PO-22369

Ombudsman's Determination

Applicant	Ms E
Scheme	Allen, Allen & Ms E SSAS (**SSAS**)
Respondents	Member Trustees (**Mr** Simon **Allen** and **Mrs** Louise **Allen**)
	Whitehall Group (**Whitehall**)

Complaint summary

1. Ms E's complaint is that the **Trustees** (collectively the Member Trustees and Whitehall) failed to administer the SSAS in an appropriate manner and have not made a proper decision in designating part of her late brother's fund to Mr Allen.

Oral Hearing

2. I held an oral hearing on 23 September 2021, to investigate certain matters further, to consider liability and redress, and whether I should decide the distribution of the balance of Mr SD's death benefits. The Oral Hearing was attended by Ms E, Counsel for Ms E, Mr CS (as a witness for Ms E), the Member Trustees, Counsel for the Member Trustees and Mr RM from Whitehall.

3. Prior to the Oral Hearing both Counsel submitted skeleton arguments and Mr CS and Mr NG (Ms E's partner, and the Executor of Mr SD's estate) provided sworn statements and additional documents. The skeleton arguments and statements are respectively summarised in Appendices 1, 2, 3 and 4.

4. Subsequent to the Oral Hearing, Mr SD's family adhered to my request for Mr SD's medical records to be submitted to an independent medical adviser (whom I selected) for review. Dr Falk (Consultant Clinical Oncologist, Honorary Senior Clinical Lecturer) provided his report on 24 January 2022. A summary of Dr Falk's report is provided in Appendix 5.

Summary of the Ombudsman's decision and reasons

5. Having fully considered the evidence and submissions presented on the papers and those provided at the Oral Hearing, I uphold Ms E's complaint against the Trustees of the Scheme. I have found that:

   5.1. the November 2019 decision was improperly made;

   5.2. the Trustees failed to take into account the fact that the Member Trustees were conflicted between their personal/business interests and their fiduciary duty as trustees; and

   5.3. too much emphasis was placed on irrelevant factors, such as the two-year tax deadline and the level of liquid funds available in the SSAS.

6. The sequence of events and the circumstances in this case have led me to conclude that the only appropriate and fair way in which to deal with the matter is for me to now make the distribution decision. I do so by directing that the remaining balance of Mr SD's death benefits, without any reduction, is paid to Ms E, as set out in my Directions in paragraphs 199 to 201 below. The delay in reaching a decision, which could have been avoided by the Trustees, may now result in an income tax liability being payable and, if so, this should be borne by the Trustees.

7. I direct that the following payments are made to Ms E: Whitehall £2,000; and the Member Trustees £1,000, for the severe distress and inconvenience this has caused her.

Detailed Determination

8. As relevant, extracts from the SSAS' Definitive Trust Deed and Rules dated 5 March 2014 (the **Rules**), The Occupational Pension Schemes (Scheme Administration) Regulations 1996, and The Finance Act 2004, are provided in Appendix 6.

Material facts

9. Mr SD was employed by 1Ecommerce Ltd 9 (the **Company**). The Director of the Company is Mr Simon Allen. The SSAS was set up in 2015 by Mr Allen, Mr SD and Mrs Louise Allen. Mr Allen and Mr SD had known each other for some thirty years, they had both worked at Sellafield, shared accommodation since 1991, and later bought a house together (joint ownership).

10. When Mr Allen married and moved out Mr SD bought his share in the house. They maintained contact and Mr SD regularly visited Mr Allen's home.

11. In 2011, Mr Allen set up the Company (building websites) and Mr SD became a part-time employee. In late 2014, Mr Allen met with an Independent Financial Adviser (the **IFA**) to review his existing pension provision. The IFA told him about SIPP and SSAS arrangements and Mr Allen decided that a SSAS was a good idea. Around this time,

both Mr SD and Mrs Allen (Mr Allen's wife) showed an interest in the venture, and both asked if they could join the SSAS and each separately met with the IFA.

12. Mr Allen completed the SSAS application with Mr SD and Mrs Allen, and an office administrator (the latter acting as the **Witness**) present, and Whitehall issued a Member Trustees' booklet. The booklet did not refer the Member Trustees to The Pensions Regulator's (**TPR**) website to keep up to date with guidance.

13. Section 11 of the application form details each member's original nomination of beneficiaries. For Mr SD two beneficiaries are recorded, Mr Allen and Ms E (Mr SD's sister), who were allocated 50% each (the **2015 Nomination**). Mr SD signed section 15 of the application form, 'Signatures by the Member Trustees', alongside Mr Allen and Mrs Allen. Mr Allen's nomination of beneficiaries was 100% to Mrs Allen and vice versa.

14. Five pension transfers were paid into the SSAS by the three members:

    Mrs Allen, £31,942.16;

    Mr Allen, £253,753 and £23,908.77; and

    Mr SD £156,426 and £7,609.68.

    The transfers-in were allocated between the members on a percentage basis by Whitehall to reflect the value of these transfers.

15. In the same year, Mrs Allen's request to transfer-in £7,530 from her membership of the Tyne & Wear Pension Fund was declined by the Fund's administering authority, South Tyneside Council[1].

16. Mr Allen, Mrs Allen and Mr SD were all Member Trustees.

17. The professional trustee and administrator of the SSAS is Whitehall. Whitehall acts for about 1600 pension schemes and currently has 16 staff. Mr RM is a Director of Whitehall and has been a professional trustee for twenty years.

18. The Trustees managed the Trust prior to Mr SD's death in an informal manner, with all communications between the Trustees handled by email or telephone. Whitehall did not send TPR updates to the Member Trustees but did send mailshots on various regulations / legislation as they arose, to keep everyone informed.

19. The SSAS holds a commercial property that was rented out to third party tenants and two plots of land. Whitehall maintained all the records that were available online. Bank statements went to the Member Trustees and Whitehall issued an annual/ anniversary pack to the Member Trustees.

[1] Mrs Allen subsequently complained to my Office (PO-14625). An Opinion was issued on 7 December 2017 that the complaint should be upheld, and that South Tyneside Council should reconsider whether it would now allow the transfer. Both parties accepted the Opinion, and the complaint was closed as resolved.

20. Regarding the land, the Member Trustees intended to gain planning permission in respect of each of the two plots and then sell them, retaining the proceeds of sale within the SSAS. The Member Trustees started this with one plot, but there was a clawback clause on both plots that meant they would have to pay 30% of the uplift in the value once new planning permission came through, so they decided to postpone the preparation of the planning permission application until the clawback clause expired. The last valuation of the business unit and the land was carried out in 2017[2].

21. In 2016, Mr SD was diagnosed with cancer. In September 2017, he was informed that his illness was terminal.

22. On 25 October 2017, Whitehall wrote to Mr SD following an information request made by Mr SD's designated representative, Mr NG. The letter detailed the five pension transfers paid into the SSAS in 2015 and the content of the 2015 Nomination. A fresh nomination form was enclosed with the letter.

23. On 1 November 2017, Mr SD completed and signed a new nomination directing his share of fund to be paid £25,000 to his estate and the remaining balance to Ms E (the **2017 Nomination**). Notes on the Form state:

> "**Note**: Please note that the Trustees will consider your wishes but shall not necessarily be bound by them. If you do not nominate beneficiaries, the Trustees will exercise their full discretion as to whom your benefits should be paid. This may include payment to your estate. We will keep this information confidential".
>
> "**Note**: You can change your nomination at any time by completing a new Nomination of Beneficiary Form obtainable from us."

24. The 2017 Nomination was enclosed with a typed letter addressed to Whitehall, signed and dated by Mr SD. The letter states:

> "Thank you for your letter dated 25th October 2017, and for the provision of requested information to my designated representative.
>
> This has enabled me to give the instructions I wanted for the completion of My Will together with the completion of a Nomination of Beneficiary Form (enclosed) with regards my SSAS Pension Fund. In addition, I have gathered further instructions to be recorded as a Letter of Wishes to give clarity and direction to my appointed Executor(s).
>
> For the record I should like to advise that the existence of a current Expression of Wishes as referred to in your recent letter that was apparently made on 26th February 2015 is not something I am aware of having made at the time the SSAS was initiated.

[2] The 2017 valuation of the SSAS assets was done to establish Mr SD's share of the fund.

I have, however, taken this opportunity to issue a current one. Please confirm it's receipt."

25. Mr SD signed his Will (the **Will**) on 8 November 2017. As relevant under 'Legacies' it states:

"3.2 I have given a current and separate instruction directly to the administrating trustees (Whitehall Group UK Limited) of **my SSAS pension fund**. This records my wishes with regards the intended beneficiary(ies) of that fund.

3.3 I have also given further instructions that have been recorded as a Letter of Wishes to give clarity and direction to my Executor(s)."

26. The Will was witnessed by a treating doctor and a staff nurse.

27. Around the time of the Will, Mr SD signed a Letter of Wishes and 'Some notes for [Ms E]'.

28. In the Letter of Wishes, Mr SD said:

"I have asked for a certain sum to be drawn from my SSAS Pension Fund and transferred to my estate so that these wishes can be properly delivered. There may also be an additional sum from my monthly Johnson Controls pension."

29. In 'Some notes for [Ms E]', Mr SD said:

"My SSAS pension is to be used to help my family. For this to best be achieved I want it to be received by [Ms E], and I have now given instruction to the pension administrators.

…

I do not want these things to ruin the original plans I had with [Mr Allen and Mrs Allen] for the SSAS Pension Fund. There were opportunities there I supported. I would like [Mr NG], as Executor, to work with them to ensure that a sensible and logical plan is put in place to release all my funds in an orderly fashion."

30. Mr SD died on 23 November 2017.

31. On 16 January 2018, Whitehall emailed Mr Allen acknowledging receipt of the certified copy of Mr SD's death certificate, Mr SD's Will and investment values for the SSAS. Whitehall said:-

31.1. Using the information provided the current value of the SSAS was:

RBS Deposit Account	£192,771.64
Business Unit	£165,000.00
Land 1	£ 55,000.00

Land 2	£ 80,000.00
Total	£492,771.64

31.2. Mr SD's share of the fund was £288,597.72.

31.3. The nominated beneficiaries were Mr SD's estate, £25,000, and Ms E, 100% of the balance.

32. The email enclosed a 'Deed of Change of Trustee', Whitehall's 'Guideline on Retirement and Death' (which explained death benefit pension and lump sum options and the documents required to proceed) and the Money Advice Service guide 'Your pension it's time to choose'.

33. On 12 February 2018, Mrs Allen emailed Mr SM (Account Executive at Whitehall who was the Member Trustees contact and dealt with the SSAS). Mrs Allen requested the release of funds for the funeral costs on receipt of an invoice from the funeral director and requested:-

33.1. A copy of the 2015 Nomination and the 2017 Nomination. Mrs Allen said she needed to know the date the beneficiaries were changed so that she could understand the timeline of events leading up to the change.

33.2. A copy of Mr NG's letter to Whitehall of 22 January 2018[3].

33.3. Confirmation of whether Ms E was proposing to take her share by a lump sum or by an annuity.

33.4. A copy of Probate letters of representation that Mr NG had sent to Whitehall.

33.5. An explanation of the process that she would need to follow should she wish to contest the change of beneficiaries.

34. On 21 February 2018, Mr SM replied to Mrs Allen. Mr SM said he had spoken with the Directors[4] and could comment as follows:

> "The issue that has arisen following the death of [Mr SD] is a beneficiary matter and not a pension administration matter, and as such we are limited to what we can do with regard to the dispute. The scheme can't pay for the funeral director's invoice, because it's not a scheme cost. The scheme is only

[3] Mr NG wrote to Whitehall to advise it that he was acting on behalf of Mr SD's estate and to request details of how funds within the SSAS might be accessed.

[4] Mr RM confirmed to Ms E's Counsel, at the Oral Hearing, that Mr SM had spoken with him at that time.

able to pay death benefits to [Mr SD's] beneficiaries, although these are now in question. No payments can be made until this matter has been resolved."

35. In response to Mrs Allen's request for information and copy documents, as detailed in paragraph 33 above, Mr SM informed Mrs Allen that:

    35.1. he could not provide copies of the 2015 Nomination or the 2017 Nomination, those were confidential to Mr SD;

    35.2. he could not provide a copy of Mr NG's letter to Whitehall of 22 January 2018 without Mr NG's authorisation;

    35.3. he was unable to disclose how Ms E wished to take her share of the fund, as that was a matter solely for Ms E;

    35.4. he could not provide a copy of the Probate letters of representation, as those documents did not concern the Scheme; Mrs Allen would have to contact Mr NG for a copy; and

    35.5. Mrs Allen would need to seek professional legal advice if she wished to contest the change of beneficiaries on the basis that Mr SD had lacked capacity when he made that change.

36. On 6 April 2018, Mr Allen's solicitor (Guthrie Jones & Jones, **GJJ**) wrote to Mr NG. GJJ said:-

    36.1. It had seen a copy of the Grant of Probate dated 22 November 2017 appointing Mr NG as the Executor of the estate of the late Mr SD.

    36.2. Its client contended that Mr SD's Will was invalid due to Mr SD lacking testamentary capacity, or in the alternative, not having knowledge of the contents of the Will and having approved the same.

    36.3. Its client's position was that the 2017 Nomination should be set aside for the same reasons as the Will was invalid.

    36.4. The 2015 Nomination, when Mr SD was of sound mind, gave 50% of his share of fund to Mr Allen.

    36.5. There was also a verbal agreement between Mr Allen, Mrs Allen and Mr SD regarding the share due to the work done to manage and grow the pension assets.

    36.6. As a result of the invalid 2017 Nomination its client had lost circa £144,000 in pension entitlements.

    36.7. If it was not agreed that the 2017 Nomination should be set aside "our client shall have to obtain medical evidence in support of his position that the nomination should be set aside".

37. GJJ requested a copy of the Letter of Wishes referred to in Mr SD's Will and a signed authority to obtain a copy of Mr SD's medical records.

38. The same day Mr SD's mother wrote to Mr Allen. She said:-

    38.1. It seemed Mr Allen and Mrs Allen were unable to understand her son's decision about the intended beneficiaries of his pension fund. She could give some insight as Mr SD had discussed the matter with her, Ms E, Mr NG and the two persons appointed to act as Executors if Mr NG was unable to act as the Executor of Mr SD's estate.

    38.2. Mr SD had spoken about the money he had lent Mr Allen, the low level of his earnings with the Company and dying in impoverished circumstances.

    38.3. Mr SD's final decision was that Mr Allen should not receive anything automatically and that was the instruction he gave by his 2017 Nomination. He wanted to pay off his debts and make token gifts to friends and family, along with tasking Ms E to deliver his plans.

    38.4. She trusted that her son's plans and wishes would now be fulfilled.

39. Mr Allen drafted a response but did not send it.

40. On 11 April 2018, Mr NG returned GJJ's letter of 6 April 2018 and requested that it be addressed to him in his capacity as an Executor. Mr NG asked GJJ to state in which capacity it had received instructions from Mr Allen; and whether, and if so in which capacity, it was representing Mrs Allen.

41. GJJ replied that it had received instructions from Mr Allen in his capacity as a disappointed beneficiary of the pension fund. GJJ said it was writing to Mr NG in his capacity as an Executor of the estate. GJJ repeated its request for a signed authority for the release of Mr SD's medical records.

42. On 30 April 2018, Mr NG wrote to GJJ setting out that:-

    42.1. No factual evidence in support of Mr Allen's position had been provided by the Member Trustees. The circumstances described in the terminal phase of Mr SD's life did not accurately reflect the actual events experienced or Mr SD's physical presentation throughout this period.

    42.2. He had not seen any affirmative evidence that the 2015 Nomination was valid. He understood that: it had been completed by a third party; it formed part of a larger document; and the page had not been recognised or accepted by Mr SD. He also understood that Mr SD had raised a concern with Whitehall[5] about the 2015 Nomination.

[5] Mr SD's letter to Whitehall dated 1 November 2017.

42.3. The 2017 Nomination was valid. It was written by and directly endorsed and dated by Mr SD and submitted to Whitehall, which had confirmed its receipt and acceptance.

42.4. Whitehall had duly given an instruction to Mr Allen, as a Member Trustee, which Mr Allen had not appropriately acted on and remained in breach of his duties as a trustee.

42.5. Mr Allen had confirmed, in an email to Mr NG dated 16 January 2018, the payment of £25,000 due to Mr SD's estate. It therefore appeared that Mr Allen's use of legal representation was an attempt to divert and distract attention away from him dealing with this obligation.

42.6. Mr Allen had pointedly refused any contact to discuss the matter.

42.7. Mr Allen would be better advised to desist from any further instruction to GJJ, and to instead engage in a more constructive dialogue with the family of the deceased.

43. GJJ replied to Mr NG on 22 May 2018, stating that:

43.1. if he (Mr NG) was so confident that Mr SD had capacity at the time of the 2017 Nomination, then he should have no trouble providing authority for Mr SD's medical records to be obtained to enable a report to be prepared on the issue of capacity: and

43.2. unless Mr NG agreed to the release of Mr SD's medical records within the next 14 days, Mr Allen would be forced to issue a pre-action application for specific disclosure of the medical records, by making a court application.

44. GJJ reissued its letter of 22 May 2018 to Mr NG on 13 June 2018.

45. The same day, Whitehall emailed Ms E and Mr Allen, stating that it had been informed by The Pensions Ombudsman's (**TPO**) Early Resolution Team Voluntary Adviser (the **ERT Voluntary Adviser**) that, unless Mr Allen was financially dependent on Mr SD, the 2017 Nomination should stand. In view of this, unless it received sufficient proof of financial dependency by 30 June 2018, it would proceed with arranging benefits in accordance with the 2017 Nomination.

46. Mr Allen replied to Whitehall as follows:-

46.1. No benefits should be paid without the Member Trustees' authority.

46.2. Their queries related to the change of beneficiaries so shortly before Mr SD's death and questioned Mr SD's capacity at that time.

46.3. GJJ had requested access to Mr SD's medical records and Letter of Wishes. To date, its request had been refused.

46.4. As Member Trustees, they (Mr Allen and Mrs Allen) required full information and understanding before agreeing to the benefits being paid.

46.5. As a beneficiary listed in the 2015 Nomination, he had taken legal advice.

46.6. Therefore, it was premature for Whitehall to approve payment of the benefits without their agreement.

47. On 6 July 2018, Mr Allen emailed the ERT Voluntary Adviser advising that:-

47.1. Following Mr SD's death, Mr NG had started sending letters and texts that were upsetting regarding his (Mr Allen's) friendship with Mr SD.

47.2. On 16 January 2018, Mr NG arrived at his office demanding the payment of £25,000 each to Mr SD's estate and to Ms E. He informed Mr NG that only Whitehall could make the payments and promised to contact Whitehall. He had later emailed Whitehall (copying in Mr NG). Whitehall had replied that it was unable to make the payments until a decision had been made about a possible dispute of beneficiaries. While he considered that Mr SD's 2017 Nomination was invalid, he was prepared to accept that £25,000 be paid to Mr SD's estate.

47.3. On 18 January 2018, while in Australia, he had received a further unpleasant text from Mr NG. He had not answered it. By the time he and his wife returned home he had been finding it mentally very hard to cope with the issues due to Mr NG's pressure, and his wife had agreed to take over.

47.4. On 13 February 2018, Mr NG and Ms E had come to the office asking why there was a hold up in the release of Mr SD's share of fund. Mrs Allen had informed them that she had some questions to ask Whitehall.

47.5. Mrs Allen:

47.5.1. had requested a copy of the Letter of Wishes, which Ms E declined to provide on the grounds that its contents were private; and

47.5.2. had asked Whitehall and Mr NG and Ms E for information about Mr SD's 2017 Nomination, to understand the timeline of events.

47.6. They now had much of the information.

47.7. Their dispute was not with Mr SD's Will, but with the 2017 Nomination, when it was made, why it was not carried out by an independent third party, and Mr SD's capacity to understand what he was signing due to the medication he was on.

47.8. Mr SD had made no prior mention to them of the nomination change, rather he had indicated no change and that Mr NG was formalising his wishes so that he did not die intestate.

47.9. Mr NG had also stated to their solicitor that Mr SD had no memory of the 2015 Nomination. This added to their questioning of Mr SD's capacity.

47.10. Their solicitor had requested the release of Mr SD's medical records so that they could obtain an independent medical assessment of Mr SD's capacity at the date he signed the 2017 Nomination. To date Ms E and Mr NG had not given their permission, so a standoff existed.

47.11. This was now subject to a potential legal process and so Whitehall was not in a position to release Mr SD's share of fund to Ms E or Mr NG as Executor of Mr SD's estate.

48. On 19 July 2018, Ms E wrote to Whitehall requesting an immediate written explanation why it had not proceeded with arranging the payment of Mr SD's share of fund in accordance with the 2017 Nomination. Ms E said she understood that liquid funds existed within the SSAS account and therefore there could be no reason why an immediate, albeit if necessarily partial, payment of the death benefits should not now be made. Ms E said:

> "It is nearly eight months since my brother died and their [*sic*] appears to have been little, or none, control exercised by Whitehall Group to mitigate the inherent conflict of interest demonstrated by the Member Trustees."

49. Ms E chased Whitehall on 3 August 2018. Whitehall replied that it was awaiting the outcome of the ERT Voluntary Adviser's correspondence with GJJ, with the objective of avoiding legal action.

50. On 7 August 2018, GJJ wrote to the ERT Voluntary Adviser:

> "Our request in this case is quite simple. That we have access to deceased's medical records so that we may obtain a report on the issue of whether the deceased had legal capacity at the time of the making of the last expression of wishes."

51. On 9 August 2018, GJJ wrote to the ERT Voluntary Adviser:

> "We write to you further to our email and directly in response to the suggestion that you made to us during our telephone conversation that our client proposes what settlement would be acceptable to him.
>
> Purely on a without prejudice, save as to costs, basis, our client would be willing to settle on the basis that out of the approximate value of £288,597.72 of [Mr SD's] fund, £25,000 is paid to [Mr SD's] estate, £165,000 is paid to [Ms E] with balance being paid to our client [Mr Allen].
>
> It is important for you to note that in making this offer, our client is not in any way accepting the validity of the last nomination or its legal basis."

52. On 9 October 2018, GJJ informed the ERT Voluntary Adviser that the 9 August 2018 offer was in response to continued requests for an alternative satisfactory outcome to resolve the case. It was not an acceptance by its client that the 2017 Nomination should be implemented. Its client wished to obtain Mr SD's medical records because he might not have had the capacity to make the changes without undue influence from Ms E, Mr NG and other third parties.

53. Following a complaint from the Member Trustees about the ERT Voluntary Adviser, the case was reallocated to an ERT Technical Specialist. The ERT Technical Specialist suggested that Mr Allen and Mrs Allen excuse themselves from the decision on the grounds of conflict of interest and for the Trustees (collectively) to delegate the decision to a suitably qualified independent third party, such as one of the trustees on TPR's Trustee Register. Ms E and Whitehall agreed with the suggestion. Mr Allen and Mrs Allen asked about the possibility of negotiating a settlement. The ERT Technical Specialist said he could not comment, but it was open to the Trustees to put forward a resolution, or decide, in accordance with the SSAS Rules.

54. In January 2019, the Member Trustees reiterated the settlement offer which GJJ had previously relayed in August 2018. Ms E rejected the offer.

55. This remained the position until approaching the second anniversary of Mr SD's death.

56. In October 2019, a TPO Senior Adjudicator (the **Senior Adjudicator**) emailed Mrs Allen commenting that:-

    56.1. Discontinuance of the investigation was being considered as the issue might only be resolved by some form of mediation or court order if the parties to the complaint could not reach an agreement.

    56.2. The Member Trustees and Ms E appeared entrenched in their respective views. Without a degree of compromise on behalf of one or both parties the matter was likely to end in the Courts.

    56.3. If the case were to proceed to Determination, the Ombudsman might only direct the Trustees to make a decision.

57. The Member Trustees replied:-

    57.1. They were not inflexible and had always been willing to compromise.

    57.2. Their doubts remained about Mr SD's testamentary capacity at the time of the 2017 Nomination.

    57.3. They were aware of the two-year designation deadline for tax implications.

    57.4. They could decide how to administer Mr SD's nomination of beneficiaries but had avoided doing this until now.

57.5. They had attempted to compromise twice.

57.6. They requested that Ms E be asked to consider a without prejudice offer:

> "£186,000 in cash, which will clear out the SSAS Pension bank account. £25,000 of this to [Mr SD's] estate and £161,000 to [Ms E].
>
> This is by far the quickest way to resolve this issue and will avoid the matter going to court. It will also mean that [Ms E] will avoid the tax implications that are looming for her."

58. The Member Trustees' offer, and a first stage Discontinuance Notice, inviting comments, in respect of Ms E's complaint to my Office were issued to Ms E.

59. Over November 2019, the timeline of events was:-

59.1. Ms E requested the payment of £25,000 to Mr SD's estate and £161,000 to herself.

8 November 2019

59.2. Ms E requested, and was granted, an extension to reply to the Discontinuance Notice to 22 November 2019.

59.3. The Member Trustees queried whether, if Ms E accepted the closure of her complaint, would that mean the matter was ended. The Senior Adjudicator replied that if the case was discontinued it remained open to Ms E, if she so chose, to pursue her complaint via the Courts or seek professional mediation. As things currently stood Ms E had accepted the Member Trustees' offer so as to avoid a tax charge if the designation was made more than two years after Mr SD's death.

59.4. Whitehall asked the Senior Adjudicator whether the matter had been resolved.

11 November 2019

59.5. The Senior Adjudicator notified Whitehall that a first stage Discontinuance Notice had been issued to Ms E and Ms E had been granted an extension to 22 November to submit comments. Ms E had accepted the payment of £161,000 to avoid a tax charge. If the case were to be discontinued, it was open to Ms E to pursue her complaint via the Courts or seek professional mediation.

12 November 2019

59.6. Whitehall emailed Ms E, Mr NG and the Member Trustees a draft Resolution "for signing by all parties to agree the basis of payment" and a Death Benefit Request Form "so that benefits can be arranged". The Resolution detailed:-

59.6.1. The current value of the SSAS.

59.6.2. The share of fund allocated to Mr SD (£298,599.90).

59.6.3. The designation of Mr SD's share of fund for payment, Ms E (£161,000), Mr Allen (£112,599.90), Mr SD's estate (£25,000).

59.6.4. Whitehall's fees (£3,600 including VAT), to be deducted on a pro rata basis from the designated amounts before payment.

13 November 2019

59.7. Mr NG rejected the deduction of Whitehall's fees from the amount designated to Mr SD's estate.

14 November 2019

59.8. Ms E emailed Whitehall commenting as follows:-

59.8.1. The draft Resolution did not properly represent their discussion when she made it clear that the Member Trustees' proposal to her was not presented as a full and final settlement. She was therefore not able to sign the Resolution.

59.8.2. The agreement was that she was content to receive £161,000 providing it was paid before 23 November 2019 to avoid a tax charge. Her understanding was the sum represented the current value of the SSAS' cash account. There was no reason why the payment could not now proceed. She would hold the Trustees wholly liable for any tax charges applied if the sum was received after 23 November 2019.

59.8.3. Mr Allen's claim to be an Eligible Recipient rested on the 2015 Nomination allegedly completed by Mr SD when the SSAS was established. The redacted copy she had was certainly not completed by Mr SD since it was not in his handwriting. Did Whitehall know who completed the nomination and did the same person make the nominations for Mr Allen and Mrs Allen?

59.8.4. Whitehall had previously acknowledged receipt of the 2017 Nomination and covering letter in which Mr SD stated he was unaware of the 2015 Nomination. Clearly Whitehall then had the opportunity to query the

matter with Mr SD, if it considered it was necessary. Whitehall knew that Mr SD was terminally ill but did nothing.

59.8.5. She was convinced that the 2015 Nomination was made without Mr SD's knowledge or agreement and could see no reasonable grounds for considering it valid.

59.8.6. She would complete and return the Death Benefit Form. Nothing further was required from her for Whitehall to make the £161,000 payment to her.

18 November 2019:

59.9. Ms E emailed Whitehall stating that:-

59.9.1. She accepted that the Trustees had absolute and total discretion in determining the designation of Mr SD's share of fund to Eligible Recipients in accordance with Rule 3.19.

59.9.2. Clearly, she and her mother were Eligible Recipients, being Mr SD's only surviving relatives. Mr SD's estate was also eligible by his personal written nomination of beneficiaries, which apparently had been accepted and agreed by the Trustees, hence its inclusion in the latest revised Resolution Notice.

59.9.3. She could not sign the revised Resolution. Whitehall's fees should only be paid by the Employer that appointed it to act as the Professional Trustee and Administrator of the SSAS. More importantly the Member Trustees appeared to be applying undue pressure to finalise her complaint by accepting Whitehall's last minute, arbitrary, and unilaterally proposed Resolution document.

59.9.4. Her only concern was to ensure that the Trustees only made payments to whomever they considered to be an Eligible Recipient in accordance with Rule 3.19. Her complaint remained until the Member Trustees proposed an acceptable resolution.

59.9.5. Perhaps the simplest solution was for Whitehall to now make the total payment to Mr SD's estate thereby avoiding any possible conflict of the Member Trustees' interests.

59.10. Ms E enclosed with her email, "a suitable Trustee resolution which fulfils this requirement, without either compromising or pre-empting your final decision". Parts 4 and 5 of the Resolution state:

"4. The Trustees do not currently hold sufficient liquid/cash assets to make a full and final settlement of the deceased member's total entitlement but do hereby agree that the following are formally designated to be "Eligible

Recipients" in accordance with the deceased member's "Expression of Wish" as notified to the Trustees in writing on 1 November 2017.

(i) The Estate of the deceased member
(ii) Ms E (sister of the deceased member)

5. As it is not possible to achieve a full and final cash settlement of the deceased's total death in service benefits to all Eligible Recipients prior to 23 November 2019 the Trustees hereby confirm and agree (in order to avoid any potential tax charges which may arise from the later achieved settlement) the Beneficiaries as detailed in paragraph 4(i) and 4(ii) above are confirmed as designated "Eligible Recipients" under Rule 3.19."

59.11. Whitehall forwarded Ms E's email to the Member Trustees requesting their comments.

20 November 2019

59.12. Mr Allen emailed Whitehall, stating that he and Mrs Allen, in their capacity as the Member Trustees, felt that payments needed to be made before the cut-off date to avoid tax. Mr Allen said this was based on Ms E's acceptance of their settlement offer of 17 October 2019 and requested Whitehall to pay £25,000 to Mrs SD's estate and £161,000 to Ms E.

59.13. Whitehall wrote to Mr Allen. It said:

"Thank you for returning the completed items regarding the benefits to be paid from the pension scheme.

I am now writing to confirm that the Trustees have reached a decision to designate an amount of £112,599.90 to yourself.

You have selected a beneficiaries' flexi-access drawdown pension with an initial starting amount of nil."

21 November 2019

59.14. Ms E emailed Whitehall acknowledging receipt in her bank account of £161,000. Ms E said:-

59.14.1. Why did Whitehall and the Member Trustees appear to reject the appointment of a totally independent arbiter to remove the Member Trustees' conflicts of interest?

59.14.2. Alternatively, no comment had been made on her previous suggestion that the final balancing payment should be made only to the Executors of Mr SD's estate.

59.14.3. To progress matters she urgently required to know: what, if any, action had been taken to realise the necessary cash funds required to complete the final settlement of Mr SD's share of fund? Did it know who completed the 2015 Nomination, which quite obviously had not been completed by Mr SD?

59.14.4. The Member Trustees' hurtful belief that the 2017 Nomination was invalid, because Mr SD was incapable of making rational decisions, conflicted with the decisions of others dealing with his affairs who had complied with his instructions and wishes.

59.14.5. When Mr SD submitted the 2017 Nomination, he confirmed that he had given further instructions to be recorded as a Letter of Wishes to give "clarity and direction to my appointed Executors". Before making any final decision, the Member Trustees should therefore act accordingly and seek/receive appropriate advice.

59.14.6. Ms E asked Whitehall and the Member Trustees to confirm that they would act completely in accordance with Mr SD's stated wishes, rather than just accede to his request to pay £25,000 to his estate.

59.14.7. Ms E said as a matter of principle she simply could not allow the Member Trustees to override and fail to respect Mr SD's undoubted wishes for their own personal gain.

59.14.8. Mr SD's share of the fund was derived wholly and exclusively from his former British Nuclear Fuels (**BNF**) Pension Fund(s) and consequently were his personal (and not an Employer) contribution. To accept this transfer, she believed the Trustees had to be satisfied that all regulatory FCA[6] requirements had been fulfilled since the transfer exceeded £30,000. This apparently required an FCA regulated and approved independent "Financial Adviser" to undertake a complete transfer analysis. Had this been done and did Whitehall have the necessary supportive documentation? Otherwise, the Trustees should not have completed the transfer.

60. In January 2020, Ms E chased Whitehall for its response to her 21 November 2019 email.

61. On 24 February 2020, Whitehall notified the Senior Adjudicator:

> "The value of [Mr SD's] share of the fund was calculated as being £298,599.90. [T]he amount designated to [Mr Allen] was therefore the balance of the fund after

[6] The Financial Conduct Authority,

designation of what we understood to be the agreed amounts to [Ms E] and [Mr SD's] estate. This was to ensure there was no liability to tax on designation of funds over two years after the date of death. [Mr Allen] was a named beneficiary of [Mr SD] in his original expression of wishes."

62. Subsequently all parties were notified that my Office's investigation would continue, and I issued a Preliminary Decision on 3 July 2020. Having received further submissions from all parties I issued a second Preliminary Decision on 21 December 2020, with my findings to date and advising that an Oral Hearing would be held to assist me in reaching my final conclusions.

Summary of Ms E's position

63. At the Oral Hearing and in addition to his pre-hearing skeleton argument (see Appendix 1), Ms E's Counsel submitted that while my Office considered discontinuing the investigation, the investigation was not discontinued. The impasse that the Trustees had not made a decision no longer existed. A decision had been made, which was there to be considered.

On the Member Trustees' conflict of interest

64. There was no meeting or documentation to explain how the November 2019 decision was reached on the allocation of Mr SD's fund. The decision was not based on relevant considerations (in the context of Edge v Pensions Ombudsman (***Edge***)[7]) and should not stand.

65. Surprisingly, the Member Trustees do not see that they were and are completely conflicted. Even if Whitehall did not bring that to their attention, given the time since Mr SD's death, the Member Trustees should have realised this. Under the SSAS Rules the signpost to remove conflict is for the Trustees to unanimously delegate the decision under Rule 22.7 and then, under Rule 22.8, the decision is taken free from conflict.

66. The Member Trustees should have delegated the decision to allocate the death benefits to Whitehall for it to make the decision, or to an independent trustee (as was originally suggested by my Office).

67. Directions should be made now by the Ombudsman rather than refer the matter back to the Trustees.

On the 2017 Nomination

68. The Letter of Wishes corroborates the 2017 Nomination as valid because it refers to the position in which Ms E finds herself now that the benefit is going to her.

[7] Edge v Pensions Ombudsman [1999] 4 All ER 546.

On 'Some notes for [Ms E]'

69. The whole of the last paragraph, rather than just the first sentence read in isolation, is not inconsistent with the 2017 Nomination.

70. At the time of the 2015 Nomination, Mr SD did not know he was going to die before his mother. There was a plan for some 20/30 years of growth of the SSAS Fund. Those are the "original plans" being referred to. Subsequently the 2017 Nomination was put in place reversing what had been discussed in 2015. This explains the comment "to work with them [Mr Allen and Mrs Allen] to ensure that a sensible and logical plan is put in place to release all my funds in an orderly fashion". Mr SD did not want his share of the fund, which was now going to Ms E, to be demanded within three months. It might take some time for the SSAS assets to be sold.

On the medical records

71. Mr SD's close family (for example Mr SD's mother, as evidenced in her letter to Mr Allen) and friends (Mr CS) had no doubts about Mr SD's capacity. Mr SD did not have an illness that raised concerns about capacity. He had terminal cancer; not advanced dementia.

72. The BMA[8] guidance[9] is that there is a presumption of capacity and there is a heavy hurdle to displace that a person has a right to distribute their assets how they wish when they are about to die.

73. Mercer did not have any difficulty in acting on Mr SD's Nomination on death in respect of a different pension arrangement, which shows how people can act if they are not conflicted.

74. While it is maintained that Mr SD's medical records are not required, as it is a red herring and the Member Trustees who had requested the records for review are conflicted, it was not previously clear that an independent reviewer might be used. However, if the medical records are to be reviewed by an expert with proper instruction from my Office, then Ms E would be happy to provide them.

On Whitehall

75. Whitehall must shoulder a great deal of the responsibility. It does appear that at no stage did they clearly say to the Member Trustees that they needed to get legal advice in respect of their conflicted position as trustees. This was clearly pointed out to Mr RM in correspondence from March 2018 that he needed to get a grip on this and possibly offer advice on how to manage conflicts, but it simply was not acted upon.

[8] British Medical Association.

[9] 'Mental Capacity Act tool kit' of February 2016.

Tax issue

76. Ms E should not have to shoulder any tax burden. It should be borne by the Member Trustees.

77. There should be a finding that the Member Trustees have acted in bad faith[10]: the Member Trustees must have known they were operating under a conflict for the last few years; they have refused sensible suggestions to mitigate this, such as the appointment of an independent trustee to get around that conflict; and it can be inferred, from what they knew, that they were not applying their powers properly when they tried to rush through the 2019 decision which had the convenient by-product of giving them almost the full entitlement that they wanted. On that basis, the Member Trustees cannot benefit from the exoneration clause in the Deed and Rules.

Suitable remedy

78. Ms E has submitted that my directions should include the following:-

    78.1. That an independent financial assessment of the fund value, including an independent asset valuation, is undertaken, to take into consideration all financial transactions or changes in the value of the SSAS.

    78.2. That Whitehall is required to make the full payment of the balance of Mr SD's fund due from its corporate resources, if the payment from the SSAS has failed to occur 90 days after the date of the Determination.

    78.3. That interest is applied to an award in respect of financial loss, that the award for non-financial injustice is clarified and that she should not suffer for any diminution of the fund value due to the delay in the decision to distribute Mr SD's share of the fund.

79. Further clarification is required on why the medical records were requested by the Member Trustees. There should be no implication that she caused the Trustees' decision on the distribution of Mr SD's death benefits to be delayed until the two-year tax deadline had passed.

Summary of the Member Trustees' position

80. At the Oral Hearing, in addition to his pre-hearing skeleton argument (see Appendix 1), the Member Trustees' Counsel made a number of submissions as set out in paragraphs 81 to 100 below.

On abuse of process

81. The Member Trustees were induced to believe, from correspondence exchanges with my Office in late October 2019 (specifically an email and letter

[10] Bad faith summed up in Melton-Medes Ltd & another v Securities and Investments Board [1995] 3 All ER 880 1995 authority, Mr Justice Lightman – specifically "or b) knowledge of absence of power to make a decision in question".

issued by my Office on 25 October 2019, and an email exchange with Mrs Allen on 29 October 2019.) and early November 2019 (an email exchange with Mrs Allen on 8 November 2019), that the complaint would not proceed. So, to proceed now would be an abuse of process.

82. The distribution in 2019 does not fall to the heart of the original complaint, which was that the Trustees had not made a decision. But the view now is to join the two issues together. But that cannot be done. There should be a new complaint and Internal Dispute Resolution Procedure.

83. Secondly, it is not within my remit to interfere with the distribution. The tests ('*Edge* and so on') represent a substantial obstacle or threshold that has not been established in this case.

On the 2017 Nomination

84. The 2017 Nomination is a legitimate and real concern. Mr SD did not mention to his closest friend, Mr Allen, that he had changed his nomination. It was inconsistent with his 2015 Nomination and was at a time when Mr SD was clearly very ill. Mr Allen, who visited Mr SD daily, had given evidence at the Oral Hearing on how the illness affected Mr SD.

85. The signing of the Will on 8 November 2017, in the presence of a doctor and nurse, is not on its own sufficient to determine that Mr SD had capacity, as the doctor and nurse were simply being asked to witness the Will, and not give an opinion on Mr SD's capacity. More importantly, neither an Oncologist nor a nurse is someone who can give expert advice with regard to capacity. But in any event, the Will is not determinative because one is looking at Mr SD's state of mind and capacity on 1 November 2017 when he made the 2017 Nomination. While there was little time between the 2017 Nomination and the Will, evidence had been given that Mr SD's condition might fluctuate from time to time.

On "Some notes for [Ms E]"

86. The final paragraph can be construed to mean that Mr SD does not want to interfere with or change to any significant degree the original plan with Mr Allen and Mrs Allen regarding the SSAS fund. That could only logically relate to the 2015 Nomination. The paragraph is inconsistent with the 2017 Nomination and again casts doubt on Mr SD's capacity at that time.

On the non-provision of Mr SD's medical records

87. The failure to provide Mr SD's medical records clearly only heightened the Member Trustees' concerns that there was something being hidden. The request was put forward on more than one occasion that the medical records would be reviewed by a suitable medical practitioner to consider the question of Mr SD's capacity. This fundamental issue of capacity could not be determined on an informed basis without the disclosure of the medical records.

88. So, fundamental to the Member Trustees' exercise of their discretion is the issue of Mr SD's capacity and the fact that if he did not have capacity, then clearly, they could not follow the 2017 Nomination because that would be invalid. So, their approach to it then, and subsequently, was entirely reasonable and not perverse.

On the November 2019 decision

89. At that stage, the Member Trustees were still without any evidence regarding the issue of Mr SD's capacity. Moreover, the surrounding documents, which again may have assisted them in casting light on the position, were not disclosed to them. So, what they were faced with was a very pragmatic, and in that sense a reasonable, decision to make a distribution that essentially provided for the specific legacy to Mr SD's estate (£25,000) and some apportionment between Ms E (£161,000) and Mr Allen (£112,599.90) (all together the **November 2019 decision**). This was not on a simple 50/50 basis as per the 2015 Nomination.

90. Ms E, and indeed the estate, did not consider that they were in a 'take it or leave it' situation as they were willing to reject the proposal offered by the Member Trustees and raised issues, which even included relatively minor ones.

91. The November 2019 decision was not perverse or contrary to the Rules of the Scheme or to the law. It was a pragmatic decision given the tax implications if there had not been a distribution, which could have led to Ms E being worse off. It was a decision that was taken after reference to Whitehall, who were clearly advising that such an offer should be put forward, and there was an indication from my Office of the desirability of this proposal. So, the Member Trustees were approaching it not simply with regard to their own assessment of the situation which, given in isolation, was correct, but they were viewing it in the context of others involved. In the circumstances the decision was entirely reasonable and not perverse.

On conflict of interest

92. When questioned at the Oral Hearing Mrs Allen made it clear that she had no direct interest in the distribution of the death benefits and that any interest she may have had was only indirect. Mrs Allen confirmed that the basis for her actions in requesting SD's medical records were her "gut feeling", Whitehall's February 2018 letter and GJJ's advice to seek medical advice.

93. The position of the Member Trustees is that the issue of conflict of interest did not arise when the 2019 November decision was taken because, without the medical records and any medical evidence based upon them, the issue of whether Mr SD had capacity could not be considered in an informed way. So, the decision is not something that could be delegated, as delegating the matter would simply present the person to whom the decision had been delegated with the same problem.

94. The Member Trustees were entirely right at first to decline to make the decision, given TPOs view that an informed decision could not be made without the disclosure of the medical records and a report being obtained on them. Although, when the

decision was made, the Member Trustees did not have that evidence they did factor into their decision the substantive litigation risks that operated both ways. That was an entirely proper approach. It is not a matter the Member Trustees could have delegated, as that same problem would have arisen regardless, and no decision would have been taken. And, in those circumstances, the punitive tax charges would have outweighed any additional monies that might be, ultimately have been, deemed to be payable.

95. The Member Trustees found themselves in a position where Whitehall had failed to provide guidance and advice to them. On 12 February 2018, Mrs Allen appropriately raised a number of questions, seeking clarification from Whitehall. The response she received was confusing at best and just plain wrong and misleading at worst. Whitehall said that the issue that had arisen on the death of Mr SD was a beneficiary and not a pension administration matter, when in fact it is both. This put the Member Trustees on a single track rather than a dual track. The guidance or advice should have been for them to have sought legal advice in relation to the beneficiary issue and the pension administration issue.

96. If the conflict of interest issue, and other issues relevant to the pension administration had been identified, then clearly the Member Trustees would have sought wider legal advice. Instead, in the light of Whitehall's response, the Member Trustees sought legal advice on a narrow context relating to the issue of the capacity of Mr SD and, potentially, the setting aside of the 2017 Nomination.

97. If there was a conflict of interest, it was upon a limited culpability basis so far as the Member Trustees are concerned. Why as lay trustees would they raise issues that a professional trustee had told them did not exist? They had done the right thing, in the initial circumstances, by seeking advice and guidance from the professional trustee. They had tried to manage any conflict of interest to the best of their abilities, including by allowing Mrs Allen to be more involved while Mr Allen took a step back from the matter.

98. When Mr SD made the 2015 Nomination, he was aware that there would be a conflict of interest between Mr Allen and himself, being both a trustee and a beneficiary, and potentially that Mrs Allen would also have an indirect conflict. Notwithstanding that, he clearly had sufficient trust in them that he felt that was something they could deal with and would not let their judgment be clouded by any conflict of interest. On that basis, the fact that Mrs Allen might benefit indirectly from the 2015 Nomination did not mean necessarily that she would abrogate or breach her duties simply because of some ulterior motive. It has emerged from her evidence that Mrs Allen clearly considered her duties to be very important and wished to discharge them in a proper manner.

99. So, with regard to the conflict of interest: first, it does not arise; and second, if there were a duty, the Member Trustees had taken such steps to try and minimise or negate it. If they failed to do so, the culpability for that failure would rest with Whitehall.

100. The principal source of distress and anxiety was the failure of the Trustees to make a decision. This is clearly not the complaint before the Ombudsman. In terms of causation of distress and anxiety, it was not the actual decision itself that was the primary cause of that; it was, instead, the failure to take the decision and that failure was what led to the referral of the matter to The Pensions Ombudsman. In any event, in terms of evaluating culpability, the culpability is not equal. The real villains of this piece are Whitehall, who did not discharge any of their responsibilities that they were paid to do. Worse still they created problems when on the solitary occasion they did provide advice and guidance.

101. The Member Trustees have submitted:-

On the SSAS' status

101.1. An error has persisted throughout TPOs investigation and documents, as the Scheme is not an occupational pension scheme.

Quantum

101.2. Mr SD's share of the fund should be reduced to reflect: any costs incurred due to delays caused by Ms E and by TPO; and administration costs in relation to the SSAS, which should have been paid by Ms E and Mr NG.

Summary of Whitehall's position

102. Whitehall considers that it has been caught in the middle of a dispute between Ms E and the Member Trustees over the distribution of Mr SD's share of the fund and that there has clearly been considerable activity and behaviour of which it was unaware.

103. It has tried to remain impartial throughout the process but was not provided with sufficient information to reach a decision unaided on how Mr SD's share of fund should be distributed. The ultimate decision on the designation of funds lies with the Member Trustees. It therefore had to accept their instruction on this matter.

104. Since it could not make a decision or take any action without this instruction, it does not consider that it should be penalised in this matter.

105. Mr Allen was a named beneficiary of Mr SD's 2015 Nomination. The amount subsequently designated to Mr Allen was the balance of Mr SD's share of fund after the designation of what it understood to be the agreed amounts to Ms E and to Mr SD's estate. This was to ensure there was no liability to tax on the designation of the funds beyond two years after Mr SD's death.

106. It did all it could to bring the matter to a satisfactory conclusion and no tax charges were incurred on Mr SD's fund. It has tried to remain professional throughout this process and has not therefore mentioned this before but both parties made verbal threats of legal action against it if it did not take their side in this dispute.

Current administration of the SSAS

107. Whitehall has recently provided me with an update concerning the SSAS's administration and the activities that are currently in progress in order to generate liquid funds within the SSAS, which it has asked me to consider when making my directions:

    107.1. The Member Trustees have informed Whitehall that the SSAS' property known as Unit 25 has been placed on the open market for sale, so Whitehall has requested that sufficient time is granted to enable a buyer to be sought and the property to be sold. Whitehall hopes that this will generate liquid funds, so that payment can be made as I direct.

    107.2. The Member Trustees have informed Whitehall that the property management accounts are being finalised and will be available shortly.

On providing a remedy for Ms E

108. Whitehall has made various suggestions in respect of how I might direct a suitable remedy for Ms E. I have taken those into consideration in making my directions.

109. In response to Ms E's suggestion that Whitehall makes full payment of the balance of Mr SD's fund due from its corporate resources if the payment from the SSAS has failed to occur 90 days after the date of the Determination, Whitehall has said that it is not prepared to subsidise the SSAS from corporate funds pending the sale of the property.

110. It is clear from the history of this case that the withholding of medical records was pivotal to the time that it has taken to resolve this matter. Therefore, it would not be appropriate to make an award for "additional financial loss".

TPO's procedure in handling this case

111. Whitehall considers that insufficient weight has been given to the email sent to it by my Office, referred to in paragraph 59.5 above. Whitehall had understood the statement that Ms E had accepted the Member Trustees offer to pay her £161,000 from the SSAS bank account to avoid a tax charge as meaning that the matter had been settled and agreed. Whitehall considers that it should be acknowledged that this was a significant cause of confusion as it led to the November 2019 decision.

The SSAS' status as an occupational pension scheme

112. It is unclear why the Member Trustees do not consider the SSAS to be an occupational pension scheme. The principal employer, 1-Ecommerce Ltd, is still active.

Conclusions

Status of the Scheme

113. I shall consider first the Member Trustees' submission, which they raised only very late in the course of my Office's investigation into this case, that the SSAS has never been an occupational pension scheme.

114. Section 1(1) of the Pension Schemes Act 1993 (**PSA 1993**), defines the term "occupational pension scheme" as:

> "a pension scheme –
>
> (a) that —
>
> (i) for the purpose of providing benefits to, or in respect of, people with service in employments of a description, or
>
> (ii) for that purpose and also for the purpose of providing benefits to, or in respect of, other people,
>
> is established by, or by persons who include, a person to whom subsection (2) applies when the scheme is established or (as the case may be) to whom that subsection would have applied when the scheme was established had that subsection then been in force."

115. Section 1(2) of the PSA 1993 applies as follows:

> "This subsection applies—
>
> (a) where people in employments of the description concerned are employed by someone, to a person who employs such people,
>
> (b) to a person in an employment of that description, and
>
> (c) to a person representing interests of a description framed so as to include—
>
> (i) interests of persons who employ people in employments of the description mentioned in paragraph (a), or
>
> (ii) interests of people in employments of that description."

116. Section 181(1) of the PSA 1993, defines "employment" as follows:

> ""*employment"* includes any trade, business, profession, office or vocation and *"employed"* shall be construed accordingly except in the expression *"employed earner"".*

117. Following the judgment in the case of *Pi Consulting v The Pensions Regulator*[11] (**Pi Consulting**), the following two main questions need to be answered affirmatively in order to conclude that the SSAS is an occupational pension scheme[12]:

(i) is the scheme in question 'for the purpose of providing benefits to, or in respect of, people with service in employments of a description or for that purpose and also for the purpose of providing benefits to, or in respect of, other people'? (the **Purpose Issue**); and

(ii) is the scheme in question established by, or by persons who include, a person to whom section 1(2) of PSA 1993 applied when the scheme was established? (the **Founder Issue**).

118. Both the purpose of the SSAS and a description of the people who can take benefits under it are stated clearly in Rule 1 of the Rules, in which it is explained that the Principal Company "determined to establish and maintain a pension scheme with the object of providing Authorised Member Payments for and in respect of Employees of the Principal Company and any participating Employers".

119. I consider that the wording of Rule 1 demonstrates that the Scheme is within the scope of section 1(1)(a)(ii) of PSA 1993, and satisfies the Purpose issue.

120. Considering the Founder Issue, the position in relation to the SSAS is more straightforward than that of the pension scheme that was in question in Pi Consulting. When the SSAS was established, Mr Allen was the Company's director and Mr SD was an employee of the Company, so it is clear that sub-issue (b) can be answered affirmatively in relation to the SSAS.

121. On the basis set out in paragraphs 114 to 120 above, it is clear that the Scheme is an occupational pension scheme, as defined under section 1(1) of the PSA 1993.

Abuse of process

122. I have considered the question of whether there has been an abuse of process, taking into consideration the Member Trustees' view that they were induced into understanding that the complaint would not proceed or that the Second Preliminary Decision goes beyond the scope of the original complaint.

123. The complaint made by Ms E to my Office on 4 January 2019, is broad in nature, covering many aspects of how the Trustees have failed to administer the SSAS. My function is, also, inquisitorial and all parties have been kept informed of the issues I have been considering throughout the investigation. The crux of the complaint is that the Trustees have failed to make correct decisions in respect of the distribution of the death benefits; the applicant's position is that the Trustees' decisions in November 2019 are a further example of this.

[11] [2013] 100 PBLR (024) - [2013] EWHC 3181 (Ch).

[12] Paragraph 22 of Pi Consulting.

124. The information provided to both Whitehall and the Member Trustees, prior to the November 2019 decision to designate funds, was clear and at no stage did my Office advise the Trustees that the complaint had been discontinued. The timeline of events, set out above in paragraph 59, shows that Ms E was granted an extension of time within which to respond to the first stage Discontinuance Notice and it is apparent that Ms E had not accepted the Member Trustees' proposal in full to settle this matter prior to the Trustees' agreeing to the designation of the death benefits to Mr Allen. I do not accept that the Member Trustees reasonably believed that a final decision had been made that the complaint would not proceed or, therefore, that their position has been compromised by any actions they may have taken or not taken based on any such mistaken belief.

125. As my investigation was ongoing at the time of the November 2019 decision, and as the Trustees had further opportunities to explain their reasons for their decisions as part of this ongoing investigation, I do not consider that there has been an abuse of process. I do not consider that delaying my investigation further by commencing a new, separate, but closely linked complaint would have aided either party in resolving this matter. I consider that to have acted in any other way than I did would have been a breach of natural justice.

Conflict of Interest

126. Neither Mr Allen nor Mrs Allen accept that a conflict of interest exists, when clearly there is a conflict between: their personal and/or business interests; and their fiduciary duty as trustees not to profit. The Member Trustees argue that a position of conflict had not been reached by 20 November 2019, as they did not have all of the necessary information available upon which to make a decision. I do not find this proposition convincing; by disregarding the 2017 Nomination and acting instead on the basis that the 2015 Nomination was valid, Mr Allen stood to benefit as an Eligible Recipient of £112,599.90 and Mrs Allen had a clear interest in this, being his wife.

127. As trustees of an occupational pension scheme, the Trustees are required by section 249A (1) of the Pensions Act 2004 (**Section 249A**), to have established and operated "an effective system of governance including internal controls". "Internal controls" is defined as:

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

128. TPR's Code of Practice number 13 (**Code 13**)[13] makes it clear that "internal controls" include processes to identify and manage conflicts of interest (see paragraph 61 of Code 13).

129. TPR's guidance on conflicts of interest[14] sets out how Trustees should manage both actual and/or potential conflicts of interest (paragraph 45). At paragraph 10, TPR comments that when seeking to manage a non-trivial conflict of interest, and where the conflict could have the potential to be detrimental to the conduct or decisions of the trustees, it would expect trustees to seriously consider obtaining independent advice from a lawyer when deciding upon any option.

130. Despite the requirement under Section 249A, which Whitehall, as a professional trustee, must have known about, I have seen no evidence that any proper system for identifying or managing conflicts of interest was in place in relation to the SSAS, let alone followed, so it appears that the Trustees have failed to fulfil that requirement.

131. In administering the SSAS' property and in dealing with it, the Trustees were required to use "the same degree of diligence and care that a person of ordinary prudence would exercise in the management of his own affairs"[15]. A higher standard of care applied to Whitehall, as a professional trustee[16]. I find that, in failing to have in place adequate internal controls to identify and manage conflicts of interest under the Scheme, Whitehall and the Member Trustees acted in breach of this duty of care.

132. Further, it seems that Whitehall did not identify the clear conflicts of interest or take any steps to manage them, or, in its capacity as the SSAS' Professional Trustee, to guide the Member Trustees in managing them, at any point.

133. I am somewhat confused by Whitehall's approach to the matter. Whitehall had clearly identified that the validity of the 2017 Nomination was in question, as it consulted my Office's ERT for guidance in that regard (see paragraph 45 above). However, Whitehall subsequently appear not to have recognised that the decision on the distribution of Mr SD's death benefits, under Rule 8, was that of the Member Trustees' (see paragraph 138 below), as it announced to the Member Trustees that it would proceed in line with the 2017 Nomination unless it received proof from Mr Allen that he had been financially dependent on Mr SD and was therefore an Eligible Recipient.

134. When Mr Allen responded to Whitehall's proposal by stating that no distribution was to be made without the Member Trustees' authorisation (see paragraph 46 above), Whitehall did not mention the conflicts of interest that existed in relation to the

[13] TPR's 'Code of practice 13: Governance and administration of occupational trust-based schemes providing money purchase benefits' – code in force 26 July 2016.

[14] TPR's guidance on 'Conflicts of interest' – Oct 2008 https://www.thepensionsregulator.gov.uk/en/document-library/scheme-management-detailed-guidance/governing-body-detailed-guidance/conflicts-of-interest.

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

[16] *Bartlett v Barclays Bank Trust Co. Ltd* [1980] Ch. 515 at 531.

Member Trustees, which were clearly present owing to the Member Trustees' having queried the validity of Mr SD's decision to effectively remove Mr Allen from the group of Eligible Recipients. Instead, Whitehall advised Mr Allen to seek legal advice in his capacity as an interested beneficiary of the SSAS, not as a Trustee in a position of conflicted interests. Even when my Office brought the conflicts of interest to Whitehall's attention (see paragraph 53 above), Whitehall failed to take any steps to address that issue or to assist the Member Trustees in doing so.

135. As a Professional Trustee on notice that a conflict of interest existed in relation to the Member Trustees' exercise of their power to decide who should receive Mr SD's death benefits, had it been exercising the necessary degree of diligence and prudence (see paragraph 131 above) Whitehall would have brought the matter to the Member Trustees' attention and assisted them in taking steps to manage the conflict. However, Whitehall failed to do this and instead assumed a passive, or at best reactive, role, in breach of its core duty of care as a professional pension scheme trustee.

136. Even without Whitehall's guidance however, I consider that it should have been apparent to the Member Trustees that significant conflicts of interest existed, and I find, on the balance of probabilities, that they were aware of those conflicts of interest. Despite this, the Member Trustees took no steps to attempt to manage the conflicts or even to enquire whether any guidance on the matter existed. Had the Member Trustees taken any steps to investigate this issue, I consider, on the balance of probabilities, that TPR's guidance on conflicts of interest would have been drawn to their attention.

137. As referred to at paragraph 129 above, TPR's guidance suggests that pension scheme trustees should seriously consider seeking legal advice when Trustees are seeking to resolve a non-trivial conflict of interest. In this instance there was a clear and serious conflict, and the Member Trustees should have sought legal advice on how to manage that conflict of interest.[17]

138. While Rule 8, read with Rule 22.7, provides that the decision regarding the distribution of Mr SD's death benefits had to be made by the Member Trustees unanimously, disregarding the participation of Whitehall as the Professional Trustee, it would have been within the Member Trustees' power to have delegated that decision to an independent person. Rule 22.8 provided the Trustees with the power to "delegate powers, duties or discretions…within their number or to third parties and on any terms". Had the Member Trustees sought legal advice in accordance with TPR's guidance, it seems likely that they would have been made aware of their delegation power and could have exercised it in order to manage their conflicts of interest. In fact, as set out in paragraph 53 above, a Technical Specialist from my Office's ERT had suggested that the Member Trustees delegate their power under

[17] Para 10 and Principle 3.3 of the Pensions Regulator's Conflict of Interest Guidance – October 2008 https://www.thepensionsregulator.gov.uk/en/document-library/scheme-management-detailed-guidance/governing-body-detailed-guidance/conflicts-of-interest.

Rule 8, in this instance, to an independent third party. However, instead, the Member Trustees ignored the conflicts of interest and proceeded to exercise their power under Rule 8 to distribute the death benefits in a manner that benefited Mr Allen and, indirectly, Mrs Allen. In doing so, the Member Trustees favoured their own interests over those of other potential beneficiaries. I find that this amounted to breaches by the Member Trustees of: their duty to act in the best financial interests of the SSAS' beneficiaries; and their duty of care, as explained in paragraph 131 above.

The 2019 November decision

139. Having failed to take into consideration the relevance of their conflicts of interest or take any steps to manage it, the Member Trustees pursued the question of the validity of Mr SD's 2017 Nomination, on the grounds that Mr SD must have lacked testamentary capacity at that time. Evidence, other than Mr SD's medical records, was available to the Member Trustees to determine whether Mr SD had testamentary capacity.

140. With regard to Mr SD's capacity and the evidence available to the Member Trustees, it is apparent that in the months prior to his death he put in place understandable changes to his financial and personal affairs that required his careful consideration. Mr SD received ongoing treatment with medical procedures undertaken both at home and at hospital that required his consent and he actively engaged with visitors. While Mr SD had reportedly been struggling to communicate verbally, the Trustees had seen no evidence that proved that his capacity to make decisions was impaired when he signed the 2017 Nomination.

141. I appreciate that the refusal of Mr SD's family to provide Mr SD's medical records to the Member Trustees raised suspicion on the Member Trustees' part. However, the manner in which this information was requested was not helpful and, despite Mr Allen's and Mrs Allen's comments to the contrary, I do not consider that the references to obtaining a report in GJJ's correspondence dated 6 April, 22 May and 7 August 2018 made it sufficiently clear that the medical records would be given to an independent party to review. Unfortunately, the position of both parties became entrenched on this point, with the result that the dispute could not be resolved in a timely manner. If Whitehall had provided the Member Trustees with adequate guidance as early as February 2018 in respect of their trustee duties, the subsequent delays, caused by the Member Trustees' insistence upon the need for Mr SD's medical records in order to determine a question in which the Member Trustees personally had an interest, may have been avoided.

142. It is for the Trustees to decide, by unanimous decision by the Member Trustees and after making the appropriate enquiries, whom the 'Eligible Recipients' are (See Appendix 6 Rule 8.2 and 22.7). The Eligible Recipients include, among others: the member's dependants; "persons interested in his estate; and persons …… that he has nominated to the Trustees in writing".

143. In exercising a discretionary power, such as that under Rule 8, trustees are required to apply the following principles as set out in the case of *Edge*. Trustees must:

    (i) take into account all relevant factors and disregard any irrelevant factors;

    (ii) ask themselves the correct questions;

    (iii) direct themselves correctly in law, for example, by adopting an incorrect interpretation of the relevant rule; and

    (iv) avoid a perverse decision, that is a decision that no reasonable decision maker, properly advising themselves of all the relevant circumstances, could make.

144. The evidence received and discussed at the Oral Hearing shows that the Member Trustees gave consideration to: Mr SD's 2015 and 2017 Nominations; the covering letter to the 2017 Nomination; and Mr SD's Will. The Member Trustees also requested a copy of Mr SD's Letter of Wishes and his medical records. However, these were not provided before the November 2019 decision, at which point the two-year period in which the death benefits could be distributed without incurring tax charges was approaching, causing the Member Trustees to expedite their decision as to whom the Eligible Recipients were. When deciding whether Mr SD had capacity to make the 2017 Nomination, the Member Trustees focused primarily on obtaining access to Mr SD's medical records and gave little weight or consideration to the other evidence that was available to them (see paragraph 140 above), which might have justified the distribution of death benefits in accordance with the 2017 Nomination.

145. Having ruled out the 2017 Nomination, the Member Trustees proceeded to make a decision that reflected neither the 2015 Nomination, which they considered to have been made validly without having been superseded by the 2017 Nomination, nor the 2017 Nomination. When I asked Mrs Allen to confirm the factors that had been taken into account when making this decision, she informed me that the Member Trustees had considered: the two-year tax deadline; the SSAS' liquid funds at that time; and the fact that they did not have evidence of Mr SD's capacity. In addition, Mr Allen referred to his belief that the offer made to Ms E, to settle this matter, had been accepted and that the Trustees had entered into a contractual agreement with her.

146. Regarding the two-year tax deadline and the level of the SSAS' liquid funds, the Member Trustees' concerns are understandable, however, these factors are irrelevant in the identification of the Eligible Recipients and the decision on how the death benefits should be distributed. In any event, I consider that the Trustees could have made their decision under Rule 8 far earlier and well within the two-year deadline had the Trustees identified and managed the conflicts of interest as they should have done, as I have outlined in paragraph 129 above.

147. I find that the Member Trustees failed to take into consideration their respective conflicts of interest when making their decisions or give sufficient weight to other

evidence available in respect of Mr SD's capacity prior to his death. In respect of their conflicts of interest, my office raised this issue with the Trustees on a number of occasions and proposed a reasonable solution that the Member Trustees excuse themselves from the decision, one that Whitehall was willing to accept. However, despite this, the Member Trustees failed to direct themselves correctly with regard to their conflicts of interest and the necessary steps to manage those conflicts, failing to seek legal advice on this point, and proceeded to make decisions without showing any acknowledgment that this might be an issue.

148. Rule 8 only permitted payments to be made to "Eligible Recipients". While Mr Allen would have been an Eligible Recipient under the 2015 Nomination (assuming it was valid), he was not named in the 2017 Nomination. Therefore, if the 2017 Nomination was made validly, which I shall consider in paragraph 150 below, Mr Allen would not have been an Eligible Recipient and payment to him would have been in breach of Rule 8. However, it does not appear that the Member Trustees considered adequately the requirements of Rule 8 or the consequences of breaching those requirements.

149. When reaching their decision on how to distribute the death benefits in November 2019, the Member Trustees ignored both: the 2015 Nomination, which they had been relying upon as valid and which detailed Mr Allen and Ms E as each receiving 50% of Mr SD's share of the fund; and the 2017 Nomination, which directed a payment of £25,000 to Mr SD's estate and the remaining balance to Ms E. Instead, the Member Trustees decided to pay £25,000 to Mr SD's estate, £161,000 to Ms E and designate £112,599.90 to Mr Allen. The 2019 November decision makes no sense when considering Mr SD's documented wishes in either the 2015 or the 2017 Nominations.

150. In fact, the Member Trustees assumed, without conclusive evidence or independent advice, that the 2017 Nomination was invalid, resulting in their decision to allocate some of the death benefit to Mr Allen. The Member Trustees' starting point, concerning the 2017 Nomination, was that Mr SD had lacked capacity to have made the 2017 Nomination, owing to their perception that they did not have evidence of his capacity. In fact, the starting point when determining whether Mr SD had capacity at the relevant time should have been, in the absence of conclusive evidence otherwise, that he did have capacity. I consider this to have been a perverse decision, which no reasonable decision maker who had advised himself properly of all of the relevant circumstances could have made. Therefore, I find that the Member Trustees breached the decision-making requirements of *Edge* in deciding to distribute the death benefits as they did.

151. When I questioned Mr RM on the process undertaken by the Trustees when deciding how Mr SD's death benefits were to be distributed, he accepted that Whitehall, as the Professional Trustee, had not called a meeting with the Member Trustees and that Whitehall had not gone through any process to ensure that the Member Trustees considered all of the factors necessary to reach a considered decision, or to guide the Member Trustees in doing so. In effect, Whitehall took no active part, as a Trustee, in assisting the Member Trustees in making their decision on how the death benefits

were to be distributed at that time. Whitehall merely accepted and endorsed the decision made by the Member Trustees on behalf of the Trustees, without raising any questions or documenting any reasons why it considered the decision to accord with Rule 8 and the requirements of the Finance Act 2004.

152. While I recognise the position in which Whitehall found itself, as explained to me by Mr RM at the Oral Hearing, this did not remove Whitehall's core duty to exercise its powers in the SSAS' beneficiaries' best financial interests. This duty is described in the case of *Armitage v Nurse*[18] where Millet LJ comments, at paragraph 253, 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". It has been confirmed, in the case of *Merchant Navy Ratings Pension Fund Trustees Ltd v. Stena Line Ltd and Others*[19] that, in the context of pension scheme trustee duties, the duty to perform the trusts for the benefit of the beneficiaries should be considered in the context of the pension scheme's purpose and the benefits that the scheme has been established to provide.

153. As the 2019 November decision is based on neither the 2015 Nomination, despite both the Member Trustees and Whitehall having considered it to have been made validly, nor the 2017 Nomination, Mr Allen cannot have been considered to be an Eligible Recipient in accordance with the Rules. Therefore, by designating a share of Mr SD's fund to Mr Allen the Member Trustees were in breach of Rule 8 and did not act in the best financial interests of the beneficiaries.

154. Whitehall should have been aware of the fact that: the Member Trustees' 2019 November decision did not accord with the Rules; the allocation of the death benefits was being made in breach of the Trustees' core duty to act in members' best financial interests; and, by failing to alert the Member Trustees to this, it was in breach of its own duty of care.

155. Irrespective of the Trustees' decision requirements in the Rules, I consider that Whitehall had a duty to act in the best financial interests of all of the beneficiaries and that it failed to do so by not providing the Member Trustees with proper advice in respect of their responsibilities, in particular the need to manage their conflicts of interest, and by not actively considering the 2019 November decision with the Member Trustees.

156. Where, as in this case, I find that a decision has been improperly made, I would normally ask the Trustees to make their decision afresh. However, in this instance I have decided not to do so as the Member Trustees would not be able to make a new decision with any degree of impartiality, given that their interests are conflicted. In addition, Whitehall has shown a lack of willingness and/or ability to fulfil its duties as a professional trustee in this regard. In the circumstances, I have concluded that the

[18] Armitage v Nurse [1998] Ch 241, page 253.

[19] [2015] EWHC 448 (Ch).

appropriate course to take is that I should determine myself the distribution that a reasonable trustee would have made under Rule 8, in accordance with the *Edge* principles.

157. In considering whether the 2017 Nomination should be regarded as a relevant factor in deciding how to distribute Mr SD's death benefits under Rule 8, I have obtained a medical report from an independent medical adviser, Dr Falk, in relation to Mr SD's mental capacity when he completed the 2017 Nomination. In his report, Dr Falk has provided succinct answers to the questions that I asked him and his response and the other evidence available to me indicates strongly that Mr SD had the mental capacity to complete the 2017 Nomination. I consider, therefore, that the 2017 Nomination should be regarded as having been made validly. On that basis, I find that the 2017 Nomination is a relevant factor in deciding how Mr SD's death benefits should be distributed.

158. Taking into consideration the evidence submitted to me, the impression I am given is that Mr SD was a kind man who found himself in a very difficult position as he did not wish to upset any of his immediate friends and family. It is reasonable that, having set up a pension to be taken many years in the future, Mr SD revisited his finances prior to his death to ensure that his estate had sufficient funds and to make gifts to his family.

159. I do not consider that Mr SD's Letter of Wishes or his note to his sister contradict the 2017 Nomination, though the practical application of his wish, "to ensure that a sensible and logical plan is put in place to release all my funds in an orderly fashion" (see paragraph 29 above), was inevitably going to be a challenge for the Trustees to administer.

160. In finding that the 2017 Nomination is valid, and taking the other information available to me into consideration, I find that Ms E and Mr SD's estate are the Eligible Recipients and that the correct distribution of Mr SD's death benefits is that £25,000 is paid to his estate with the remaining balance paid to Ms E. Due to the length of time that has passed since the assets of the SSAS were last valued, the Trustees shall obtain a new valuation of the property and land identified at paragraph 31 above and confirm the value of the SSAS assets. The Trustees shall then pay Ms E the remaining balance of Mr SD's death benefits, revalued to reflect any increase in the value of the SSAS' assets.

161. Having found that the 2017 Nomination is valid, while I note the parties' opposing views as to the validity of the 2015 Nomination, I do not consider it necessary to make a finding as to whether or not the 2015 Nomination was valid. If it was made validly, it was superseded by the 2017 Nomination before Mr SD's death.

162. I have concluded that it would be unfair to reduce the entitlement I have directed in favour of Ms E as she was not responsible for causing any tax charge to be triggered, and there would have been no charge had the process been carried out properly by the Trustees. My directions (see paragraph 201 below) take this into account.

163. This matter has caused Ms E severe and unnecessary distress and inconvenience and I make a direction in recognition of that fact.

Liability

164. Under Clause 23.1 of the Trust Deed, no trustee shall be personally liable for any breach of trust or other breach of duty, except to the extent attributable to his act or omission knowingly and deliberately committed in bad faith.

165. A further exoneration provision, in respect of the Professional Trustee, is contained in Clause 23.3, under which the Professional Trustee shall not be under any liability "to any member or beneficiary in respect of any Scheme Chargeable Payment including in relation to any Scheme Sanction Charge or a De-registration Charge except to the extent attributable to that Professional Trustee's…own act or omission knowingly and deliberately committed in bad faith.".

166. Clause 23.1 also contains an indemnity under which each Trustee is indemnified out of the Scheme "against any liabilities relating to the Scheme or the relevant trusteeship and any such breach of trust or other breach of duty, including in relation to the making of any Scheme Chargeable Payment, unless so attributable to him."[20].

167. Clause 23.2 provides a further indemnity for Whitehall, as the Professional Trustee, under which each Professional Trustee shall "be indemnified from the assets of the Scheme and from the assets of each relevant Member's Fund and by each relevant Member and Beneficiary personally and by each of the Employers from all and any liabilities, costs, claims, expenses, obligations, demands and proceedings whatsoever to or in respect of or arising out of or in connection with a Scheme Sanction Charge or a De-registration Charge or any other Tax, including any other Tax under the Finance Act except to the extent attributable to that Professional Trustee's…own act or omission knowingly and deliberately committed in bad faith."[21].

168. Considering first the exoneration under Clause 23.1 and 23.3 of the Trust Deed (see paragraphs 164 and 165 above), I find that Whitehall did act in bad faith[22] as it made the explicit decision to remain impartial in this dispute so as to avoid conflict with either party. In particular, the designation of £112,599.90 to Mr Allen without seeking any legal advice on how this matter should be resolved represents a breach of Whitehall's core duty of care, as a trustee, to act in the best financial interest of the beneficiaries.

169. I find also that the Member Trustees, knowingly and deliberately, acted in bad faith and in breach of their fiduciary duties as they made the November 2019 decision knowing that they were conflicted or potentially conflicted, with the purpose of

[20] This indemnity is subject to section 256 of the Pensions Act 2004 and does not apply to the extent that the Trustee recovers under any insurance.
[21] This indemnity does not apply to the extent that the Professional Trustee recovers under any insurance claim.

[22] Sub-para 59.13 - Whitehall's letter to Mr SA dated 20 November 2019.

designating a share of the death benefits to Mr Allen, while using the two-year tax deadline as justification for the decision. This was despite their stated concerns that they did not have sufficient information in respect of Mr SD's capacity. The Member Trustees are therefore unable to rely upon the exoneration under Clause 23.1.

170. In any event, the scope of the exoneration under Clause 23.1 is limited by the case of *Armitage* (see paragraph 152 above), which established 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".

171. In *Armitage*, Millet LJ accepted, at paragraph 18, that dishonesty:

> "connotes at the minimum an intention on the part of the trustee to pursue a particular course of action, either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interests or not."

172. Millet LJ explained (at paragraph 19) that:

> "It is the duty of a trustee to manage the trust property and deal with it in the interests of the beneficiaries. If he acts in a way which he does not honestly believe is in their interests then he is acting dishonestly.".

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

> "… in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sights this may seem surprising. Honesty has a connotation of subjectivity as distinct from objectivity of negligence. Honesty, indeed does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated…However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour."

174. 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.”

175. 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”.

176. 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.

177. 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…”.

178. 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.

179. In the later case of *Fattal v Walbrook Trustees (Jersey) Limited* [2010] EWHC 2767 (Ch)[23], it was accepted, at para 81, that the law concerning the interpretation of exoneration clauses, as set out in *Walker v Stones*, was not confined to applying to solicitor-trustees. In *Fattal v Walbrook*[24] 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.

180. In the case of *Ivey v Genting Casinos Ltd t/a Crockfords* [2017] UKSC 67, it was confirmed that there should be a common standard of dishonesty in both civil and criminal cases and that the civil standard, as considered in the cases of *Royal Brunei* and *Twinsectra* should be applied in the criminal, as well as in the civil, context (paragraph 62 of *Ivey v Genting*). *Ivey v Genting* emphasised, in line with *Twinsectra*, that, in considering whether an individual had acted dishonestly, it was necessary to make that judgment on the basis of the standards of ordinary common people, not of those of that individual.

181. Having found that Whitehall has breached its core duty of care and its duty to act in the beneficiaries' best financial interests, I consider that the circumstances call into question the honesty and basis on which Whitehall made its decisions. It has been explained to me that Whitehall made a deliberate decision to remain impartial throughout the process of deciding how to distribute Mr SD's death benefits and that it tried to resolve the situation to the best of its ability.

182. As I have indicated at paragraphs 130 and 131 above, Whitehall did not handle the issue of the conflict of interest in a professional manner and did not seek legal advice on this, or in relation to any other issue that may have assisted it and/or the Member Trustees in resolving this matter. In particular, Whitehall did not seek any legal advice in respect of the proposed resolution in November 2019 and how this could be applied in accordance with the Rules, simply flagging to the Member Trustees that they should consider whether or not they needed to take independent legal advice. Whitehall did not refer itself and/or the Member Trustees to TPR's guidance that was freely available on managing conflicts. By not applying itself fully by failing to seek additional advice, I consider that, as a professional trustee, Whitehall was recklessly indifferent to Ms E's interests as a beneficiary, and that it acted to protect its own interests by remaining impartial. For these reasons, I consider that Whitehall's actions

[23] which acknowledged, at para 81, that there had been "twists and turns in the legal definition of dishonesty", referring to the cases of Twinsectra Ltd v Yardley [2002] AC 164 (**Twinsectra**), Barlow Clowes v Eurotrust International Ltd [2006] 1 WLR 1476 and Abou-Rahmah v Abacha [2006] EWCA Civ 1492.

[24] and confirmed in the case of Sofer v Swiss Independent Trustees SA [2019] 2071 (Ch) and subsequently in Robert Sofer v Swiss Independent Trustees SA [2020] EWCA Civ 699.

fall within the legal definition of dishonesty that is relevant to this case, as set out in paragraph 171 above.

183. The Member Trustees' honesty is called into question by the fact that, in disregarding the 2017 Nomination, Mr Allen stood to benefit financially. As I have explained, the Member Trustees' failure to make any enquiries as to the existence of a conflict of interest amounts to a reckless indifference regarding their duties and obligations as trustees. I consider, therefore, that the Member Trustees acted dishonestly, under the test of honesty set out in *Armitage* (see paragraph 170 above) and also any and all of the other applicable tests, as outlined in paragraphs 172 to 181 above. As a consequence, they are unable to rely upon the exoneration under Clause 23.1 of the Trust Deed.

184. I shall consider now whether any of the Trustees should benefit from either or both of the indemnities under Clause 23.1 and 23.2 (see paragraphs 166 and 167 above). The indemnity under Clause 23.1 does not apply to any Trustee if the breach of trust or breach of duty in question is "attributable to him".

185. I have found that each of the Trustees breached their respective individual duty of care (see paragraphs 135 and 138 above in respect of Whitehall and the Member Trustees), and their duty to act in the SSAS' beneficiaries' best financial interests (paragraph 156 above in respect of Whitehall, and paragraphs 138 and 153 above in respect of the Member Trustees). I have found also that the Member Trustees failed to fulfil the decision-making requirements of *Edge* when they made their decision concerning the distribution of death benefits in 2019 (paragraph 150 above), and that Whitehall failed to fulfil the requirements of section 249A Pensions Act 2004, by failing to have in place any proper system for identifying conflicts of interest (paragraph 130 above).

186. Each of those breaches of trust or breaches of duty, as applicable, has led to the need for the Trustees to obtain a new valuation of the property and land held under the SSAS (paragraph 160 above) and, as acknowledged in paragraph 162 above, may lead, or have led, to tax charges being imposed on Ms E and/or the SSAS. Therefore, any liabilities relating to the Trustees' respective breaches of trust and/or duty are attributable to each and all of the Trustees. I find that the Trustees are unable to rely upon the indemnity under Clause 23.1.

187. Regarding the indemnity under Clause 23.2, which relates to Whitehall only (see paragraph 167 above), having found already that Whitehall acted in bad faith (see paragraph 168 above), I find that Whitehall is unable to rely upon that indemnity.

188. I note also that it has been acknowledged, in the case of *Sofer v Swiss Independent Trustees SA* [2020] EWCA Civ 699, that the existence in indemnities of an implied term that there is no protection for dishonesty under an indemnity is arguable. As I have found that each of the Trustees acted dishonestly (paragraphs 182 and 183 above), I consider that this reinforces my finding that the Trustees are unable to rely upon the indemnities under Clause 23.1 and 23.2, as applicable.

189. In the Member Trustees' case, I am required to consider whether they should be afforded any relief from liability by Section 61 of the Trustee Act 1925 (**Section 61**). Under Section 61, I may direct relief to the Member Trustees wholly or partly of their personal liability if it appears to me that: (1) the Member Trustees acted honestly and reasonably; and (2) it would be fair to excuse them from personal liability, having regard to all the circumstances of the case.

190. As I have already found that the Member Trustees failed to act honestly in their handling of their conflicts of interest and failed to allocate Mr SD's death benefits in accordance with Rule 8, I find that the Member Trustees are unable to rely on section 61 of the Trustees 1925, for relief from any personal liability for their breaches of trust and breach of their duty of care.

Decision

191. Having found that both the Member Trustees and Whitehall have breached their respective duties of care to the beneficiaries of the SSAS, the remedy for these breaches is similar to common law damages, and rules relating to causation, remoteness and the measure of damages apply[25]. This is relevant in respect of any tax charge that Ms E may incur due to the fact that the decision to distribute the outstanding balance of Mr SD's death benefits has been made more than two years after his death.

192. I have considered Ms E's request that an independent assessment of the total value of the SSAS and of the fund assets is undertaken and, while I recognise the reasons for this request, I am not of the view that an independent assessment would be of any material help in bringing this matter to a conclusion. I consider that it may even delay a resolution.

193. I understand that the pension scheme property known as Unit 25 has been placed on the market and that the property management accounts are being finalised, therefore, the Trustees are now required to resolve this matter as soon as it is practically possible to do so.

194. Ms E has submitted that Whitehall should pay her the outstanding share of Mr SD's benefits if payment from the SSAS cannot be made within 90 days of this Determination. I cannot agree with this proposal, despite the fact that Whitehall's actions contributed to the impasse between Ms E and the Member Trustees. Whitehall is not solely responsible for the breach of duties of care to the beneficiaries of the SSAS and should not be asked to solely provide the remedy, in the event of any delay.

195. Having obtained an up-to-date valuation of the SSAS (as set out in paragraph 160 above) the Trustees should share this information with Ms E, detailing the changes in the value of the SSAS' assets since 20 November 2019. This information is to include the property management accounts that show any rent received and all relevant

[25] Bristol and West Building Society v Mothew [1998] Ch 1 at 16-22.

information necessary to provide a fully transparent view of the current total value of the SSAS. I do not consider that Ms E should have to bear the cost of any work undertaken by Whitehall since 20 November 2019, so any such costs should be excluded from the valuation.

196. As a minimum the Trustees shall pay Ms E £112,599.90 plus simple interest at a rate of 8% per annum between 20 November 2019 and the date of payment to Ms E.[26] The addition of interest to this payment is appropriate as the Trustees identified the value of Mr SD's share in November 2019, but as outlined in this Determination they did not correctly pay it to Ms E.

197. If the value of the SSAS has increased since 20 November 2019, the Trustees shall pay Ms E the appropriate share of that increase, in addition to the £112,599.90 plus interest, though no interest will be paid on the share of the increase since 20 November 2019.

198. I have considered Whitehall's and the Member Trustees' acts and omissions, bearing in mind that the decisions made by the Trustees related to her brother's final wishes, over a prolonged period. The Member Trustees, although let down by the advice provided by Whitehall, had sufficient knowledge to recognise their actual and/or potential conflicts of interest. Their failure to appreciate this and their subsequent actions have caused Ms E serious distress and inconvenience. Whitehall failed to provide the Member Trustees with clear guidance at an early stage and its failures to understand its own duties reflect a series of errors that prevented Ms E's complaint from being resolved at a much earlier stage, prolonging Ms E's distress and inconvenience. I consider that Whitehall's inaction caused Ms E to suffer a severe level of distress and inconvenience. On that basis, I find that it is appropriate to award payments, from the Member Trustees and Whitehall to Ms E, in recognition of the non-financial injustice that they have each caused Ms S to suffer.

Directions

199. Within 28 days of the date of this Determination, the Trustees shall:

199.1. confirm an up-to-date valuation of the Business Unit and Land identified at paragraph 31 above;

199.2. confirm an up-to-date value of the SSAS assets in total, disregarding any costs incurred by the SSAS after 20 November 2019;

199.3. confirm how the outstanding share of Mr SD's death benefits will be paid to Ms E in full, without any deductions; and

[26] The Pension Ombudsman's power to award interest at a rate of 8% falls under S151(2) of the Pension Schemes Act 1993.

199.4. provide Ms E with a full breakdown of the valuation of the SSAS (including the property management accounts) and confirm, in writing, when the outstanding share of Mr SD's death benefits will be paid.

200. As soon as it is practically possible to do so, the Trustees shall pay to Ms E the greater of:

200.1. the outstanding share of Mr SD's death benefits, revalued to reflect any increase in the SSAS' total assets; and

200.2. £112,599.90, plus simple interest at a rate of 8% from 20 November 2019.

201. In the event that Ms E incurs any income tax charge in connection with the distribution of Mr SD's death benefits, she will inform the Trustees, and provide them with appropriate evidence, of the charge and the Trustees shall reimburse Ms E in full within 28 days of having been notified of the charge by Ms E.

Within 28 days of the date of this Determination, Whitehall shall pay £2,000 and the Member Trustees £1,000 to Ms E in respect of the severe and serious distress and inconvenience caused.

Anthony Arter

Pensions Ombudsman

6 December 2022

Appendix 1

Skeleton argument submitted by Ms E's Counsel prior to the Oral Hearing

202. Counsel for Ms E says:-

On the Member Trustees' conflict of interest

202.1. It is beyond doubt that as Member Trustees, Mr Allen and Mrs Allen, were (and are) heavily conflicted in this matter, as a result of their financial interest in the outcome.

202.2. The decision of the Trustees to pay Ms E only £161,000 and designate the remainder to Mr Allen:

202.2.1. was made in the absence of any conflict management steps being taken;

202.2.2. took into account irrelevant considerations; and

202.2.3. as a result, is inherently flawed and perverse.

202.3. Had the Trustees demonstrated any appreciation of the conflict management steps (for example, if they had read TPR's guidance on conflicts of interest) they would have quickly appreciated the obvious way to manage the conflict in this case. Namely, the Member Trustees should have left the decision to the unconflicted Whitehall. It is of note that prior to the Member Trustee's interference, Whitehall had already taken the proper decision to set in train the payment of the benefit to Ms E.

202.4. At a bare minimum legal advice should have been sought by the Trustees. Such legal advice would have immediately identified that:-

202.4.1. The obvious way to manage the conflict was for Whitehall to take the decision.

202.4.2. There was no bar to this step being taken in the governing Deed and Rules. Rules 22.8 provides that "Two Trustees constitute a quorum…" and that "the Trustees may delegate powers, duties or discretions (including but without limiting the foregoing, those relating to investment or banking transactions) within their number or to third parties on any terms."

202.4.3. There was no bar to the Member Trustees then enacting Whitehall's decision by approving it at a quorate meeting to ensure conformity with Rule 22.8.

202.5. The failure to take this step found a near repetition when the Member Trustees refused to agree with my Office's suggestion that the decision be handed over

to a separate Independent Trustee. This refusal was because the Member Trustees "could not bring themselves to participate in such a system which did not guarantee them the financial outcome which they wanted".

202.6. The decision to pay Ms E £161,000 appears to have been taken on the basis that it would clear out the SASS' bank account and because the Member Trustees thought, incorrectly, they were tying Ms E to a contract which she would be driven to accept because of the imminent expiry of the two-year period, and potential unauthorised payment tax charges. Those are irrelevant considerations and have no basis in a proper trustee decision.

On the 2017 Nomination

202.7. As a result of their conflict of interest, in early 2018, the Member Trustees began emailing Ms E questioning the bona fides of the 2017 Nomination, apparently based on no more than Mrs A's "gut feeling". Since then, the Member Trustees have requested sight of Mr SD's medical records, apparently to satisfy themselves of Mr SD's capacity at the time of making the 2017 Nomination.

202.8. The medical records are a red herring. A trustee acting properly would quickly identify the following considerations:-

202.8.1. There is no basis for thinking that someone with terminal cancer and in pain is not fit to make a simple expression of wishes regarding their pension.

202.8.2. There is no proper basis for speculating that Mr SD did not understand the content of the 2017 Nomination or the issue he was deciding upon.

202.8.3. Even indulging such speculation, the evidence goes the other way, showing that:-

- The treating consultant witnessed Mr SD's will some seven days later, which he is hardly likely to have done if he doubted Mr SD's capacity.
- If the Member Trustees had made any enquiries of, for example, Mr NG, those would have quickly elicited the sort of independent evidence contained in Mr NG's statement to me.

202.8.4. A solicitor is not particularly well placed to assess capacity – the Member Trustees' position appears to be that a solicitor should have made Mr SD's will.

202.8.5. There is nothing odd or surprising about the decision, that Mr SD

wished for his pension fund to be directed to his family. Indeed, the reverse is true. It is startling that Mr A, as Mr SD's friend, should expect to be the beneficiary of 50% of his pension fund.

202.8.6. There is no evidence that the Trustees took even basic steps to inform themselves of the proper legal test for an individual lacking capacity or took any steps to receive legal advice about the true position. For example, the Mental Capacity Act 2005 carries with it a presumption of capacity.

202.8.7. A small amount of research could easily have identified the BMA's Mental Capacity Toolkit of February 2016 – a short document which on ordinary reading demonstrates that Mr SD's facts were not those which any reasonable individual would consider raised issues of capacity.

202.9. Instead of these considerations, the Member Trustees demanded that they review Mr SD's medical records. This was an absurd position to take and quite improper for layperson trustees to purport to interpret medical records that they are simply not equipped to do[27].

202.10. The structured approach to the issue before the Trustees was:-

202.10.1. The Trustees must consider the 2017 Nomination.

202.10.2. If it was made by someone who was properly regarded as incapacitated, it would not be considered. Otherwise, it must be considered.

202.10.3. The proper considerations are those listed above.

On Whitehall

202.11. It agrees that Whitehall is responsible in part for allowing this case to develop in the way it has.

202.12. At the very least, it was incumbent upon Whitehall to ensure that proper legal guidance was obtained in the face of the Member Trustees' position. This would have identified the obvious way of resolving the Member Trustees' conflict of interest and matters should have progressed from there.

202.13. There is no evidence that Whitehall consulted, or was aware of, the Pensions Regulator's guidance on managing conflicts of interest.

[27] For similar reasons, nor should I, as opposed to instructing expert evidence on the question of capacity from an appropriate medical expert, should I deem such a step appropriate.

202.14. Nor did it obtain a proper valuation of the SSAS investments at the time of Mr SD's death, so that a proper approach to the valuation of Mr SD's benefit could be taken.

The remaining assets in the SSAS

202.15. It agrees that it is necessary to obtain a full understanding of the financial position of the SSAS, where the balance of Mr SD's death benefit is held and its accessibility.

In conclusion, Ms E's Counsel submits:-

202.16. I should substitute my own decision for that of the decision-makers' flawed decision. The matter has dragged on for a very long time. The Member Trustees have shown themselves incapable of handling the matter properly, shown little insight into the true extent of their conflict of interest and its effects upon their actions, and relations between the parties are extremely poor.

202.17. Ms E should be awarded 100% of Mr SD's correctly identified member's fund (after £25,000 has been paid to Mr SD's estate).

202.18. The Trustees' failure to manage the conflict of interest and their approach to the exercise of discretion (for example, inordinate delay) constitute maladministration.

202.19. Furthermore, there is the potential risk of a heavy tax charge being applied to the remaining lump sum, if paid to Ms E, as an unauthorised payment. Ms E should not be forced to bear the tax consequences of the Member Trustees' conduct. That charge should be met by the Trustees and a finding of bad faith be made against the Member Trustees, so that they cannot argue they should benefit from the exoneration clause at clause 23 of the SSAS Deed and Rules.

202.20. The distress and inconvenience caused Ms E warrants an exceptional award of £5,000.

Appendix 2 - Skeleton argument submitted by the Member Trustees' Counsel prior to the Oral Hearing

203. Counsel for the Member Trustees says:-

On the investigation

203.1. The continued investigation of the complaint amounts to an abuse of process and so should be stayed.

203.2. The emails from the Senior Adjudicator dated 14 October, 8 and 11 November 2019 induced a clear belief in the Member Trustees that following a Notice of Discontinuance I could not consider further the complaint in its form, or as a further complaint, and that Ms E could only pursue the matter through the courts or mediation.

203.3. As a result of the representations made, the Member Trustees acted to their detriment in that they entered into a Settlement Agreement with Ms E and have let themselves be open to complaint by making a determination[28].

203.4. The investigation constitutes a reopening of the original complaint which had been discontinued, rather than bringing of a new complaint.

203.5. The Member Trustees had a legitimate expectation that the investigation had ceased and would not be pursued further. To continue with the investigation now is oppressive and unfair.

On the conflict of interest

203.6. It is accepted that a trustee is under a duty not to act in conflict of interest nor to profit. But no such duty exists in relation to Mrs Allen. She is not an employee of the Company. She is a self-employed contractor and does not profit from the 2015 or 2017 Nomination or the nomination made in accordance with the Settlement Agreement.

[28] The November 2019 decision.

Appendix 3

Summary of Mr CS's sworn statement

204. In his statement Mr CS said:-

204.1. He had known both Mr SD and Mr Allen for some 30 years and Ms E, Mr SD's mother and Mr NG through Mr SD's illness. Hence, he felt he was able to give an informed view on Mr SD's mental capacity.

204.2. While the cancer and treatments at times significantly affected Mr SD's ability to speak, he could still clearly communicate by writing, gestures and even facial expressions and use a pad and phone to chat via messenger. The illness sapped Mr SD's physical strength and he easily tired. But neither reduced his mental facility, his short and long-term memory and reasoning were very much still present. Throughout his illness Mr SD remained himself.

204.3. He saw Mr SD on 6-7, 20-21 and 25-26 October 2017 and on 2-4 November 2017.

204.4. During these visits, Mr SD's intellect and spirit remained intact. He was actively and rationally involved in his treatment and was making key decisions and giving (and eventually denying) consents for further treatment. He witnessed no concern from the health professionals about Mr SD's mental capacity.

204.5. He had no reason to doubt that Mr SD was of sound mind at signing the 2017 Nomination on 1 November.

204.6. While he had known Mr Allen as a friend, he became increasing perturbed with what he was seeing during his visits:-

204.6.1. Mr Allen was incorrectly presenting himself 'as next of kin' to medical staff.

204.6.2. Mr Allen and Mrs Allen would visit Mr SD without liaising with Mr SD's family. Mr Allen visited when he wanted to, with no consideration of when it might be convenient/helpful to Mr SD.

204.6.3. Mr Allen gave every indication of resenting the presence of Mr SD's family and believing that his friendship of Mr SD was more important.

204.6.4. Mr Allen would take upon himself roles/duties that were not his responsibility, such as feeding Mr SD through a tube and administer certain drugs. More than once Ms E asked Mr Allen to refrain from such interventions.

204.6.5. He exchanged harsh words with Mr Allen when he found Mr Allen once

again injecting food into Mr SD. At that point his relationship with Mr Allen soured.

204.7. When he visited Mr SD on 2 November 2017, it was clear he was annoyed/agitated about the SSAS pension fund. Mr SD was particularly irritated by information recently supplied by Whitehall, which showed that some funds he believed were agreed to be placed in the SSAS at its inception were still missing some two years later. Additionally, he had read about the 50% benefit nomination to Mr Allen. Mr SD saw both as a betrayal of trust.

204.8. While he did not know how the 2015 Nomination came to be made, the 2017 Nomination is an accurate reflection of Mr SD's wishes and totally rational. Even if Mr SD had caused the 2015 Nomination to be recorded, on diagnosis of his terminal illness, he would have wished to revisit the nomination knowing that he was likely to die before his mother and wanting to provide whatever assistance he could from his passing. Not doing so, thereby allowing a considerable part of his estate to transfer to Mr SD's employer would seem irrational. Mr Allen's and Mrs Allen's insistence that Mr SD would have wished to leave money to Mr Allen, in preference to his family, is perverse and self-serving.

204.9. Mr Allen and Mrs Allen were present during the final period of Mr SD's illness. While they were more carefully observed after the feeding incident, they were not barred in any way. From direct observation they must know that Mr SD was "Compos Mentis" throughout this period.

204.10. Mr Allen's portrayal of Mr SD as a burden to his business is totally incorrect. In his opinion, without Mr SD he would not have had a business for very long. Mr SD only became a burden when he became terminally ill.

204.11. Much mischief has been made from the refusal to share the contents of Mr SD's Letter of Wishes with Mr Allen and Mrs Allen. The Letter of Wishes relates to the allocation of the surplus funds remaining in Mr SD's estate once debts have been resolved. Hence, it is difficult to understand why the refusal to share the contents of the Letter of Wishes has any bearing on the Trustees and their ongoing refusal to implement the 2017 Nomination. "It is **not** a smoking gun proving that [Mr SD] was dysfunctional when he produced the document. On the contrary, it is a collection of small, thoughtful gestures so typical of [Mr SD], demonstrating the intrinsic integrity of his spirit".

Appendix 4

Summary of Mr NG's sworn statement

205. In his statement Mr NG said:-

205.1. The apparent insinuation by the Member Trustees that he (or Ms E) only became involved in Mr SD's adult life after the onset of his terminal illness is both false and extremely offensive.

205.2. His contact with Mr SD also occasioned providing a supportive financial role.

205.3. Following his terminal diagnosis, Mr SD quipped that he was going to need a Will and that he again wanted the benefit of his help. It was extremely hard for Mr SD to reconcile his thoughts with the reality of his personal finances: his debts exceeded his assets. But Mr SD clearly understood that if he died intestate, he would lose his freedom to gift away his personal possessions. Mr SD repeatedly refused his offer of funds to have his Will prepared, as he considered it "money wasted" and directed him to the Money Saving Expert website. Mr SD clearly understood his financial position meant that his was a very simple situation: he was single, had no children and had no property assets. So, Mr SD asked him to download the relevant document and begin the completion process. Mr SD asked him to be Executor.

205.4. It was a very natural progression for Mr SD to then give consideration to his SSAS pension.

205.5. Once out of hospital, Mr SD got things organised, including endorsing his Will, completing an expression of wish form in respect of his Mercer pension, requesting that he find out about the SSAS on his behalf and completion of his 2017 Nomination.

205.6. The Member Trustees' inferences that Mr SD was not an active participant and indeed the initiator of these activities is false.

205.7. Mr SD discussed the contents of Whitehall's letter of 31 October 2017 and raised the question of money that Mr Allen owed him and whether it could be recovered. He believes that this was a relevant consideration in Mr SD's decision with regards to the 2017 Nomination.

205.8. As Executor, he did not receive any request to obtain Mr SD's medical records. The aggressive demands from GJJ were stated to be on behalf of Mr Allen as a "disappointed beneficiary of the SSAS fund". However, in April 2018, he did discuss the request that GJJ had then made with Mr SD's mother, who explained the reasons for her refusal. At that point she had not received a response to her letter to Mr Allen of 6 April 2018. She also considered that only a medical professional should be given access, that access should be limited to the period relevant to the question of Mr SD's mental capacity, and that this should be organised through an independent third party.

Appendix 5

Dr Falk's Report of 24 January 2022

206. I engaged Dr Falk (Consultant Clinical Oncologist, Honorary Senior Clinical Lecturer) to review Mr SD's medical records and answer two specific questions. Namely:-

    206.1. Do the medical records provided show that Mr SD had an impairment of, or disturbance in the functioning of his brain due to his illness and/or any treatment of his illness in the two months prior to his death?

    206.2. If Mr SD suffered any impairment or disturbance in the functioning of his brain due to his illness or his treatment would this have prevented him from making a decision for himself to alter his Nomination of Beneficiary Form on the 1 November 2017?

207. Dr Falk reviewed Mr SD's Hospital records, GP records and Radiology.

208. In his report, in answer to the first question Dr Falk said:

> "The tongue cancer by itself and its documented spread and treatment would not cause an impairment of, or disturbance in the functioning of his brain.
>
> The medications administered for pain relief namely opiates and gabapentin can cause an impairment of, or disturbance in the functioning of his brain.
>
> The elevated calcium in the blood which is related to an aggressive cancer can cause an impairment of, or disturbance in the functioning of his brain.
>
> I have been through the case notes summarized above and can find no evidence of an impairment of, or disturbance in the functioning of [Mr SD's] brain until 17 November 2017 at which stage he was deemed to be speaking incoherently. There are no further relevant annotations."

209. In answer to the second question Dr Falk said:

> "In my opinion no. [Mr SD] was deemed well enough to receive anti-cancer therapy on 01 November 2017. If he was not competent at that time on balance treatment would not have been administered. There is no evidence in the contemporaneous medical records that [Mr SD] had an impairment or disturbance in the functioning of his brain due to his illness or his treatment that would have prevented him from making a decision for himself to alter his Nomination of Beneficiary Form on 01 November 2017."

Appendix 6

The SSAS Trust Deed and Rules

210. Under ‘ESTABLISHING THE SCHEME’ it says:

> “2.3 The Principal Company hereby appoints the Trustees to be the first trustees of the Scheme and the first Scheme Administrator.”
>
> “2.4 The Trustees accept appointment as Trustees and Scheme Administrator.”

211. Under ‘DEFINITIONS’ it says:

> “3.15 “Dependant” has the same meaning as in paragraph 15 of Schedule 28 to the Finance Act.”
>
> “3.19 “Eligible Recipients” in relation to a person are on the basis of reasonable enquiries made by the Trustees his spouse, his grandparents, such grandparents descendants, such descendant’s spouses, his dependants, persons interested in his estate and persons or unincorporated associations whom or that he has nominated to the Trustees in writing.”
>
> “3.25 “Finance Act” means the Finance Act 2004 as amended from time to time.”
>
> “3.74 “Trustees” means initially those named above and thereafter the Trustees for the time being of the Scheme”.

212. As relevant, Rule 8, ‘Lump sum death benefits’, says:

> “8.1 On the death of a Member a lump sum death benefit may be paid, equal to the Member’s Fund or such lesser amount as the Trustees may determine which is either permitted by the Lump Sum Death Benefit Rules or by regulations made under section 164 of the Finance Act or otherwise permitted by HMRC…
>
> 8.2 The Trustees may pay or apply such lump sum (and any payments of the Member’s pension payable after his death under a guarantee) to or for the benefit of one or more Eligible Recipients in such proportions as they think fit. The Trustees may pay all or any of the lump sum to trustees of another trust to benefit one or more Eligible Recipients or may direct all or any of the lump sum to be held by themselves or other trustees on such trusts including discretionary trusts and with such powers and provisions including maintenance, advancement, accumulation, selection and variation for the benefit of one or more Eligible Recipients as the Trustees think fit. If and to the extent that (in the case of any Member) the lump sum is not so paid or applied the lump sum will be paid to his personal representatives (unless the deceased’s estate passes bona vacantia in which case no lump sum in excess of any already committed will be payable).”

213. As relevant Rule 22, ‘Trustees Decisions’ says:

> 22.4 …a minimum of two Trustees is required.
> …
> 22.7 The Scheme shall comply with the requirement of Regulation 3(1)(h) of the Occupational Pension Schemes (Scheme Administration) Regulation 1996…and of any other regulations so requiring for all decisions which fall to be made by the Trustees to be made by the Trustees who are Members by unanimous agreement…disregarding in each case the participation of a Professional Trustee in the making of a decision provided that the prior agreement in writing of the Professional Trustee (if and for so long as there is a Professional Trustee which is a Trustee of the Scheme) and of the Scheme Administrator shall be required for any decision of the Trustees to invest or disinvest under Rule 19.1 or Rule 19.2 save for any investment or disinvestment decisions to which Rule 19.4 or 20 applies. The Scheme shall comply with this requirement in order to obtain exemption from the requirements of the 1995 Act or of the Pensions Act 2004 which from time to time are expressed not to apply if this requirement is satisfied.”
>
> 22.8 …The Trustees may delegate powers, duties or discretions…within their number or to third parties and on any terms.”

214. As relevant Rule 23 ‘Exoneration and Indemnity’ says:

> “23.1 Subject to section 33 as limited by section 36(6) of the 1995 Act (where applicable) no Trustee (nor any officer or representative of a Trustee nor any delegate or nominee of the Trustees) will be liable for any breach of trust or other breach of duty including in relation to the making of any Scheme Chargeable Payment, except to the extent attributable to his act or omission knowingly and deliberately committed in bad faith and each Trustee (and such person) will (subject to section 256 of the Pensions Act 2004 and except to the extent that re recovers any insurance under this Rules 23.1) be indemnified out of the Scheme against liabilities relating to the Scheme or the relevant trusteeship and any such breach of trust or other breach of duty, including in relation to the making of any Scheme Chargeable Payment, unless so attributable to him.
>
> 23.2 Without prejudice to the generality of Rule 23.1 above, each Professional Trustee…shall (except to the extent that he recovers under any insurance claim) be indemnified from the assets of the Scheme and from the assets of each relevant Member’s Fund and be each relevant Member and Beneficiary personally and by each of the Employers from all and any liabilities, costs, claims, expenses, obligations, demands and proceedings whatsoever to or in respect of or arising out of or in connection with a Scheme Sanction Charge or a De-registration Charge or any other Tax, including any other Tax under the Finance Act except to the extent attributable to that Professional Trustee’s…own act or omission knowingly and deliberately committed in bad faith. The Trustees may at the expense of the

Scheme insure the Scheme and themselves including the Professional Trustee and the Scheme Administrator and such officers, representatives, delegates and nominees against any such Tax liability.

23.3 Neither the Professional Trustee (if any) nor the Scheme Administrators nor any officer or representative of a Professional Trustee or of a Scheme Administrator nor any delegate or nominee of the Trustees or of the Scheme Administrator shall be under any liability to any member or beneficiary in respect of any Scheme Chargeable Payment including in relation to any Scheme Sanction Charge or a De-registration Charge except to the extent attributable to that Professional Trustee's…own act or omission knowingly and deliberately committed in bad faith.

…

23.5 All and any Tax payable arising out of or in connection with the Scheme shall be met from the assets of the Scheme and from Member's Funds as determined by the Professional Trustee or the Scheme Administrator from time to time."

The Occupational Pension Schemes (Scheme Administration) Regulations 1996

215. As relevant:

"Exemptions from the professional advisers' requirements

3.—(1) Section 47(1)(a) of the 1995 Act (for every occupational pension scheme there shall be an individual, or a firm, appointed by the trustees or managers as auditor) does not apply to—

…

1 (h) a scheme– (i) with fewer than 12 members where all the members are trustees of the scheme and either– (aa) the provisions of the scheme provide that all decisions which fall to be made by the trustees are made by unanimous agreement by the trustees who are members of the scheme; or (bb) the scheme has a trustee who is independent in relation to the scheme for the purposes of section 23 of the 1995 Act(a) (power to appoint independent trustees and is registered in the register maintained by the authority in accordance with regulations made under subsection (4) of that section; or (ii) with fewer than 12 members where all the members are directors of a company which is the sole trustee of the scheme, and either– (aa) the provisions of the scheme provide that any decisions made by the company in its capacity as trustee are made by the unanimous agreement of all the directors who are members of the scheme; or (bb) one of the directors of the company is independent in relation to the scheme for the purposes of section 23 of the 1995 Act, and is registered in the register maintained by the Authority in accordance with regulations made under subsection (4) of that section;".

The Finance Act 2004

216. Schedule 28, paragraph 15, ‘Meaning of “dependant”’, says:

> “(1) A person who was married to, or a civil partner of, the member at the date of the member's death is a dependant of the member.
>
> (1A) If the rules of the pension scheme so provide, a person who was married to , or a civil partner of, the member when the member first became entitled to a pension under the pension scheme is a dependant of the member.
>
> (2) A child of the member is a dependant of the member if the child—
>
> (a) has not reached the age of 23, or
>
> (b) has reached that age and, in the opinion of the scheme administrator, was at the date of the member's death dependant on the member because of physical or mental impairment.
>
> (2A) A child of the member is a dependant of the member if the child—
>
> (a) has reached the age of 23, and
>
> (b) is not within sub-paragraph (2)(b).
>
> (2B) But this paragraph, so far as it has effect for the purpose of determining the meaning of “dependant” —
>
> (a) in paragraphs 16 to 17 and 27A, and
>
> (b) in paragraph 18 of Schedule 29,
>
> has effect with the omission of sub-paragraph (2A).
>
> (3) A person who was not married to , or a civil partner of, the member at the date of the member's death and is not a child of the member is a dependant of the member if, in the opinion of the scheme administrator, at the date of the member's death—
>
> (a) the person was financially dependent on the member,
>
> (b) the person's financial relationship with the member was one of mutual dependence, or
>
> (c) the person was dependant on the member because of physical or mental impairment.”

CORRECTION TO THE DETERMINATION PO-22369

Minor mistakes in a Determination (including any directions) by the Ombudsman, such as accidental slips or omissions, can be corrected[1]. This certificate sets out corrections to the Determination and must be kept with it.

Determination reference: PO-22369

Dated: 6 December 2022

Between Ms E and the Member Trustees (**Mr** Simon **Allen** and **Mrs** Louise **Allen**) and Whitehall Group (**Whitehall**).

I certify the following corrections:

- Paragraph 14 – the transfers-in respectively paid by Mr Allen and Mr SD are corrected to:

  "Mr Allen £156,426 and £7,609.68

  Mr SD £253,753 and £23,908.77"

- Paragraph 200 – "the greater of" is deleted from the first sentence.

- Sub-paragraph 200.2 – Second sentence added: "The proportion of simple interest to be paid shall be shared by the Trustees: 2/3 Whitehall and 1/3 Mr and Mrs Allen."

Anthony Arter

Pensions Ombudsman

8 December 2022

[1] Rule 17(2), The Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995.