension Assist. However, Mr D Kench was unable to give any good reason why the Trustee had allowed Pension Assist to issue those annual benefit statements. The Trustee clearly knew the statements contained false information, as Mr D Kench informed me, on the Trustee's behalf at the Oral Hearing, that he had continued to send out the statements in the hope that the situation would resolve itself. A basic search of the Companies House register at any time after 14 October 2014 would have informed him that Realsave had been dissolved and that it had not filed any annual reports and accounts during its existence. The Trustee has not been able to point to any information or proper evidence that the investment in Realsave was performing as it should have done, on which he could have relied when preparing those benefit statements.
137. Pension Assist stopped sending annual benefit statements in 2015, but the Trustee did not inform members of the situation concerning their investments under the Scheme until September 2017.
138. The Trustee was under a duty to act honestly and in good faith. Although Mr D Kench has submitted on the Trustee's behalf that it was Pension Assist that sent the statements to members, he clearly knew of their content, as is evidenced by his signature on those statements. The Trustee has submitted that he acted with the best of intentions and tried to assist the members. However, providing members with false information and withholding the information that Mr Stone had been convicted and that any preference shares in Realsave were worthless following Realsave's dissolution in 2014, was clearly not carried out honestly or in good faith. The Trustee has clearly acted in breach of his duty to act honestly and in good faith.

E.6 Member consent / contributory Negligence

E.6.1 Member consent

139. 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).

140. 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."

141. 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."

142. Underhill and Hayton: *Law of Trusts and Trustees*^{18 19} advises that, for this principle to apply: the beneficiary must have: been "of full age and capacity at the date of such assent or release²⁰"; "had full knowledge of the facts and knew what he was doing²¹ and the legal effect thereof²², 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 significant²³)

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].

that he should himself have directly benefited by the breach of trust²⁴; and “no undue influence was brought to bear upon him to extort the assent or release²⁵.”

143. 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.”
144. The Trustee has submitted that he was acting on the instruction of the members, who were aware that the Scheme's funds were to be invested in Realsave, and that he provided no advice or assurances as to the success of the investment. The members selected the investment of their own volition and were invited to seek their own professional advice on whether to proceed.
145. I note that there are also statements, in the Scheme's documents, that might suggest that the Scheme's members were informed of the facts, if those statements were to be taken at face value.
146. The Key Features Document (see Section A.3.5 above) stated that: members could “choose from a wide range of investment opportunities, to build up your pension fund”; members had a commitment to “act as a trustee of the SSAS with the other SSAS members, to operate the SSAS effectively”; members were required “to take responsibility as a trustee for the management of the investments in the SSAS; and that “some investments are higher risk than others and you should understand the risk profile and diversity of the investments you hold.”
147. The Terms and Conditions (see Section A.3.3 above) contains a statement that “We are not authorised by the FSA to provide you with advice in relation to your SSAS and we recommend that you obtain advice where required from a qualified financial adviser. Nothing in any communication to you should be construed as financial or investment advice within the meaning of the Financial Services and Markets Act 2000”. There is a further statement, in the Terms and Conditions, that investments are made at the direction of the members and that Grosvenor National Limited gives no investment advice and is not required to assess the suitability of investments and accepts no liability for the choice or performance of individual investments or of the members' chosen advisers.

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.

²⁵ See paragraph 144 below.

148. Considering first the Key Features Document, I have already noted, and Mr D Kench has confirmed, that there was no choice of investment opportunities offered under the Scheme (see section E.4.2.1) as the investment in Realsave was the only investment available under the Scheme. It is clear, from the Trustee's and Mr D Kench's accounts of the circumstances in which the Scheme was set up (see Section A.2 and the Trustee's submissions in Section B) that the Scheme was set up as a vehicle to invest in Realsave and there had at no point been any suggestion that it would be used for any other investment. There is no evidence to suggest that the members had any effect on the Trustees' actions. This was a predetermined investment by the Trustee, not the members.
149. I have also found that, contrary to the statements in the Key Features Document, no member of the Scheme has at any point been a trustee of the Scheme (see Section E.2).
150. Regarding the Terms and Conditions, the Trustee's submissions and those made on his behalf by Mr D Kench are in accordance with the statements that I have referred to in paragraph 147 above. It does also appear that there may have been some slight awareness by at least a couple of the members that they did not entirely understand the terms under which they had joined the Scheme and/or that the payment they received was not entirely risk-free or without consequence. However, *Re Pauling's Settlement Trusts* requires me to consider all of the circumstances in which Ms T and the Additional Applicants joined the Scheme, namely the context in which they received the Terms and Conditions and any influence that they might have been subject to at or before the time when they each joined the Scheme, in order to determine whether it is fair to allow them to sue the Trustee for the breaches of trust that I have found him to have committed.
151. Ms T's, Ms Y's and Mr N's accounts of the meetings that preceded the transfer and investment of their pension funds contradict the Trustee's submissions and those made by Mr D Kench, outlined at paragraph 144 above and in the Terms and Conditions. As it was Mr D Kench, not the Trustee, who attended the meeting with the members of the Scheme, the Trustee's knowledge of what happened at those meetings must be, at best, second hand. There is no documentary account of what was said at those meetings. I do not consider it reasonable to rely on what the Trustee has said was discussed, given that he was not present at the meetings and that he did not attend the oral hearing to give evidence on oath.
152. At the Oral Hearing, Ms T submitted that Mr D Kench had presented himself as a "pensions adviser" and that she had believed him, as he owned a pension company, with a website that had stated that it was regulated by the FSA. Ms T submitted that it was particularly important to her that she was dealing with a regulated body, given the serious nature of pensions and being aware of the Robert Maxwell scandal. Ms T submitted that she was informed that the investment was insured, so she would not lose any of her pension fund. Ms T had also considered that her existing pension provider would only transfer her pension fund to a genuine scheme, having carried out checks against the Scheme.

153. Mr D Kench submitted, at the Oral Hearing in response to those submissions by Ms T, that the website had never included any statement that Pension Assist had FSA authorisation and that Pension Assist was clear that it was not regulated, and this was communicated in the Services Agreement. Mr D Kench also submitted that: the members were informed that none of the parties that were involved were regulated; no advice was provided by Pension Assist; that they should seek independent financial advice; and no member was told that their pension funds would be insured. However, contrary to Mr D Kench's submissions, the introductory letter that Ms T received from Pension Assist, dated 6 December 2012 (see Section A.3.5 above) stated clearly that the investment would be in "underwritten" short term loans and that she was "guaranteed a return of 100% of [her] initial transfer value upon completion of the 5 year term". This would align with the Trustee's and Mr D Kench's position that Mr Stone had provided personal guarantees as to the investment's security and I consider it to be reasonable to expect that that persuasive factor was shared with all prospective members.
154. Ms Y and Mr N also stated, at the Oral Hearing, that they had considered Pension Assist to be reputable advisers. Ms T, Ms Y and Mr N all stated that they had had no prior investment experience and both Ms T and Ms Y were in urgent need of funds and so were in a financially vulnerable position. Mr N submitted that he would not have simply given his money away "on a wing and a prayer" and had questioned Mr D Kench to check that there was no "catch" to the investment. All three of the Scheme members whom I questioned at the Oral Hearing seemed unclear of the documentation that they signed in relation to their joining the Scheme and clearly trusted Mr D Kench's instructions to sign those documents. For example, Ms Y accepted that she had "probably" signed the Services Agreement, but informed me that she was dyslexic and had honestly believed that investing in the Scheme would allow her the access to her funds that she needed urgently at that time.
155. Ms T and the Additional Applicants have consistently submitted that they were not aware of Realsave's involvement, that they had not been informed that Pension Assist would receive commission and that they were assured that their investment would be secure.
156. Having considered the circumstances of the meetings, the parties' submissions at the Oral Hearing and the content of the introductory letter that Ms T received from Pension Assist that I referred to in paragraph 153 above, I find Ms T's and the Additional Applicants' submissions concerning the meetings to be more credible than the Trustee's and Mr D Kench's respective submissions that no advice was provided to members at those meetings. Even if the discussions were caveated with the statement that no advice was being provided, the nature of the meetings means that it is more likely than not that the members, who had no prior investment experience, reasonably believed that they were being advised.
157. There would have been no reason for the members to meet face to face with Mr D Kench if the purpose of that meeting had been solely to share information. The use

of a face to face meeting, without any written record, allowed Mr D Kench to present the Scheme and the investment in Realsave as he wished. If the Trustee and Mr D Kench had merely wanted to provide documentation to the potential members for their consideration, this could have been done by correspondence. Mr D Kench and the Trustee appear to have worked as a duo, in order to: find prospective members who had no prior investment experience and many of whom were in financially vulnerable positions and in need of immediate cash funds; and persuade them to transfer their pension funds into the Scheme (which would financially benefit them). The Trustee was clearly aware of the nature of the meetings between Mr D Kench and the Scheme's members. I note Ms Y's submission that, on hearing that Ms Y was in severe financial difficulty following the loss of her pension fund, Mr D Kench offered to pay her some of his own money. I consider this to be evidence that Mr D Kench accepted that he and the Trustee were in the wrong and had brought about Ms Y's difficult situation.

158. I note that in *Re Pauling's Settlement Trusts* it was found that, due to the complicated action in question in that case, even one of the claimants who was an experienced lawyer could not be expected to appreciate his rights as a beneficiary until they had been drawn to his attention. Looking at the present case, investments made by a pension scheme, and the raft of legislation which governs those investments and the trustees who possess the power to make them, are a complicated matter. It is clear, from Ms T's and the Additional Applicants' accounts of their joining the Scheme, that they, understandably as they are not pension professionals and had no investment experience, placed their trust in the Trustee to invest their funds on their behalf and to do so safely, as Mr D Kench had assured them would be the case. Given their lack of relevant experience and their accounts of their meetings with Mr D Kench (which, as I have explained in paragraph 156 above, I consider more likely than not to be accurate), I cannot see that Ms T or the Additional Applicants could have been expected to understand that their pension funds were to be invested in Realsave or that the Trustee had almost completely failed to carry out any due diligence before making that investment.
159. The Trustee's credibility is further eroded by the fact that, as submitted on his behalf by Mr D Kench, he: allowed false statements of the performance of the members' funds, which were entirely fabricated as the Trustee had received no information concerning Realsave's performance whatsoever, to be issued to the members; and withheld from the members the fact that Mr Stone had been convicted of fraud and the implications of this for their pension funds (see Section E.5 above).
160. I consider, on the balance of probabilities, that: Ms T and the Additional Applicants lacked the full knowledge of the facts of the investment of their funds under the Scheme; they were unduly influenced by Mr D Kench when they made their respective decisions to transfer their pension funds into the Scheme; and the Trustee was aware of, and essentially counting on, this undue influence.

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

E.6.2 Contributory negligence

162. I have found the Trustee 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 E.3 to E.5 above.

163. 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'"²⁶.

164. It is further explained, in Underhill and Hayton, that "Where the trustee has acted fraudulently, a further reason for denying him the defence would be the rule that 'it is no excuse for someone guilty of fraud to say that the victim should have been more careful and should not have been deceived'"²⁷.

165. As I have explained above in section E.4.4, duties imposed on the Trustee by case law required him to invest members' funds prudently and with regard to members' best interests. The Trustee also had a fiduciary duty to act honestly and in good faith when dealing with members' funds. As I have already found, the Trustee has breached all of those duties and those breaches have caused the members to lose their pension funds.

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

E.7 Mr R Kench's liability as Trustee

167. Typically, a pension scheme's trust deed and rules would contain some form of indemnification or exoneration in favour of its trustees. However, as I have not been provided with a copy of the Trust Deed and Rules, my starting point in determining whether or not Mr R Kench, in his capacity as Trustee, is to be held personally liable for his actions and omissions has to be that he cannot benefit from any indemnity or exoneration under the Scheme's governing documents.

²⁶ 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].

²⁷ *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.

168. The Trustee has highlighted a passage from the Terms and Conditions document (see Section A.3.3 above) to suggest that no advice was provided to members in relation to their investment choice. I note that the Key Features document carries similar warnings. However, I do not consider that this assists the Trustee in any way: I have seen no such term or condition relating to Mr D Kench, whose visit to Ms T prompted Ms T to transfer his pension fund into the Scheme; and the term referred to applies only to Grosvenor National Ltd and not to Mr R Kench as a Trustee (or, more generally, to any trustee of the Scheme).
169. Even if there were an exoneration or indemnity clause under the Trust Deed and Rules, or exclusion or limitation of the Trustee's liability under any other document, the Trustee would be prevented from relying upon it, in relation to his shortcomings in the exercise of his investment functions, by Section 33 of the Pensions Act 1995 (**1995 Act**):
- “(1) Liability for breach of an obligation under any rule of law to take care or exercise skill in the performance of any investment functions, where the function is exercisable:
- (a) by a trustee of a trust scheme, or
- (b) by a person to whom the function has been delegated under Section 34,
- cannot be excluded or restricted by any instrument or agreement.
- (2) In this Section, references to excluding or restricting liability include:
- (a) making the liability or its enforcement subject to restrictive or onerous conditions,
- (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy”.
170. 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*).
171. 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.

172. A purposive interpretation of Section 33 requires indemnities (particularly a member indemnity) to be included. The impact of any indemnity would prejudice the member in consequence of his pursuing his right or remedy (section 33(2)(b)). To allow an indemnity under Section 33, especially where I have found dishonesty (see below section E.7.2), 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.
173. I find that the application form to join the Scheme containing the indemnity in this case can properly be regarded as forming part of the documents comprising the Scheme. "Pension scheme" for the purposes of section 1(5) of the 1993 Act is defined as a "...scheme or other arrangements, *comprised in one or more instruments or agreements* (my emphasis) having or capable of having effect so as to provide benefits".
174. On that basis, if the Scheme's documents contain any exoneration clause or indemnity, Section 33 would apply and would prevent the Trustee from relying on it²⁸. This would render any such provisions ineffective in preventing the Trustee from being held personally liable for any loss suffered by members in relation to the Trustee's breach of his investment duties, imposed by statute (see Section E.4.2) and/or common law (see Section E.4.4) by having invested, or attempted to invest, the Schemes' assets in Realsave.

E.7.2 Section 61 of the Trustee Act 1925

175. Under Section 61 of the Trustee Act 1925 (**Section 61**), I may direct relief to the Trustee, wholly or partly, of any personal liability for any breach of trust that has arisen out of his actions or inactions, if it appears to me that: (1) he acted honestly and reasonably; and (2) it would be fair to excuse him from personal liability, having regard to all the circumstances of this case.
176. The question of what constitutes "honesty" has been considered by the Courts in several key cases.
177. In *Armitage v Nurse* [1997] EWCA Civ 1279, the test for honesty, in the context of considering the validity of an exoneration clause, appeared to be subjective. However, in considering the test of honesty in *Armitage*, 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

²⁸ It has also been acknowledged, in the Court of Appeal judgment of *Robert Sofer v SwissIndependent Trustees SA* [2020] EWCA Civ 699, that it is arguable that an indemnity must be subject to an implied term that it does not apply to any underlying transaction where the defendant has acted dishonestly (paragraph 52 of the judgment). I have considered the question of the Trustee's honesty below, in Section E.7.2.

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."

178. 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."

179. 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".

180. 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.

181. 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*...”.

182. 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.
183. In the later case of *Fattal v Walbrook Trustees (Jersey) Limited* [2010] EWHC 2767 (Ch)29, it was accepted, at para 81, that the law concerning the interpretation of exoneration clauses, as set out in *Walker v Stones*, was not confined to applying to solicitor-trustees. As set out in *Fattal v Walbrook* the test for dishonesty, at least in the case of a professional trustee, seems to be that the trustee has committed a deliberate breach of trust and either: (a) knew, or was recklessly indifferent as to whether, it was contrary to the interests of the beneficiaries; or (b) believed it to be in the interests of the beneficiaries, but so unreasonably that no reasonable professional trustee could have thought that what he did was for the benefit of the beneficiaries.
184. While the Trustee received no remuneration in respect of his office as Trustee, his position could be regarded as analogous to that of a professional trustee. The Scheme was, by the Trustee’s own submission, offered to members as an opportunity to invest in Realsave and the Trustee benefitted, in his capacity as Mr R Kench, from large cash sums being transferred to his brother’s company, Pension Assist, of which he was an employee. The Trustee has also submitted that his motivation for establishing the Scheme and investing its assets in Realsave was to build upon his existing business relationship with Mr Stone, in order that more profit-making opportunities might arise in the future. On that basis, I consider that the test for dishonesty set out in *Fattal v Walbrook* applies here.
185. The subjects of scrutiny are the acceptance of Scheme funds, supposedly to be invested in preference shares in Realsave in order to raise capital for Realsave to use for its benefit, by an individual who was an acquaintance of someone connected with Realsave (Mr Stone being an acquaintance of Mr R Kench’s and

²⁹ 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.

married to the sole director of Realsave), as well as the payment of a significant proportion of members' transfer values to his brother's company, Pension Assist. Although, by his own admission, the Trustee lacked experience as a pension scheme trustee, I cannot see how the existence, or at least the possibility of the existence, of a duty of care in relation to his handling of members' funds can have escaped his notice. Particularly so, given that as a professional experienced individual, in his capacity as a director (of Grosvenor National Ltd), he would or should be aware of the concept of director's fiduciary duties, which are akin.

186. I have already found that the Trustee acted in breach of trust by: breaching his fiduciary duty to manage conflicts of interest and his duty not to profit from his position as Trustee (see Section E.3); 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 E.3); failing to comply with the requirement, under section 247 of the Pensions Act 2004, to have knowledge and understanding of the Scheme's documents or the law relating to pensions and trusts (Section E.3); transferring large sums of money into his brother's company, Pension Assist (Section E.3.2); paying all of the Schemes' assets that remained after the payments to Pension Assist and to the members to Mr Stone to invest in Realsave's preference shares (see Section E.4); and providing false information to members, in breach of the Trustee's fiduciary duty to act honestly and in good faith (Section E.5).
187. I have also found that it was maladministration on the Trustee's part to have: failed to have regard to the 2013 Code and the 2016 Code as detailed in Section E.3; and failed to make the necessary enquiries to establish that the payment of members' funds to members on joining the Scheme constituted an Unauthorised Payment (Section E.3.3). All of these breaches of duty and findings of maladministration are intertwined and have led, directly or indirectly, to the loss of Scheme funds. Therefore, I have considered together the Trustee's liability in relation to all of these breaches of trust and findings of maladministration, and the extent to which the Trustee should benefit from any relief under Section 61.
188. The Trustee has submitted in writing, and Mr D Kench has submitted on his behalf at the Oral Hearing, that: he did not promote the investment to prospective members or claim that he was in any way authorised or regulated to do so; he believed the investment in Realsave to be a good opportunity, based on the assurances of Mr Stone, whom he held in high regard; and he was unaware of his duties and responsibilities as a pension scheme trustee.
189. As I have explained, the applicable test, which has been developed by case law since *Armitage*, is partly objective. Here the circumstances call into question the Trustee's honesty on the basis that he had interests of his own. By promoting the Scheme to prospective members, in partnership with Mr D Kench, Mr R Kench's brother's company, Pension Assist, would receive large sums of members' money.

190. The Trustee's honesty may be questioned further because he failed to ask questions concerning his duties and necessary level of knowledge as a Trustee and take advice before attempting to invest the remainder of the Schemes' assets in Realsave's preference shares.
191. Although the nature of the objective test in *Walker v Stones*, which was accepted in *Fattal v Walbrook Trustees*, is in some respects unclear, I consider that there is a distinction between a trustee's conduct constituting a breach of trust and the belief he held at the time of the breach. For the reasons set out below, I consider that the Trustee's perception of the interests of the Schemes' beneficiaries was so unreasonable that no reasonable trustee could have held such a belief.
192. As explained, in sections E.3 and E.4 above, the Trustee was aware that Realsave was a new company, with no financial history on which to base his decision that it would be a good company to invest in. The Trustee chose to take Mr Stone's word that Realsave would be a profitable investment. The Trustee's perception of Mr Stone as trustworthy, experienced and qualified was not based on any due diligence carried out by the Trustee whatsoever. In fact, a search of the FCA register shows that Mr Stone was not actually a qualified IFA at the time when the Trustee attempted to invest Scheme funds in Realsave. The Trustee knew so little of the requirements of his role as Trustee that he did not even realise that he was required to act in members' best financial interests in investing their funds, believing instead that it was the members' own responsibility to make such investment decisions. I consider that the Trustee was only able to sustain this belief because he turned a blind eye and refrained from asking obvious questions. He closed his eyes and ears for fear of learning information he would rather not know, that is, he was under certain fiduciary and statutory duties as Trustee which, if fulfilled, would have forced him to conclude that the investment in Realsave was not in the members' interests, so that investing in that manner would amount to acting in breach of his fundamental fiduciary duties. A reasonable and honest trustee in the Trustee's position would have raised questions to assure himself that the investments in Realsave and the payment of approximately 30% of members' funds to Pension Assist and 20% to the members themselves were proper transactions in the members' interests and that his actions accorded with his duties and obligations as Trustee. The failure to ask those questions was dishonest, not because it was negligent not to ask, but because any honest reasonable trustee would have asked them. The fact that Ms T and the Additional Applicants appear not to have known that part of their pension fund would be paid to Pension Assist is further evidence of the Trustee's awareness that that payment was not in the members' interests.
193. It is not disputed that the Trustee took no proper investment advice when he made the attempted investment of members' funds in Realsave's preference shares. Any advice that the Trustee may have received, in respect of the investment in Realsave, came from Mr Stone, who had a personal link to Realsave and whose perceived qualifications had not been verified by the Trustee. Without any proper professional advice, I cannot see how the Trustee could reasonably have believed

that these transactions were in the Scheme members' interests. I do not consider that any reasonable trustee would have been happy to make a decision on that basis. The Trustee's submissions, and those made on his behalf at the Oral Hearing by Mr D Kench, confirm that he was aware that, when he invested the Schemes' assets in Realsave, the business had not even begun trading. A reasonable trustee would have taken minimum steps to satisfy himself that investing in Realsave was in the members' interest. No such steps were taken. Further, I cannot see how any reasonable trustee could have considered that the payment of 30% of members' funds, as commission, to a company owned by his own brother and of which he was himself an employee could possibly have been in the members' financial interest.

194. The fact that the Trustee was aware of Realsave's lack of trading history and was willing to pay such a large proportion of members' funds to his own company suggests that he deliberately pursued a policy of favouring Realsave and Pension Assist at the expense of the members, which arguably is dishonest under the *Armitage* approach, as well as under the subjective and objective approach accepted in *Fattal*. The conflict of interest between the Trustee's fiduciary duty to the Scheme's beneficiaries, and the interests of Realsave and Pension Assist, are obvious and yet the payment to Pension Assist and the investment of the Scheme's entire fund left over after the payments to Pension Assist and the members, without diversification, proceeded. These transactions conflicted, in the most obvious way, with the Trustee's fiduciary duty to keep the Schemes' beneficiaries' interests paramount. Given the facts, I do not accept that a reasonable trustee could have believed that making these payments and investments would be in the members' financial interests. In doing so, the Trustee specifically intended benefiting Pension Assist and Realsave, which were not the object of the trust, knowing that this would be at the expense of the beneficiaries' financial interests if the business failed. No matter their motives, no reasonable trustee would regard this course of action as honest.
195. The Trustee benefited Pension Assist and Realsave by a decision taken with those businesses in mind in his capacity as Mr R Kench, and not by the exercise of his own, independent judgment as Trustee.
196. In my judgment, it is this general blunting of his moral antennae which explains why the Trustee had a lower standard of honesty, as well as his recklessness for others' rights. He was reckless of the members' right that they could expect the Trustee to: take and heed advice in proposing to invest their pension funds in Realsave; and to refrain from paying significant proportions of their fund away as "commission".
197. An honest and reasonable person would have had regard to the circumstances known to him (especially the complete lack of any evidence that Realsave's business model was in any way tried, tested and realistically viable), including the nature and purpose of the proposed transactions, the nature and importance of his roles and any conflicts of interest and the seriousness of the adverse consequences to the beneficiaries.

198. I conclude, on the balance of probabilities, having regard to the evidence and submissions received, that the Trustee's belief that paying a significant proportion of members' funds to his brother's company and a further significant sum to members themselves under the age of 55 and investing the entirety of the remainder of the Scheme's funds in Realsave was in the members' interests, and his failure to take proper advice on the matter, or inform himself of his responsibilities and duties, as a pension scheme trustee, was so unreasonable that no reasonable trustee could have held such a belief. Alternatively, looking at the first limb of the test set out in *Fattal*, I find that the Trustee was recklessly indifferent as to whether his various breaches of trust and his maladministration were contrary to the interests of the beneficiaries.
199. For completeness, I will consider also the subjective test set out in *Armitage*, which would apply if the Trustee were not to be regarded as a quasi-professional trustee. As I have explained, the Trustee's failure to make even basic enquiries as to the existence of any duties or obligations imposed on him as Trustee, clearly amounts to reckless indifference regarding his duties and obligations as Trustee, such that, even if there were a copy of the Scheme's Trust Deed and Rules containing an exemption clause, he would not be able to rely on it in respect of any of my findings of breach of trust or maladministration.
200. It is also established, in *Armitage*, that "The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries, is the minimum necessary to give substance to the trusts" (para 29 of *Armitage*). A trustee's duty to act honestly and in good faith are part of the "irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust". As I have already found, knowing what he knew about Realsave at the time of purportedly investing the Schemes' assets in Realsave, the Trustee cannot be said to have acted in good faith.
201. Therefore, even if the Trustee's role as trustee of the Scheme were not to be considered analogous to that of a professional trustee, meaning that the test for honesty had to be entirely subjective, I find that the Trustee would still be unable to rely on Section 61 for relief from liability resulting from any of the breaches of trust or from the maladministration that I have found he has committed.
202. I find that the Trustee's belief was not honest or reasonable and it would not be fair to excuse him for the breaches of trust that he has committed. The Trustee, having acted dishonestly and unreasonably is not entitled to any relief, under Section 61, from personal liability for the financial consequences of his breaches of trust.

Decision

203. The Trustee has committed multiple breaches of trust, and has committed acts of maladministration, as summarised in paragraph 186 and 187 above which have caused the loss of the members' pensions.

204. The Trustee is not entitled to rely upon any defence of member consent or contributory negligence (see Section E.6).
205. The Trustee cannot rely upon any exoneration provisions or indemnity, as explained in Section E.7.1 above, and is afforded no relief from personal liability for the consequences of his many breaches of trust and acts of maladministration, as explained in Section E.7.2 above.
206. Realsave has been dissolved, so there are no longer any preference shares. I, therefore, find that the full value of the members' funds invested less any returns received to date is the starting point for redress in my directions below.
207. My power to award redress, including those to recognise distress and inconvenience, comes from s151(2) Pension Schemes Act 1993:
- “Where the Pensions Ombudsman makes a determination under this Part or under any corresponding legislation having effect in Northern Ireland, he may direct the trustees or managers of the scheme concerned to take, or refrain from taking, such steps as he may specify...”
208. 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 *Bagniet v Capita Employee Benefits Ltd* [2017] EWHC 501 (Ch), HHJ Simon Barker QC suggested an increase from £1,000 to £1,600 as being broadly in line with inflation. In *Smith v Sheffield Teaching Hospitals NHS Foundation Trust* [2017] EWHC 2545 (Ch), Norris J made similar comments in relation to the effect of inflation, adopting £1,600 as the upper limit and going on to increase the award made by the Deputy Ombudsman from £500 to £2,750. The judge highlighted several instances of maladministration, occurring over a long period, which was material to the likely level of distress.
209. In the *Smith* judgment, Norris J specifically discussed (at para 31) the Ombudsman's then current Factsheet 'Guidance on redress for Non-Financial Injustice' and considered that the levels referred to therein warranted updating for inflation. He then awarded £2,750 to reflect the severity of the maladministration (i.e. that it fell above the non-exceptional level).
210. It was as a direct result of the judges' comments in the *Smith* and *Bagniet* cases that my office published 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 (ie. 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.

211. 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. Moreover, those who attended the Oral Hearing gave persuasive and unchallenged testimony about the impact on their lives of the Appellant's actions.
212. The circumstances of the complaint have clearly caused Ms T and the Additional Applicants an exceptional level of distress and inconvenience. They were significantly misled as to the cost, security and legality of the arrangement they were entering into. In addition, they were misled after Mr R Kench became aware of the issues that the Scheme found itself in and have lost significant sums, which has affected their quality of life detrimentally.

Putting things right

213. Within 28 days of the date of this Determination, the Trustee shall pay into the Scheme;
- the total amount of the funds transferred into the Scheme, including any amount paid to Pension Assist as commission in respect of the Scheme's members' transfers into the Scheme (see paragraph 38 above); less
 - the total amount of any payments made to the Scheme's members in relation to their respective transfers into the Scheme (see paragraph 38 above); plus
 - interest at the rate of 8% per annum simple to the date of payment.
214. For the exceptional maladministration causing injustice, within 28 days of the date of this Determination, the Trustee shall pay the sum of £6,000 to each of Ms T and the Additional Applicants.

Reporting to TPR

215. On issuing this Determination, I intend to pass a copy of it to TPR, so that it can consider whether or not to appoint an independent trustee to the Scheme.

Anthony Arter

Pensions Ombudsman
2 July 2021