Ombudsman's Determination

Applicant	Mr M & Mr Y, Mr T, Mr K (together the **Additional Applicants**)
Scheme	Grovesnor Solutions Limited Retirement Benefits Scheme (the **Scheme**)
Respondent	Mr Darryl Kench, trustee of the Scheme (the **Trustee**)

1. Mr M's and the Additional Applicants' complaints are upheld and, to put matters right, the Trustee shall comply with the directions set out in paragraphs 204 and 205 of this Determination.

Complaint summary

2. Mr M has complained that the Trustee invested the Scheme's funds inappropriately, which has resulted in members' benefits and rights in the Scheme being lost.

3. Three 'Additional Applicants' have complained on what I consider to be identical issues. Those complaints have been associated with Mr M's complaint by my office. This means that the conclusions reached in respect of Mr M's case apply equally to the associated cases.

4. Throughout this Determination I have referred to Mr Kench, in his role as the trustee of the Scheme, as the "**Trustee**". Where I have referred to Mr Kench in any other capacity, for example as director of Pension Assist Limited (**Pension Assist**), I have referred to him as "**Mr D Kench**".

Oral Hearing

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

6. The Trustee and one of the Additional Applicants, Mr Y, attended the Oral Hearing.

Summary of the Ombudsman's decision and reasons

7. Having fully considered the evidence and submissions presented in the papers, and those provided at the Oral Hearing, I uphold Mr M's and the Additional Applicants' complaints. My reasons are as follows:

    7.1. the Trustee has acted in breach of trust by:

        7.1.1. breaching his fiduciary duty to manage conflicts of interest and his duty not to profit from his position as Trustee;

        7.1.2. failing to have in place and operate the necessary internal controls to manage conflicts of interest, as required by section 249A of the Pensions Act 2004;

        7.1.3. failing to comply with the requirement, under section 247 of the Pensions Act 2004, to have knowledge and understanding of the Scheme's documents or the law relating to pensions and trusts;

        7.1.4. transferring large sums of money into his own company, Pension Assist;

        7.1.5. investing all of the Schemes' assets that remained after the payments to Pension Assist and to the members in Realsave's preference shares; and

        7.1.6. providing false information to members, in breach of the Trustee's fiduciary duty to act honestly and in good faith.

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

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

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

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

Jurisdiction

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

10. I have the power to direct the Trustee to restore, or pay, to the Scheme, any assets which have been lost by reason of the breach of trust, or appropriate funds for such breach. If specific restitution is not possible, the liability of the Trustee to the Scheme is to put it back into funds as if there had been no breach of trust.

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

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

12. In an action to have a breach of trust redressed, it has been confirmed that no issues usually arise between one beneficiary and another, or as between a beneficiary and the current trustees. The object is to secure the return of the trust property for the benefit of all the beneficiaries according to their respective interests (*Young v Murphy* [1996] VR19).

Detailed Determination

A. Material facts

A.1. Background

13. On 12 May 2011, Pension Assist was incorporated by Mr D Kench, the sole Director and Shareholder. Pension Assist was an unregulated introducer. Mr D Kench has said that Pension Assist used "lead suppliers", which purchased details of potential clients from "lead producers". Pension Assist would then contact those potential clients, with a view to referring them to a pension scheme or to an independent financial adviser (**IFA**).

14. When I asked Mr Kench, at the Oral Hearing, which lead producer he had received Mr M's and the Additional Applicants' details from, he could not recall which one it had been. He was able to recall the name of one lead producer, Clarity, that Pension Assist had used from time to time, but not whether that had been the lead producer that had supplied Mr M's and / or the Additional Applicants' details to Pension Assist. In fact, I have noticed that at least one of the members received a letter from Pension Assist, informing them that they could themselves become an introducer to Pension Assist, though I have received no evidence that any did or that this should affect any of the findings I make in this Determination.

15. When I questioned which other pension schemes Pension Assist had referred individuals to, Mr D Kench was unable to recall any specific scheme, other than one that Mr D Kench referred to as "Five Rings"[1]. Later in the Oral Hearing, I asked whether Mr D Kench had been aware that the "Five Rings" pension scheme had been a pension scam. Mr D Kench said that another company had dealt with the investments in relation to that scheme and that, while he was aware that the scheme's assets had been frozen, he had not known that it had been officially classed as a "scam".

16. Mr D Kench recalled that, normally, a "master introducer" or other person connected with the pension scheme would approach Pension Assist and would provide literature to supply to its clients. However, there were various means by which a scheme or advisor would be advertised. In some cases, Pension Assist would pass its clients directly to IFAs to handle the transfer.

17. Mr D Kench was also unable to recall how Pension Assist would have become known to IFAs. Mr D Kench was unable to provide any details of any specific IFA to whom Pension Assist had made introductions, although he considered that there were likely to have been fewer than ten such IFAs.

18. Mr D Kench said that Pension Assist did not provide financial advice and, until his involvement with the Scheme, Pension Assist had been solely an introducer.

19. At the Oral Hearing, Mr D Kench recalled that he had been introduced to Mr Stuart Stone by his brother, Mr Robin Kench (who was an employee of Pension Assist) (**Mr R Kench**) in 2011 or 2012. Mr D Kench could not recall exactly how Mr R Kench had met Mr Stone, but speculated that they might have become acquainted through a mutual business connection, possibly three to four years before the Scheme was established. Prior to the Scheme's establishment, Pension Assist had referred clients to one of Mr Stone's prior investments, which Mr D Kench was unable to name precisely although he recalled that its name included the word "Sustainable"[2].

20. Mr D Kench said, at the Oral Hearing, that Mr Stone had appeared successful, owning a large house and expensive cars. He does not recall making any checks on Mr Stone's regulated status but believed he was an IFA at the time they met[3].

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

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

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

A.2. Investment of Scheme members' funds

21. Mr Stone proposed an investment arrangement involving the establishment of a pension scheme which would invest in a finance company, Realsave Business Solutions Limited (**Realsave**). Mr D Kench had been under the impression that Mr Stone owned Realsave. In fact, Realsave had been established by Mr Stone's wife, Laura Challiner, on 2 July 2012. Ms Challiner was Realsave's sole director at all times. Mr Stone was never appointed as an officer of, or held shares in, Realsave.

22. According to Mr Stone, Realsave would provide short term finance to businesses which could not otherwise get credit, at a monthly interest rate of 2.5% to 3%, while holding goods in a warehouse as security. Mr Stone said he had contacts in banks who would refer potential clients to Realsave and would personally provide security for the investments. Mr Stone also assured Mr D Kench that if, for any reason, the investment in Realsave was not profitable, he had access to other investments that could cover the returns needed, even if this meant that Mr Stone's[4] own profit would not be as good.

23. Mr D Kench did not investigate the validity of those assurances or carry out any due diligence in relation to Realsave, other than visiting Realsave's warehouse, which he said was empty. At the time, Realsave had no annual returns or accounts, had received no existing investments, had lent no money and had no contracts in place with banks for clients to be referred to it, although Mr D Kench believed that Realsave had "arrangements" with banks in place. When I asked Mr D Kench, at the Oral Hearing, on what basis he had considered Realsave to be a suitable investment, he replied that he had viewed the investment as a "game-changing opportunity to make a great deal of lolly".

24. On 31 August 2012, Grovesnor Solutions Limited was incorporated by Mr D Kench, apparently, so that it could be appointed as the Scheme's sponsoring employer.

25. On 6 September 2012, the Scheme was registered with HMRC for tax relief and exemptions. I understand that the Scheme is a small self-administered scheme (a **SSAS**) and that Mr D Kench, although not a member of the Scheme, was appointed as the Trustee.

26. Mr Stone set up and registered the Scheme and provided the necessary documentation, which Mr D Kench signed. Mr Stone, along with another individual, carried out the administration of the Scheme and wrote the "Key Features" document (see Section A.3.5 below). Realsave was the only investment available within the Scheme, despite statements to the contrary, in paperwork provided to prospective members (see Sections A.3.3 and A.3.5 below).

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

27. A Statement of Capital in respect of Realsave, filed at Companies House, shows that, as at 2 July 2013, 231,273 redeemable preference shares were held in Realsave by "Grosvenor [sic] Solutions Limited". The same Statement of Capital states that £1 was paid per preference share and that the prescribed particulars of those shares were "16% accumulative preference shares redeemable in 5 years".

28. When I asked the Trustee, at the Oral Hearing, who he understood held the shares in Realsave, the Scheme's employer (Grovesnor Solutions Limited) or the Scheme's trustee (Mr D Kench), he answered that he did not understand my question. On further questioning concerning the role of a pension scheme trustee and the responsibility imposed by that role, the Trustee answered that he had not been aware of the duties that were imposed on pension scheme trustees by statute. The Trustee had not been aware of the Pensions Regulator's website or the guidance for pension scheme trustees available via that website. The Trustee had taken no steps whatsoever to educate himself in respect of his role or responsibility as Trustee and had seen no reason to do so. He had simply signed the paperwork presented to him by Mr Stone.

29. The Trustee informed me, at the Oral Hearing, that Mr Stone, together with an individual, Ms E, whom Mr D Kench said was an IFA and who had worked for Mr Stone at the time, but who he now thought worked for HMRC, had carried out all of the Scheme's administration. Mr D Kench did not attempt to verify Ms E's IFA qualifications.

30. In 2012, Mr M was put in contact with Pension Assist, with a view to transferring his personal pension into the Scheme. Mr R Kench met with Mr M at his home and explained the Scheme and the proposed investment to be held by it.

31. Mr M said that he was told he would receive a cash payment for investing and the "fund would be placed in a secure company and would mature in 5 years risk free.". The Trustee confirmed, at the Oral Hearing, that 50% of the sum transferred into the Scheme by each member was invested in Realsave. Of the remaining 50%, approximately 30%[5] was paid to Pension Assist, as commission for introducing the member to the Scheme, and the remainder was paid to the member, as a "fee". The Trustee admitted that members were not made aware of either: the commission arrangement; or the conflict of interest that arose from it on account of the Trustee's involvement in Pension Assist as Mr D Kench.

32. The Trustee has informed my office that the Scheme had 8 members, who had "invested" a total of £776,000. I have only seen evidence that £231,273 of those funds were used to purchase preference shares in Realsave (see paragraph 27 above). When I questioned the Trustee about this in the Oral Hearing, he confirmed that only 50% of members' funds had been paid to Realsave. However, this explanation still leaves approximately £313,000 of members' funds unaccounted for.

[5] The Trustee was unable to provide me with the precise figures at the Oral Hearing.

33. On 23 October 2012, two payments were attempted by Grovesnor Solutions Limited, but were delayed while the bank undertook "extra checking…". The following day, Mr M was paid £5,100 and "Realsave Bus Sols" was paid £12,750.98.

34. Following Mr M and others' investments in Realsave, the Trustee received no contact from Mr Stone, or any further documentation, concerning Realsave's performance.

35. In August 2013, Mr Stone was arrested, and charged with fraud in relation to a separate investment arrangement. The Trustee recalled that Mr Stone had informed him that he was being investigated. However, Mr Stone had told the Trustee that he need not be concerned about that.

36. On 14 October 2014, Realsave was dissolved.

37. In December 2014, Mr Stone was sentenced to six years in prison[6]. Mr R Kench attended a later Court hearing, on 27 to 28 July 2016, at which Mr Stone received a confiscation order to pay £1,141,680 within three months or face a default sentence of a further seven years. The Trustee said that Mr R Kench had argued that the funds should be returned to the Scheme. However, the funds were used to meet the confiscation order issued against Mr Stone[7] which was paid in full.

38. The Trustee confirmed that he took no steps, on hearing of Mr Stone's later conviction, to ensure that the Scheme's administration was being taken care of in Mr Stone's absence. The Trustee was unable to confirm whether the Scheme returns had been filed annually with HMRC.

39. However, the Trustee said that he had reported his concerns regarding Realsave to the Financial Conduct Authority (**FCA**) and had asked the FCA on several occasions for an update. I queried whether Mr D Kench had actually reported the situation to TPR, not to the FCA, as he had referred previously to TPR in correspondence sent to my office in connection with these complaints. The Trustee responded that he had contacted whichever he was supposed to contact, having made enquiries to find out whom that was. However, the Trustee was not certain whether that had, in fact, been the FCA or TPR.

A.3. Relevant provisions of Scheme documents

A.3.1 Trust Deed and Rules

40. I have not been provided with a copy of the Scheme's Trust Deed and Rules and the Trustee has confirmed that he does not have a copy in his possession. I have instead been given a copy of a separate scheme's trust deed and rules (**the Stirling Deed**), which the Trustee has said will have been identical to the Scheme's version in all but date and name. The Trustee informed me, at the Oral Hearing, that he

[6] https://www.sfo.gov.uk/2014/12/08/city-directors-sentenced-28-years-total-23m-green-biofuel-fraud/
[7] https://www.sfo.gov.uk/cases/sustainable-agroenergy-plc-sustainable-wealth-investments-uk-ltd/

had not seen the Scheme's Trust Deed and Rules. The Trustee had not considered it necessary to see them, as he believed that the document was merely a "mass of literature, like a phone book, that wouldn't make a lot of sense to a lay person."

A.3.2 Scheme application forms

41. On 31 August 2012, Mr M signed a SSAS application which provided authority for Pension Assist to make enquiries with his existing pension provider.

42. On 25 September 2012, Mr M signed a Grovesnor Solutions Limited Retirement Benefit Scheme Application form (the **Application Form**). He provided details of his existing pension and confirmed that he wished to transfer into the Scheme. The Application Form included the following declaration:

> "I confirm that by completing this application I agree to become a member of this Employer's Small Self-Administered Scheme and to be bound to the Trust Deed and Rules.
>
> I authorize [sic] my previous company, any insurer or other pension provider and Her Majesty's Revenue and Customs to disclose to Grovesnor Solutions Limited Benefits any details they request about the benefits for me.
>
> I agree to the appointment of Grovesnor Solutions Limited Retirement Benefits as independent trustee and scheme administrator [8]."

A.3.3 Scheme terms and conditions

43. An additional document entitled Grovesnor Solutions Limited Retirement Benefit Scheme Terms and Conditions (**Terms and Conditions**) has been provided. The Trustee states that this was provided to all members. That document contains the following statements:

> "We are not authorised by the FSA to provide you with advice in relation to your SSAS and we recommend that you obtain advice where required from a qualified financial adviser. Nothing in any communication to you should be construed as financial or investment advice within the meaning of the Financial Services and Markets Act 2000.
>
> …
>
> **SSAS Bank Account**
>
> Your SSAS has an individual bank account with HSBC, and the SSAS members and D J Kench of Grovesnor Solutions Limited are joint trustees of the account.

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

…

Payments out of the account are made by Grovesnor Solutions Limited acting on your written authority.

…

Investments

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

…

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

…

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

A.3.4 Services Agreement

44. On the same day, Mr M signed a Services Agreement, which made him an employee of Grovesnor Solutions Limited.

A.3.5 Key features document

45. One of the Additional Applicants has supplied a document that appears to be contemporaneous to their application to join the Scheme, entitled "Key Features of the Grovesnor Solutions Limited Retirement Benefit Scheme SSAS". It includes the following statements:

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

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

Aims of the SSAS

...

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

…

Your Commitment

…

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

…

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

…

Risk Factors

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

…

What is the Grovesnor Solutions Limited Retirement Benefit Scheme SSAS?

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

46. I note that this document refers to there being a "wide range of investment opportunities". However, when I questioned the Trustee on this at the Oral Hearing, he confirmed that the Realsave investment was the only investment that had been available to members under the Scheme.

47. When I asked the Trustee, at the Oral Hearing, about the statement in this document that members would "take responsibility as a trustee for the management of the investment in the SSAS", he responded that he could not recall if members were trustees or not, but that he was not aware of any instrument appointing them if they were trustees. The Trustee informed me that he did not even know how to register an individual as a trustee.

A.4 Communications with Scheme members

48. On 16 April 2014, Mr M received an annual report. This confirmed that he had joined the Scheme on 16 October 2012 and had invested £118,265 to date. The investment had a five year minimum commitment, with the expiry date being 12 February 2018, at which time Mr M would have a predicted transfer value of £118,265 (having already received a lump sum payment at the outset). The annual statement did not mention Realsave, but included the statement:

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

49. The letter was signed by Mr D Kench, "Trustee of Grosvenor Solutions Retirement Benefits Scheme".

50. Mr Y confirmed, at the Oral Hearing, that he had received annual reports, along the lines of the one sent to Mr M, as described in paragraph 48 above, for the first three years after he had joined the Scheme in 2012.

51. On 12 May 2015, Grosvenor Solutions Ltd issued an annual report to Mr T. The annual report showed the initial investment and the intended return at maturity. It included the statement:

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

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

53. On 26 September 2017, less than a year before the members' funds were due to mature, Mr M was contacted by the Trustee, who informed him that there was a possible problem with the investment and that the matter had been referred to TPR. Mr M subsequently made efforts to speak with Mr D Kench but was unsuccessful. Eventually, he wrote to Pension Assist and received a response. Mr D Kench reiterated that the Scheme had been referred to TPR, but no response had been received.

54. On 5 June 2018, Pension Assist was dissolved. Mr D Kench did not inform Scheme members of this, as Pension Assist was not a trustee of the Scheme, so he did not consider Pension Assist's dissolution to be relevant to the Scheme members.

B. The Trustee's submissions

55. The Trustee has provided a number of submissions outlining his position, which are summarised here:-

- Mr Stone had apparently already set up his own SSAS in order to invest in Realsave and offered Mr D Kench the opportunity to do the same. Mr Stone would establish the Scheme and deal with the administration. He would then pay commission equivalent to what Pension Assist was receiving from other schemes.

- Mr Stone offered assurances that he would cover the returns needed for the clients if Realsave was not successful.

- Mr D Kench set up Grovesnor Solutions Limited and Mr Stone established the Scheme and provided the paperwork.

- A Trust Deed and Rules was prepared for the Scheme, but copies are not available to the Trustee at this time as they were kept by Mr Stone. Copies of those documents had been requested by members' ceding schemes and provided to them by Mr Stone. The Stirling Deed and Rules[9] are available, which the Trustee believes to be a duplicate of those for the Scheme in all but name and date.

- The Trustee had visited Realsave's large warehouse which, Mr D Kench confirmed at the Oral Hearing, was empty at the time of his visit but which was intended to secure property held as security on the loans, and he had seen how Realsave would find its clients. Mr Stone was seen as a highly qualified and successful IFA and Mr D Kench was impressed by him.

- Mr Stone had explained the mechanism for paying members through the company from the pension fund and said it was legal and did not constitute pension liberation.

- Mr Stone said that as trustees they[10] were given the trust of the members to invest the funds at their discretion. Neither Mr D Kench nor Mr R Kench was an IFA or a professional investor, and it was not up to them to act in each client's best interest. The clients made their own decision on whether to invest in Realsave and they were not offered tax advice. It was stressed that the income received should be recorded for their personal tax calculations. The members were told to seek professional advice if they required it.

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

[10] Mr R and Mr D Kench established two separate Schemes for which they would individually act as trustee.

- The Terms and Conditions document provided to the members states that no advice had been provided and it was recommended that the members seek regulated financial advice.

- Additionally, as set out in the Terms and Conditions, Grovesnor Solutions was "not required to assess the suitability of investments and accept no liability for the choice or performance of individual investments or of your chosen advisers."

- Mr Stone was charged with fraud in relation to a separate scheme and received a six-year custodial sentence. The Realsave funds were frozen by the courts. Mr R Kench attended the Court and argued that the funds should be returned to the Scheme, but these arguments were ignored. The funds were used to meet a £1million confiscation order issued against Mr Stone[11].

- The situation was reported to The Pensions Regulator (TPR) immediately, the major concern was the recovery of the members' funds.

- The Trustee says he was not a professional trustee and was carrying out the role of Trustee to the best of his limited knowledge.

- There was no financial benefit to being a trustee of the Scheme.

- The expectation was that Realsave would return 105% of the transfer value, the additional 5% being a bonus intended to cover admin costs of running the Scheme.

- He believed the investment would be a success and the members would be happy and reinvest in an alternative product available at that time.

- He accepted that as trustee he would have control of funds and that was a potential risk.

- As a pension introducer, Mr D Kench believed that becoming a trustee was a "step forward" and would provide him with a better understanding of the pension market, knowing where the funds were going and providing him with security of getting paid where investments went ahead.

- There were clear indemnities in the documents provided to the members which protected him even if the investment went wrong.

- The Trustee said in relation to his involvement:

[11] https://www.sfo.gov.uk/cases/sustainable-agroenergy-plc-sustainable-wealth-investments-uk-ltd/

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

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

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

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

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

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

As trustees we received no remuneration.

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

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

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

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

It was easy to explain to clients.

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

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

- Additionally, the Trustee said:

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

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

If any potential client was interested in the Realsave proposal arranged by Mr Stone and presented by Pension Assist Ltd it was explained that no-one connected to Pension Assist Ltd, Grovesnor Solutions Ltd or Realsave were in any position to provide financial advice. There was no deviation from this with any client at any point. It was explained that any potential member had the right to seek professional financial advice from a regulated advisor of their choice.

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

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

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

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

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

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

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

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

The main emphasis of the report to TPR was that Mr Stone was apparently using the invested funds to pay a proceeds of crime penalty.

> This was 50% of the clients [sic] total fund and yet to the best of my knowledge no action has been taken to even look into this claim or indeed to identify where the remaining funds are.
>
> I am available to assist this or any investigation in regard of Grovesnor Solutions to help achieve a speedy resolution."

56. At the Oral Hearing, the Trustee made the following additional points:-

- Pension Assist made it clear that it was not regulated and this was also stated on the Scheme's documentation. It confirmed no parties involved were regulated and recommended that clients seek advice from an IFA. This was not hidden in small print but was on the front page.

- It was made clear to clients that the ultimate investment would be Realsave and every member received brochures.

- Pension Assist's commission was not discussed with the clients. Occasionally an individual might ask what he as the Trustee received but said that he would get nothing until the end of the investment when there might be a small bonus. As a Trustee he received nothing.

- He was unaware of the idea of diversification.

- On Mr Stone's conviction no legal action was taken because he was unaware that the Scheme's funds would be used to meet the confiscation order and could not afford to take legal action.

- Mr Stone had come across to the Trustee as "a very rich, successful, well-connected, astute, smart, switched-on guy".

- The annual statements issued to the members were produced by Pension Assist.

- The annual statements did not mention Realsave because the money was invested by Grovesnor and not the member directly.

- He knew that pensions could not be accessed until age 55 but believed Mr Stone's explanation that the company (Grovesnor Solutions Limited) could take a loan from the Scheme and make a payment to the member as an employee. He sought no separate legal advice on this information.

- At the time he did not consider he had any personal responsibility for the Scheme.

- He did not understand the role of a pension scheme trustee or the gravity of what it meant to be a trustee and believed it was just a requirement for the Scheme. He trusted Mr Stone's guidance on this and Mr Stone was responsible for all the paperwork, telling him where to sign.

- He accepted the role of Trustee to ensure the money would be directed to the right place. Another trustee could have just taken the money without making the investment.

- He did not see the Trust Deed and Rules and understood it to be a mass of literature that he would not have understood as a layperson.

- He took no steps to understand trusteeship and did not know of TPR's training and guidance resources. If he had known of his potential personal liability, he would not have taken on the role of a pension scheme trustee.

- As the Trustee he did not promote the Scheme as a good scheme; the members made their own decision.

- Prior to the establishment of the Scheme he had only been an introducer. Pensions were viewed as a new business opportunity and so he transitioned from an existing business into Pension Assist.

- Annual returns were submitted for Grovesnor Solutions Limited, but he was unaware of the need to submit returns for the Scheme.

- Members had his direct contact number and, when concerns were raised, he referred them to TPO. He has assisted TPO however possible and in good time.

- He is very sorry for his involvement and he would not have been involved if he had known that people would lose their money.

C. Mr M's submissions

57. Mr M has said:

> "I think Mr Kench is being uneconomical [sic] with the truth on many occasions he confirmed verbally to me it was 100% safe.
>
> I think there was an extreme lack of due diligence and very little regulation of the scheme by the Trustee.
>
> There was no communication both verbally or written apart from the letter confirming the matter had been passed to the Regulator.

It took me approx 3 weeks after receiving the letter to contact him as telephone number was incorrect, fax number was incorrect and he apparently was no longer at the address on the letter.

It was only by searching on Google and sending letters to various addresses that he eventually contacted me."

D. The Additional Applicants' submissions

58. The Additional Applicants' complaints are, in essence, identical to Mr M's complaint. Mr M was unable to attend the Oral Hearing held on 15 December 2020. However, I questioned Mr Y, one of the Additional Applicants, during the Oral Hearing. I have summarised Mr Y's oral submissions below:-

- At the time of the transfer he had been made redundant and understood his pension was frozen. The Scheme was attractive because of the prospect of a "loan" from his pension.

- Mr Y had searched online and had subsequently received a telephone call from Mr R Kench. Mr R Kench arranged to visit Mr Y at his home in Northern Ireland.

- When visiting Mr Y, Mr R Kench presented himself as a financial adviser. Mr D Kench was the main trustee of the Scheme.

- Mr R Kench came across to Mr Y as very assured and confident. If he had not, Mr Y would not have risked his family's future financial security by transferring his pension fund. With this in mind, he has queried how the Trustee can claim now that he had been ignorant of the risks of the investment.

- He was aware that he could not access his pension before age 55 but it was explained that the Scheme's structure provided a legal way to circumvent the rules. Mr R Kench made it appear legal, describing it as a "loan" being made by Mr Y to himself.

- Mr Y had no prior investment experience.

- It was explained that the Scheme funds would be invested in "other companies". The Scheme would lend money to companies that could not get credit from banks and receive interest from those loans.

- Mr Y had been receiving annual statements in relation to his Scheme fund for three years before they stopped. At that point he took steps to contact Mr D Kench and became aware that the Scheme was a scam.

- Realsave was not mentioned at the meeting and he was not aware of it until a letter dated 26 September 2017, around the time his investment was due to mature.

- Mr Y had accepted that there was a risk to any investment. However, he had believed the arrangement would work and he was in serious need of finances, so that he could "get back on [his] feet".

- The documentation presented indicated that all the members would be trustees, but that Mr D Kench was the main trustee and responsible for the investments made by the Scheme. He had no understanding that he had any responsibility for investments.

- He did not understand why the Service Agreement was necessary. However, Mr R Kench explained the process so well and seemed so genuine that, at the time he did not think that the Service Agreement was strange. It is only with hindsight that he accepts that it seems irregular.

- His understanding had been simply that he would invest his money for five years and would receive an immediate payment and the full amount back after that time had passed.

- He believed that Mr R Kench was a financial adviser and that Mr D Kench was the main trustee. He was told they were regulated and checked. He received verbal assurance that Mr R Kench was regulated.

- He believed Mr D Kench was the Scheme's investment manager/adviser and that Pension Assist was responsible for transferring members' pensions.

E. Conclusions

The missing Trust Deed and Rules

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

60. However, as Trustee, it is his responsibility to have a copy of the Trust Deed, understand it and act in accordance with it. The Trustee is lawfully required to have become conversant with the Trust Deed and Rules during his period of office[12]. Should there be specific indemnity and exoneration provisions within the Trust Deed and Rules, it is the Trustee who needs to identify them and evidence why those provisions should provide him with protection in these circumstances.

61. The Trustee has provided the Stirling Deed and argued that this is identical to the Scheme's Trust Deed and Rules in all but name. That may be the case, but I cannot rely on the Stirling Deed's provisions on the basis that the Trustee believes them to be identical. Subtle differences can have significant implications in these circumstances. Further, the Trustee informed me at the Oral Hearing that he never had sight of the Trust Deed and Rules, so it is clear that he was not familiar with that document.

62. In the absence of the Trust Deed and Rules, I will have to rely principally upon the wider statutory duties placed upon the Trustee, before then going on to consider any potential protection provided by the Trustee Act 1925.

Order of conclusions

63. I will consider Mr M's and the Additional Applicants' complaints under the following headings, to determine whether the Trustee has committed any breach of trust and / or acted in maladministration:

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

E.1 The Scheme's status

64. It is not in dispute that the Scheme is an occupational pension scheme. I am informed that the Scheme is a small, self-administered scheme (**SSAS**) and I shall proceed on that basis.

65. The Scheme's intended investment in Realsave (albeit that it seems that, in fact, Grovesnor Solutions Limited, not the Trustee, purchased the preference shares in Realsave), suggests no segregation of Scheme assets. Realsave's annual return dated 2 July 2013, shows that all 231,273 preference shares were held by

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

Grovesnor Solutions Limited. On that basis, it seems that the Scheme's assets were pooled amongst its members.

E.2 The Scheme's trustees

66. A SSAS often has a professional or independent trustee, such as Mr D Kench, in addition to member trustees. If Mr M was a member trustee, his being so may have implications on the outcome of the complaint, and therefore, I need to make a finding on his status.

67. Having reviewed the evidence, I am not persuaded that Mr M is a trustee of the Scheme. The Key Features document does suggest that the members would also be trustees. However, the only documents that the members signed in relation to joining the Scheme were the Services Agreement and the Application Form, the latter of which only carries the limited declaration set out in paragraph 42 above.

68. There is no indication in that declaration that Mr M was taking on the role of a Scheme trustee and I have seen no evidence that Mr M accepted such a role. I have seen no deed appointing Mr M as a Scheme trustee and there is no evidence that any such deed exists. I would also expect a Deed or similar instrument to have been signed formally appointing the members to the role of trustee but there is no evidence of this. At the oral hearing Mr D Kench was asked about this and he confirmed that he was unaware that the members were trustees and there was no instrument appointing anyone else as a trustee.

69. At the Oral Hearing Mr Y indicated that the Application Form said that the members would be Trustees but that Mr D Kench would be the main trustee and responsible for the investments. However, Mr Y's comment is not consistent with the Application Form, which makes no reference to Scheme members being trustees of the Scheme.

70. I have seen no document under which Mr M or the Additional Applicants were appointed as trustees of the Scheme. Therefore, my conclusions are reached on the basis that Mr M is a member, not a trustee, of the Scheme and that the Trustee is, and has been at all times, the sole trustee of the Scheme.

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

71. As explained in paragraphs 66 to 70 above, Mr D Kench was the sole trustee of the Scheme. Mr D Kench was also the sole director and shareholder of Pension Assist. Clearly, Mr D Kench's interests, in his capacity as director and shareholder of Pension Assist, conflicted with his duties to the Scheme's beneficiaries in his capacity as Trustee.

72. The Trustee was under a fiduciary duty not to profit from his position in relation to Pension Assist at the expense of the Schemes' beneficiaries and not to be in a position of conflict of duty or interests.

73. The Trustee was also under a common law duty to act with prudence, requiring him to take such care as an ordinary prudent man of business would take in managing his own affairs[13]. Case law[14] has further established that that standard of prudence is to be determined by reference to the actions of an ordinary man of business, who was under a moral obligation to provide for others.

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

74. Code of Practice No.13 (the **2013 Code**), published by TPR in November 2013, and entitled 'Governance and administration of occupational defined contributions trust-based pension schemes', applied to the Trustee. The 2013 Code was replaced by a new code[15] in July 2016 (the **2016 Code**).

75. TPR's codes of practice are not binding in their nature. However, I am required to take them into account, insofar as they are relevant, in determining complaints made to my Office.

76. Paragraph 143 of the 2013 Code also states that the statutory requirement under section 249A of the Pensions Act 2004, to have in place an effective system of governance, includes a requirement for pension scheme trustees to ensure that they have processes in place to manage their conflicts of interest.

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

> "61. Conflicts of interest may arise from time to time in the course of running a pension scheme, either among trustees themselves or with service providers or advisers. Part of the requirement in law to establish and operate adequate internal controls[16] includes having processes in place to identify and manage any conflicts of interest.
>
> 62. We expect these controls to include, as a minimum:
>
> a written policy setting out the trustee board's approach to dealing with conflicts
>
> a register of interests (which should be reviewed at every regular board meeting)
>
> declarations of interests and conflicts made at the appointment of all trustees and advisers
>
> contracts and terms of appointment to require advisers and service providers to operate their own conflicts policy and disclose all conflicts to the trustee board."

[13] Speight v Gaunt [1883] EWCA Civ 1.
[14] Re *Whiteley* (1886) 33 ChD 347. See Section [E.4.4] below for further detail.
[15] Code of practice no: 13: 'Governance and administration of occupational trust-based schemes providing money purchase benefits'.
[16] i.e. in accordance with section 249A of the Pensions Act 2004.

78. The Trustee has admitted that he was not aware of any of the requirements imposed on pension scheme trustees by statute, case law or TPR's publications. By his own admission, he has not even retained a copy of the Scheme's Trust Deed and Rules, let alone become conversant with them. He was therefore clearly unaware of the above governance requirements, or of the requirement, under section 247 of the Pensions Act 2004, to have acquired knowledge and understanding of the law relating to pensions and trusts within six months of becoming Trustee of the Schemes[17]. I have seen no evidence that any steps were taken to manage any conflict of duty or interests in relation to the Scheme or that any policy was in place to do so.

E.3.2 Payments to Pension Assist

79. As explained in paragraph 31 above, when members joined the Scheme, only half of their pension fund was invested in Realsave, while approximately 30% was paid to Pension Assist and approximately 20% was paid to the member. Bearing in mind Mr D Kench's position as director and sole shareholder of Pension Assist, these payments to Pension Assist of nearly one third of each member's pension fund constituted an obvious conflict of interest in his role as the Scheme's Trustee, as a consequence of which Mr D Kench's own company made a profit, in breach of his fiduciary duty.

80. In knowing that he would receive this payment in his capacity as Mr D Kench, as director and shareholder of Pension Assist, the Trustee was incentivised to invest members' funds into Realsave, and so cannot have been objectively assessing the suitability of the investment for the Scheme. Additionally, at the oral hearing, Mr D Kench admitted that members were not made aware of either the commission arrangement or the conflict of interest.

81. I cannot see how such a flagrant breach of the Trustee's duty to avoid conflicts of interest could have been addressed, and I have seen no evidence that any steps were taken to manage the conflict of interest.

82. The Trustee has submitted that he has not, at any point, received payment in respect of his position as Trustee. However, Mr D Kench clearly profited from the receipt of a large percentage of members' funds at the time when they were admitted to the Scheme. Such a level of commission is completely disproportionate with the level of service provided by Pension Assist and far in excess of typical commission levels paid to regulated financial advisers. Mr D Kench's role in relation to Pension Assist clearly created a conflict of interest with his role as Trustee.

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

83. As a consequence of the payment of approximately 30% of members' funds to Pension Assist, members' funds were diminished by a significant amount at the outset, with part of the remainder being invested in one investment only and the rest paid direct to the member, this constituted an unauthorised payment (see paragraph 87 below). As I have explained in Section E.4 of this Determination, investing the Schemes' funds in their entirety in one investment cannot be said to have been a reasonable or prudent manner of investing those funds.

84. The Trustee's submissions that he was unaware of any duties or requirements imposed on him as a pension scheme trustee are not in dispute. However, they do not assist him in relation to the complaints made against him.

85. The Trustee cannot have been oblivious to the fact that, as Trustee, he was responsible for large sums of money transferred into the Schemes by members, which those members would rely upon to sustain themselves during their later years. However, the Trustee did not make enquiries regarding the requirements imposed upon him in his role as Trustee. I cannot see that any reasonable pension scheme trustee would have assumed their role without having at least enquired as to the existence of any specific duties to which they were subject.

86. The Trustee has breached the requirements of sections 247 and 249A of the Pensions Act 2004, and has acted in breach of his fiduciary duties not to be in a position of conflict of duty or interests and not to profit from his position as Trustee. The Trustee also failed to act in accordance with the 2013 Code, and I find that such failure to have regard to the 2013 Code amounts to maladministration on the Trustee's part.

E.3.3 Payments to Scheme members

87. I understand that Mr M received at least £5,100 of the transferred fund value as a lump sum payment from the Scheme. As Mr M was only 49 years of age at the time of the transfer, this was an unauthorised payment under Section 160(2) Finance Act 2004 (**Unauthorised Payment**), and a form of pension liberation. The payment of any tax charges arising from that payment is a matter for HMRC, and not for me, to investigate further and to determine. However, the Trustee's actions and omissions in entering into this arrangement, under which Unauthorised Payments were made, fall within my jurisdiction.

88. The Trustee has said that he was aware of pension liberation as a concept but was reassured by Mr Stone that the arrangement was legitimate and was not pension liberation.

89. I cannot see how the Trustee, being aware of pension liberation, could have failed to identify that the payment to Mr M would be an Unauthorised Payment. Further, regardless of whether the Trustee was aware that the payment would constitute an Unauthorised Payment, there were requirements imposed on the Trustee, by case law, which he clearly did not meet on deciding to pay a significant proportion of members' funds from the Scheme to the members. Those requirements are

discussed further in Section E.4.4 below. In particular, the Trustee was required to act as an "ordinary prudent person", investing "for the benefit of other people for whom he felt morally bound to provide"[18]. By merely taking Mr Stone's word that paying Scheme funds to members before their 55th birthday would not constitute an Unauthorised Payment, without even taking written advice from Mr Stone to confirm that point and given that the Trustee was aware of the concept of pension liberation, the Trustee clearly failed to meet those minimum standards of prudence.

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

E.4 Investment of the Scheme's funds

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

E.4.1 Investment powers and duties

92. The duties imposed on pension scheme trustees in relation to investments are contained in: the pension scheme's documents, such as the scheme's trust deed and rules; Part I of the 1995 Act; and case law, as set out below.

93. As I have explained in paragraphs 59 to 62 above, no copy of the Scheme's Trust Deed and Rules is available to me. Therefore, I can look only at the statutory and common law requirements.

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

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

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

[18] *Whiteley* (see paragraph 113 below).

E.4.2.1 The Investment Regulations

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

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

98. It is not disputed that there was no diversification of investment of Scheme funds whatsoever; the Trustee has not claimed to have invested any Scheme funds anywhere other than in Realsave. By the Trustee's own admission, he was unaware of, and therefore had not considered, the requirement to have regard to the need for diversification of the Schemes' investments in accordance with Regulation 7(2) of the Investment Regulations, at any point leading up to his investment of the Schemes' funds in Realsave.

99. However, the Trustee's ignorance of these requirements provides him with no excuse. Knowing, as Mr D Kench did, that he would be directly involved in the investment of other people's pension funds in his role as Trustee, had he acted reasonably he would have made, at the very least, basic enquiries about the role and the responsibilities that accompanied it. A simple internet search would have brought up TPR's guidance, which is aimed specifically at new pension scheme trustees. Perhaps this knowledge would have dissuaded Mr D Kench from accepting the trustee role. But at the very least, assuming he was acting with the best financial interests of the members in mind, as he says he was, he would have become aware of the requirement to have some diversification in the Scheme's portfolio. Instead, Mr D Kench accepted Mr Stone's guidance and ignored the common-sense conclusion that trusteeship would be subject to obligations and duties.

100. Despite the statement, in the Key Features document, that "a wide range of investments" was available under the Scheme (see Section E.3.5 above), Realsave was the sole investment made by the Scheme.

101. It is clear, therefore, that there was no attempt to diversify the Scheme's investments whatsoever. As I have found in paragraphs 116 to 117 below, the investment in Realsave was high-risk in nature and, as set out in Section E.4.4 above, the Trustee had carried out no due diligence in relation to that investment. On that basis, I find that the Trustee acted in breach of the requirements of Regulation 7(2) by failing to have regard to the need to diversify investments taking into account all of the circumstances of the Schemes.

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

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

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

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

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

105. The Trustee has explained that he relied on Mr Stone's advice regarding the investment in Realsave, on the understanding that Mr Stone was an IFA. However, the Trustee took no steps to verify Mr Stone's purported IFA qualification or experience. The Trustee has conceded that he undertook no due diligence on Mr Stone's background through, for example, reviewing the Financial Services Authority's (as it was at the time) register.

106. Mr D Kench appears to have made his assessment of Mr Stone's "experience" and "success" as an IFA on the basis of Mr Stone's apparent wealth and his expensive lifestyle. I cannot see how any reasonable pension scheme trustee would have reached the conclusion that an individual was "qualified in his ability and practical experience of the management of the investments of trust schemes" without at least having sought independent verification of that individual's ability or experience.

107. However, it is not in dispute that the Trustee invested members' funds in Realsave without having taken any written investment advice whatsoever. Given the statutory requirement, imposed by Regulation 7(2), to diversify Scheme investments, it seems more likely than not that, had the Trustee obtained investment advice in accordance with Section 36 of the 1995 Act, he would have been advised against investing the Scheme's assets solely in Realsave's preference shares.

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

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

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

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

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

E.4.4 Duties under case law

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

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

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

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

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

and the prospects of the yield of income and capital appreciation both have to be considered in judging the return from the investment.

114. Citing the case of Re: *Whiteley,* Megary V-C said, at paragraphs 49 to 50, that the standard required of a trustee in exercising his powers of investment is that he must take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide. That duty includes the duty to seek advice on matters which the trustee does not understand, such as the making of investments and, on receiving that advice, to act with the same degree of prudence. This requirement is not discharged merely by showing that the trustee has acted in good faith and with sincerity. Honesty and sincerity are not the same as prudence and reasonableness. Some of the most sincere people are the most unreasonable. Deliberately not taking advice is a reckless breach of trust.

115. I find that, in investing the entirety of the Scheme's assets in Realsave without taking investment advice, Mr D Kench cannot be considered to have met the above requirements. I find that Mr D Kench failed in his equitable duty to exercise due skill and care in the performance of his investment functions. Investing all of the Scheme's assets in Realsave was high-risk in nature and there was a complete lack of diversification of investment, showing a lack of regard for members' financial interests and a failure to avoid hazardous investments, contrary to the requirements imposed on trustees by *Cowan v Scargill* and *Learoyd v Whiteley*.

116. Regarding the purported investment itself, I have made the following observations:

116.1. Realsave had no history, it was a start-up company with no proven track record of profitability;

116.2. the investment was unregulated and without any means of Regulatory redress; for instance, via the Financial Services Compensation Scheme;

116.3. Realsave proposed to provide short term finance without the typical credit checks used by mainstream lenders; and

116.4. the investments proposed a high level of return 2.5 – 3% per month, which was well above typical investment returns for that time.

117. Bearing in mind the above, the investment would most likely have been classed as high-risk by any competent financial adviser.

118. The only evidence that the Trustee conducted any due diligence on the investment is: his account of visiting the warehouse which would be used to store goods but was, at that time, empty; the 'due diligence pack', or company brochure, issued by Realsave and therefore self-serving; and the Trustee's personal impression of Mr Stone's integrity, which has been demonstrated to be palpably wrong.

119. In respect of the due diligence pack, it contains only generic, high-level information. It provides no meaningful detail that I consider a pension scheme trustee investing

scheme assets should have considered and, in most cases, sought independent advice in relation thereto. For example, there was no detail of: the investment or its expected returns; or the terms of the investment agreement such as costs, fees or how the Trustee might withdraw from the investment agreement. There also appears to be no formal confirmation of the terms of the investment. Further, I note that the company brochure contains a statement that "We don't require your home or any other personal assets as security". I find it interesting that the Trustee appears not to have noticed, or queried, that statement, given that he had been informed that Realsave would be holding assets securely in its warehouse as security for the loans that it issued.

120. The Trustee has submitted that Mr Stone verbally assured him that he had investments available to him to personally secure the assets of the Scheme. However, the Trustee saw no documentary evidence of the security Mr Stone had said would be provided and took no steps to formalise Mr Stone's assurances. These steps that Mr D Kench said he took to minimise the risk of investment loss were wholly inadequate, especially given the high-risk nature of the investment in Realsave.

121. As a further observation in respect of Mr D Kench's reliance upon Mr Stone's advice, I have seen no evidence that Mr Stone was appointed in any way as an adviser to Mr D Kench as Trustee. Essentially, Mr D Kench has relied upon the personal faith that he placed in Mr Stone's apparent knowledge, experience and ability, making no enquiries himself into the legitimacy or suitability of the Scheme, the investment of Scheme members' funds or the payments made to him and Pension Assist from those funds. I cannot see that Mr D Kench's reliance upon Mr Stone's advice and failure to make his own enquiries accord with the duty imposed upon him by the case of *Re: Whiteley*.

122. Finally, as explained in paragraph 32 above, approximately £313,000 of the total funds transferred into the Scheme by members has not been accounted for by either the evidence of the Scheme's investment in Realsave or by the payments to Pension Assist and to the members. I have not been informed of what happened to those funds, although the Trustee submits that those funds were invested in Realsave. It might be that the Trustee passed those funds to Stuart Stone, for investment in Realsave, but there is no evidence that Mr Stone actually applied those funds to purchase shares in Realsave and it seems that the Trustee did not receive formal documentation of the investment of the £313,454 that is unaccounted for in the records available at Companies House. In any case, the Trustee has clearly not demonstrated that he has met any of his investment duties in relation to the unaccounted for £313,454.

123. I find that the Trustee has failed to meet the minimum standards imposed on him by case law, outlined above in paragraphs 112 to 113, regarding his investment of the Scheme's funds. The Trustee has failed to discharge his equitable duty to exercise due skill and care in the performance of his investment functions, which constitutes a breach of trust on his part.

E.5 Information provided to members

124. The benefit statements, which I understand were issued to members on an annual basis (see Section A.4 above), gave the impression that members would be due to receive back the amount of their fund that had been transferred into the Scheme when the investment matured on the fifth anniversary of their joining the Scheme (members having additionally received a cash payment on joining the Scheme). As I have explained in paragraph 52 above, these benefit statements, which Mr D Kench had signed, apparently in his capacity as Trustee, continued to be issued after Mr Stone's conviction and Realsave's dissolution, despite Mr D Kench's having received no information concerning the performance of the investment in Realsave.

125. The Trustee explained at the oral hearing that these annual benefit statements had been prepared and sent out by Pension Assist. However, the Trustee was unable to give any good reason why he had allowed Pension Assist to issue those annual benefit statements. The Trustee clearly knew the statements contained false information, as he informed me that he had continued to send out the statements in the hope that the situation would resolve itself. A basic search of the Companies House register any time after 14 October 2014 would have informed him that Realsave had been dissolved and that it had not filed any annual reports and accounts during its existence. The Trustee has not been able to point to any information or proper evidence that the investment in Realsave was performing as it should have done, on which he could have relied when preparing those benefit statements.

126. Pension Assist stopped sending annual benefit statements in 2015, but the Trustee did not inform members of the situation concerning their investments under the Scheme until September 2017.

127. The Trustee was under a duty to act honestly and in good faith. Although the Trustee has submitted that it was Pension Assist that sent the statements to members, he clearly knew of their content, as is evidenced by his signature on those statements. The Trustee has submitted that he acted with the best of intentions and tried to assist the members. However, providing members with false information and withholding the information that Mr Stone had been convicted and that the preference shares in Realsave were worthless following Realsave's dissolution in 2014, was clearly not carried out honestly or in good faith. The Trustee has, clearly acted in breach of his duty to act honestly and in good faith.

E.6 Member consent / contributory Negligence

E.6.1 Member consent

128. It is an established principle of trust law that where a beneficiary, who is of full age and capacity, freely consents to the act in question, or afterwards waives the right to sue the trustees in respect of it, he may not later sue for that breach of trust,

whether or not he knew that what he was consenting to would amount to a breach of trust (*Re Paulings' Settlement Trusts* [1962] 1 WLR).

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

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

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

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

131. Underhill and Hayton: Law of Trusts and Trustees[19] [20] advises that, for this principle to apply: the beneficiary must have: been "of full age and capacity at the date of such assent or release[21]"; "had full knowledge of the facts and knew what he was doing[22] and the legal effect thereof[23], though, if in all the circumstances it is not fair and equitable that, having given his concurrence or acquiescence, he should then sue the trustees, it is not necessary that he should know that what he is concurring or acquiescing in is a breach of trust (provided he fully understands what he is concurring or acquiescing in) and it is not necessary (though it is significant[24]) that he should himself have directly benefited by the breach of trust[25]"; and "no undue influence was brought to bear upon him to extort the assent or release[26]."

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[19] Paragraph 1 of Article 95 of the 19th edition.

[20] The same paragraph of the 1960 edition of Underhill and Hayton was referred to by Wilberforce J in *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 (on appeal [1964] Ch 303).

[21] *Lord Montford v Lord Cadogan* (1816) 19 Ves 635*;* Overton v Banister (1844) 3 Hare 503 at 506*.*

[22] *Re Garnett* (1885) 31 Ch D 1; Buckeridge v Glasse (1841) Cr & Ph 126; *Hughes v Wells* (1852) 9 Hare 749; *Cockerell v Cholmeley* (1830) 1 Russ & M 418; *Strange v Fooks* (1863) 4 Giff 408; *March v Russell* (1837) 3 My & Cr 31; *Aveline v Melhuish* (1864) 2 De GJ & Sm 288; *Walker v Symonds* (1818) 3 Swan 1

[23] *Re Garnett* (1885) 31 Ch D 1; Cockerell v Cholmeley (1830) 1 Russ & M 418; *Marker v Marker* (1851) 9 Hare 1; *Burrows v Walls* (1855) 5 De GM & G 233; *Stafford v Stafford* (1857) 1 De G & J 193; *Strange v Fooks* (1863) 4 Giff 408; *Re Howlett* [1949] Ch 767 at 775.

[24] *Stafford v Stafford* (1857) 1 De G & J 193 (benefits from breach of trust accepted for 15 years); *Roeder v Blues* [2004] BCCA 649, (2004) 248 DLR (4th) 210 at [33].

[25] *Holder v Holder* [1968] Ch 353 at 369, 394, 399 (CA) approving *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 at 108. Also *Re Freeston's Charity* [1979] 1 All ER 51 at 62, CA.

[26] See paragraph 133 below.

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

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

133. The Trustee has submitted that he was acting on the instruction of the members, who were aware that the Scheme's funds were to be invested in Realsave, and that he provided no advice or assurances as to the success of the investment. The members selected the investment of their own volition and were invited to seek their own professional advice on whether to proceed.

134. I note that there are also statements, in the Scheme's documents, that might suggest that the Scheme's members were informed of the facts, if those statements were to be taken at face value.

135. The Key Features Document (see Section A.3.5 above) stated that: members could "choose from a wide range of investment opportunities, to build up your pension fund"; members had a commitment to "act as a trustee of the SSAS with the other SSAS members, to operate the SSAS effectively"; members were required "to take responsibility as a trustee for the management of the investments in the SSAS; and that "some investments are higher risk than others and you should understand the risk profile and diversity of the investments you hold."

136. The Terms and Conditions (see Section A.3.3 above) contains a statement that "We are not authorised by the FSA to provide you with advice in relation to your SSAS and we recommend that you obtain advice where required from a qualified financial adviser. Nothing in any communication to you should be construed as financial or investment advice within the meaning of the Financial Services and Markets Act 2000". There is a further statement, in the Terms and Conditions, that investments are made at the direction of the members and that Grovesnor Solutions Limited gives no investment advice and is not required to assess the suitability of investments and accepts no liability for the choice or performance of individual investments or of the members' chosen advisers.

137. Considering first the Key Features Document, I have already noted, and the Trustee has confirmed, that there was no choice of investment opportunities offered under the Scheme (see section E.4.2.1) as the investment in Realsave was the only investment available under the Scheme. It is clear, from the Trustee's account of the circumstances in which the Scheme was set up (see Section A.2 and the Trustee's submissions in Section B) that the Scheme was set up as a vehicle to invest in Realsave and there had at no point been any suggestion that it would be

used for any other investment. There is no evidence to suggest that the members had any effect on the Trustees' actions. This was a predetermined investment by the Trustee, not the members.

138. I have also found that, contrary to the statements in the Key Features Document, no member of the Scheme has at any point been a trustee of the Scheme (see Section E.2).

139. Regarding the Terms and Conditions, the Trustee's submissions are in accordance with the statements that I have referred to in paragraph 136 above. It does also appear that there may have been some slight awareness by at least a couple of the members that they did not entirely understand the terms under which they had joined the Scheme and/or that the payment they received was not entirely risk-free or without consequence. However, *Re Pauling's Settlement Trusts* requires me to consider all of the circumstances in which Mr M and the Additional Applicants joined the Scheme, namely the context in which they received the Terms and Conditions and any influence that they might have been subject to at or before the time when they each joined the Scheme, in order to determine whether it is fair to allow them to sue the Trustee for the breaches of trust that I have found him to have committed.

140. Mr M's and Mr Y's accounts of the meetings that preceded the transfer and investment of their pension funds contradict the Trustee's submissions outlined at paragraph 133 above and in the Terms and Conditions. As it was Mr R Kench, not the Trustee, who attended the meeting with the members of the Scheme, the Trustee's knowledge of what happened at those meetings must be, at best, second hand. There is no documentary account of what was said at those meetings. I do not consider it reasonable to rely on what the Trustee has said was discussed, given that he was not present at the meetings.

141. At the Oral Hearing, Mr Y commented that Mr R Kench had seemed very "assured and confident", that he had presented himself as a financial adviser and that Mr Y had believed Mr R Kench to be the Scheme's investment manager. Mr Y had no prior investment experience and, having recently been made redundant, was in a financially vulnerable position. Mr Y has submitted that, had he not been assured of the investment's security and so trusting of Mr R Kench, he would not have risked his family's financial security by investing his pension fund in the Scheme. It seems, from Mr Y's submissions, that Mr R Kench's confident performance at their meeting led Mr Y to place his trust in Mr R Kench, which resulted in his decision to transfer his fund to the Scheme. For example, Mr Y has stated that while, with hindsight, the Service Agreement that he signed seemed "irregular", he did not regard it as such at the time, as Mr R Kench had explained the process so well and had seemed so "genuine".

142. Mr M has also commented that he had received verbal assurances of the investment's security, on several occasions, from Mr R Kench; Mr R Kench had stated that the investment was "100% safe" on many occasions. This would align

with the Trustee's position that Mr Stone had provided personal guarantees as to the investment's security and I consider it to be reasonable to expect that that apparently important factor was shared with prospective members.

143. Mr M and the Additional Applicants have consistently submitted that they were not aware of Realsave's involvement, that they had not been informed that Pension Assist would receive commission and that they were assured that their investment would be secure.

144. Having considered the circumstances of the meetings and the parties' submissions at the oral hearing, I find Mr M's and the Additional Applicants' submissions concerning the meetings to be more credible than the Trustee's submissions that no advice was provided to members at those meetings. Even if the discussions were caveated with the statement that no advice was being provided, the nature of the meetings means that it is more likely than not that the members, who had no prior investment experience, reasonably believed that they were being advised.

145. There would have been no reason for the members to meet face to face with Mr R Kench if the purpose of that meeting had been solely to share information. The use of a face to face meeting, without any written record, allowed Mr R Kench to present the Scheme and the investment in Realsave as he wished. If the Trustee and Mr R Kench had merely wanted to provide documentation to the potential members for their consideration, this could have been done by correspondence. Mr R Kench and the Trustee appear to have worked as a duo, in order to: find prospective members who had no prior investment experience and many of whom were in financially vulnerable positions and in need of immediate cash funds; and persuade them to transfer their pension funds into the Scheme (which would financially benefit them). The Trustee was clearly aware of the nature of the meetings between Mr R Kench and the Scheme's members.

146. I note that in *Re Pauling's Settlement Trusts* it was found that, due to the complicated action in question in that case, even one of the claimants who was an experienced lawyer could not be expected to appreciate his rights as a beneficiary until they had been drawn to his attention. Looking at the present case, investments made by a pension scheme, and the raft of legislation which governs those investments and the trustees who possess the power to make them, are a complicated matter. It is clear, from Mr M's and the Additional Applicants' accounts of their joining the Scheme, that they, understandably as they are not pension professionals and have no investment experience, placed their trust in the Trustee to invest their funds on their behalf and to do so safely, as Mr R Kench had assured them would be the case.

147. Given their lack of relevant experience and their accounts of their meetings with Mr R Kench (which, as I have explained in paragraph 144 above, I find more likely than not to be accurate), I cannot see that Mr M or the Additional Applicants could have been expected to understand that their pension funds were to be invested in

Realsave or that the Trustee had almost completely failed to carry out any due diligence before making that investment.

148. The Trustee's credibility is further eroded by the fact that, by his own admission, he: allowed false statements of the performance of the members' funds, which were entirely fabricated as the Trustee had received no information concerning Realsave's performance whatsoever, to be issued to the members; and withheld from the members the fact that Mr Stone had been convicted of fraud and the implications of this for their pension funds (see Section E.5 above).

149. I find, on the balance of probabilities, that: Mr M and the Additional Applicants lacked the full knowledge of the facts of the investment of their funds under the Scheme; they were unduly influenced by Mr R Kench when they made their respective decisions to transfer their pension funds into the Scheme; and the Trustee was aware of, and essentially counting on, this undue influence.

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

E.6.2 Contributory negligence

151. I have found the Trustee to have committed multiple breaches of trust, including the breach of the fiduciary duty to act honestly and in good faith, as set out in Sections E.3 to E.5 above.

152. In Underhill and Hayton: Law of Trusts and Trustees (19th edition), at paragraph 2 of Article 87, it is explained that, in cases such as this one, where a trustee has lost or misapplied the trust's assets, "contributory negligence [as a defence against the requirement that the trustee restores those assets to the trust fund or pays the amount due to make the accounts balance] is inapt because of 'the basic principle that a fiduciary's liability to a beneficiary for breach of trust is one of restoration'"[27].

153. It is further explained, in Underhill and Hayton, that "Where the trustee has acted fraudulently, a further reason for denying him the defence would be the rule that 'it is no excuse for someone guilty of fraud to say that the victim should have been more careful and should not have been deceived'"[28].

154. As I have explained above in section E.4.4, duties imposed on the Trustee by case law required him to invest members' funds prudently and with regard to members'

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

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

best interests. The Trustee also had a fiduciary duty to act honestly and in good faith when dealing with members' funds. As I have already found, the Trustee has breached all of those duties and those breaches have caused the members to lose their pension funds.

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

E.7 Mr D Kench's liability as Trustee

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

157. The Trustee has highlighted a passage from the Terms and Conditions document (see Section A.3.3 above) to suggest that no advice was provided to members in relation to their investment choice. I note that the Key Features document carries similar warnings. However, I do not consider that this assists the Trustee in any way: I have seen no such term or condition relating to Mr R Kench, whose visit to Mr M prompted Mr M to transfer his pension fund into the Scheme; and the term referred to applies only to Grovesnor Solutions Ltd and not to Mr D Kench as a Trustee (or, more generally, to any trustee of the Scheme).

158. Even if there were an exoneration or indemnity clause under the Trust Deed and Rules, or exclusion or limitation of the Trustee's liability under any other document, the Trustee would be prevented from relying upon it, in relation to his shortcomings in the exercise of his investment functions, by Section 33 of the Pensions Act 1995 (**1995 Act**):

> "(1) Liability for breach of an obligation under any rule of law to take care or exercise skill in the performance of any investment functions, where the function is exercisable:
>
> (a) by a trustee of a trust scheme, or
>
> (b) by a person to whom the function has been delegated under Section 34,
>
> cannot be excluded or restricted by any instrument or agreement.
>
> (2) In this Section, references to excluding or restricting liability include:
>
> (a) making the liability or its enforcement subject to restrictive or onerous conditions,

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

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

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

161. A purposive interpretation of Section 33 requires indemnities (particularly a member indemnity) to be included. The impact of any indemnity would prejudice the member in consequence of his pursuing his right or remedy (section 33(2)(b)). To allow an indemnity under Section 33, especially where I have found dishonesty (see below section E.7.2), would render Section 33 open to circumvention and ineffective in practice. As a matter of public law policy where there has been dishonesty it cannot be correct to give effect to any indemnity.

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

163. On that basis, if the Scheme's documents contain any exoneration clause or indemnity, Section 33 would apply and would prevent the Trustee from relying on it[29]. This would render any such provisions ineffective in preventing the Trustee from being held personally liable for any loss suffered by members in relation to the Trustee's breach of his investment duties, imposed by statute (see Section E.4.2)

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

and/or common law (see Section E.4.4) by having invested the Schemes' assets in Realsave.

E.7.2 Section 61 of the Trustee Act 1925

164. Under Section 61 of the Trustee Act 1925 (**Section 61**), I may direct relief to the Trustee, wholly or partly, of any personal liability for any breach of trust that has arisen out of his actions or inactions, if it appears to me that: (1) he acted honestly and reasonably; and (2) it would be fair to excuse him from personal liability, having regard to all the circumstances of this case.

165. The question of what constitutes "honesty" has been considered by the Courts in several key cases.

166. In *Armitage v Nurse [1997] EWCA Civ 1279*, the test for honesty, in the context of considering the validity of an exoneration clause, appeared to be subjective. However, in considering the test of honesty in *Armitage,* Millet LJ did not consider the House of Lords decision in *Royal Brunei Airlines v Tan [1995] 2 AC 378*. Lord Nicholls said (in the context of knowing assistance and constructive trusts) in Royal Brunei Airlines that an objective test of [dis]honesty is to be applied:

> "… in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sights 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."

167. 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."

168. 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".

169. 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.

170. 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…".

171. 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.

172. In the later case of *Fattal v Walbrook Trustees (Jersey) Limited* [2010] EWHC 2767 (Ch)30, it was accepted, at para 81, that the law concerning the interpretation of exoneration clauses, as set out in Walker v Stones, was not confined to applying to solicitor-trustees. As set out in *Fattal v Walbrook* the test for dishonesty, at least in

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

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.

173. While the Trustee received no remuneration in respect of his office as Trustee, his position could be regarded as analogous to that of a professional trustee. The Scheme was, by the Trustee's own submission, offered to members as an opportunity to invest in Realsave and the Trustee benefitted, in his capacity as Mr D Kench, from large cash sums being transferred to his own company, Pension Assist. On that basis, I consider that the test for dishonesty set out in *Fattal v Walbrook* applies here.

174. The subjects of scrutiny are the investment of Scheme funds in preference shares in Realsave in order to raise capital for Realsave to use for its benefit, by an individual who was an acquaintance of someone connected with Realsave (Mr Stone being an acquaintance of Mr D Kench's and married to the sole director of Realsave), as well as the payment of a significant proportion of members' transfer values to his own company, Pension Assist. Although, by his own admission, the Trustee lacked experience as a pension scheme trustee, I cannot see how the existence, or at least the possibility of the existence, of a duty of care in relation to his handling of members' funds can have escaped his notice. Particularly so, given that as a professional experienced individual, in his capacity as a director, he would or should be aware of the concept of director's fiduciary duties, which are akin.

175. I have already found that the Trustee acted in breach of trust by: breaching his fiduciary duty to manage conflicts of interest and his duty not to profit from his position as Trustee (see Section E.3); failing to have in place and operate the necessary internal controls to manage conflicts of interest, as required by section 249A of the Pensions Act 2004 (Section E.3); failing to comply with the requirement, under section 247 of the Pensions Act 2004, to have knowledge and understanding of the Scheme's documents or the law relating to pensions and trusts (Section E.3); transferring large sums of money into his own company, Pension Assist (Section E.3.2); investing all of the Schemes' assets that remained after the payments to Pension Assist and to the members in Realsave's preference shares (see Section E.4); and providing false information to members, in breach of the Trustee's fiduciary duty to act honestly and in good faith (Section E.5).

176. I have also found that it was maladministration on the Trustee's part to have: failed to have regard to the 2013 Code and the 2016 Code as detailed in Section E.3; and failed to make the necessary enquiries to establish that the payment of members' funds to members on joining the Scheme constituted an Unauthorised Payment (Section E.3.3). All of these breaches of duty and findings of maladministration are intertwined and have led, directly or indirectly, to the loss of Scheme funds. Therefore, I have considered together the Trustee's liability in relation to all of these

breaches of trust and findings of maladministration, and the extent to which the Trustee should benefit from any relief under Section 61.

177. The Trustee has submitted, in writing and in person at the Oral Hearing, that: he did not promote the investment to prospective members or claim that he was in any way authorised or regulated to do so; he believed the investment in Realsave to be a good opportunity, based on the assurances of Mr Stone, whom he held in high regard; and he was unaware of his duties and responsibilities as a pension scheme trustee.

178. As I have explained, the applicable test, which has been developed by case law since *Armitage*, is partly objective. Here the circumstances call into question the Trustee's honesty on the basis that he had interests of his own. By promoting the Scheme to prospective members, in partnership with Mr R Kench, Mr D Kench's own company, Pension Assist, would receive large sums of members' money.

179. The Trustee's honesty may be questioned further because he failed to ask questions concerning his duties and necessary level of knowledge as a Trustee and take advice before investing the remainder of the Schemes' assets in Realsave's preference shares.

180. Although the nature of the objective test in *Walker v Stones*, which was accepted in *Fattal v Walbrook Trustees*, is in some respects unclear, I consider that there is a distinction between a trustee's conduct constituting a breach of trust and the belief he held at the time of the breach. For the reasons set out below, I find that the Trustee's perception of the interests of the Schemes' beneficiaries was so unreasonable that no reasonable trustee could have held such a belief.

181. As explained, in sections E.3 and E.4 above, the Trustee was aware that Realsave was a new company, with no financial history on which to base his decision that it would be a good company to invest in. The Trustee chose to take Mr Stone's word that Realsave would be a profitable investment. The Trustee's perception of Mr Stone as trustworthy, experienced and qualified was not based on any due diligence carried out by the Trustee whatsoever. In fact, a search of the FCA register shows that Mr Stone was not actually a qualified IFA at the time when the Trustee invested Scheme funds in Realsave.

182. The Trustee knew so little of the requirements of his role as Trustee that he did not even realise that he was required to act in members' best financial interests in investing their funds, believing instead that it was the members' own responsibility to make such investment decisions. I consider that the Trustee was only able to sustain this belief because he turned a blind eye and refrained from asking obvious questions. He closed his eyes and ears for fear of learning information he would rather not know, that is, he was under certain fiduciary and statutory duties as Trustee which, if fulfilled, would have forced him to conclude that the investment in Realsave was not in the members' interests, so that investing in that manner would amount to acting in breach of his fundamental fiduciary duties.

183. A reasonable and honest trustee in the Trustee's position would have raised questions to assure himself that the investments in Realsave and the payment of approximately 30% of members' funds to Pension Assist and 20% to the members themselves were proper transactions in the members' interests and that his actions accorded with his duties and obligations as Trustee. The failure to ask those questions was dishonest, not because it was negligent not to ask, but because any honest reasonable trustee would have asked them. The fact that Mr M and the Additional Applicants appear not to have known that part of their pension fund would be paid to Pension Assist is further evidence of the Trustee's awareness that that payment was not in the members' interests.

184. It is not disputed that the Trustee took no proper investment advice when he made the investment of members' funds in Realsave's preference shares. Any advice that the Trustee may have received, in respect of the investment in Realsave, came from Mr Stone, who had a personal link to Realsave and whose perceived qualifications had not been verified by the Trustee. Without any proper professional advice, I cannot see how the Trustee could reasonably have believed that these transactions were in the Scheme members' interests. I do not consider that any reasonable trustee would have been happy to make a decision on that basis. The Trustee's submissions confirm that he was aware that, when he invested the Schemes' assets in Realsave, the business had not even started trading. A reasonable trustee would have taken minimum steps to satisfy himself that investing in Realsave was in the members' interest. No such steps were taken. Further, I cannot see how any reasonable trustee could have considered that the payment of 30% of members' funds, as commission, to a company owned by the same trustee could possibly have been in the members' financial interest.

185. The fact that the Trustee was aware of Realsave's lack of trading history and was willing to pay such a large proportion of members' funds to his own company suggests that he deliberately pursued a policy of favouring Realsave and Pension Assist at the expense of the members, which arguably is dishonest under the *Armitage* approach, as well as under the subjective and objective approach accepted in *Fattal*. The conflict of interest between the Trustee's fiduciary duty to the Scheme's beneficiaries, and the interests of Realsave and Pension Assist, are obvious and yet the payment to Pension Assist and the investment of the Scheme's entire fund left over after the payments to Pension Assist and the members, without diversification, proceeded. These transactions conflicted, in the most obvious way, with the Trustee's fiduciary duty to keep the Schemes' beneficiaries' interests paramount. Given the facts, I do not accept that a reasonable trustee could have believed that making these payments and investments would be in the members' financial interests. In doing so, the Trustee specifically intended benefiting Pension Assist and Realsave, which were not the object of the trust, knowing that this would be at the expense of the beneficiaries' financial interests if the business failed. No matter their motives, no reasonable trustee would regard this course of action as honest.

186. The Trustee benefited Pension Assist and Realsave by a decision taken with those businesses in mind in his capacity as Mr D Kench, and not by the exercise of his own, independent judgment as Trustee.

187. In my judgment, it is this general blunting of his moral antennae which explains why the Trustee had a lower standard of honesty, as well as his recklessness for others' rights. He was reckless of the members' right that they could expect the Trustee to: take and heed advice in proposing to invest their pension funds in Realsave; and to refrain from paying significant proportions of their fund away as "commission".

188. An honest and reasonable person would have had regard to the circumstances known to him (especially the complete lack of any evidence that Realsave's business model was in any way tried, tested and realistically viable), including the nature and purpose of the proposed transactions, the nature and importance of his roles and any conflicts of interests and the seriousness of the adverse consequences to the beneficiaries.

189. I conclude, on the balance of probabilities, having regard to the evidence and submissions received, that the Trustee's belief that paying a significant proportion of members' funds to his own company and a further significant sum to members themselves under the age of 55 and investing the entirety of the remainder of the Scheme's funds in Realsave, was in the members' interests, and his failure to take proper advice on the matter, or inform himself of his responsibilities and duties, as a pension scheme trustee, was so unreasonable that no reasonable trustee could have held such a belief. Alternatively, looking at the first limb of the test set out in *Fattal*, I find that the Trustee was recklessly indifferent as to whether his various breaches of trust and his maladministration were contrary to the interests of the beneficiaries.

190. For completeness, I will consider also the subjective test set out in *Armitage*, which would apply if the Trustee were not to be regarded as a quasi-professional trustee. As I have explained, the Trustee's failure to make even basic enquiries as to the existence of any duties or obligations imposed on him as Trustee, clearly amounts to reckless indifference regarding his duties and obligations as Trustee, such that, even if there were a copy of the Scheme's Trust Deed and Rules containing an exemption clause, he would not be able to rely on it in respect of any of my findings of breach of trust or maladministration.

191. It is also established, in *Armitage*, that "The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries, is the minimum necessary to give substance to the trusts" (para 29 of *Armitage*). A trustee's duty to act honestly and in good faith are part of the "irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust". As I have already found, knowing what he knew about Realsave at the time of investing the Schemes' assets in Realsave, the Trustee cannot be said to have acted in good faith.

192. Therefore, even if the Trustee's role as trustee of the Scheme were not to be considered analogous to that of a professional trustee, meaning that the test for honesty had to be entirely subjective, I find that the Trustee would still be unable to rely on Section 61 for relief from liability resulting from any of the breaches of trust or from the maladministration that I have found he has committed.

193. I find that the Trustee's belief was not honest or reasonable and it would not be fair to excuse him for the breaches of trust that he has committed. The Trustee, having acted dishonestly and unreasonably is not entitled to any relief, under Section 61, from personal liability for the financial consequences of his breaches of trust.

Decision

194. The Trustee has committed multiple breaches of trust, and has committed acts of maladministration, as summarised in paragraph 175 and 176 above which have caused the loss of the members' pensions.

195. The Trustee is not entitled to rely upon any defence of member consent or contributory negligence (see Section E.6).

196. The Trustee cannot rely upon any exoneration provisions or indemnity, as explained in Section E.7.1 above, and is afforded no relief from personal liability for the consequences of his many breaches of trust and acts of maladministration, as explained in Section E.7.2 above.

197. Realsave has been dissolved, so there are no longer any preference shares. I, therefore, find that the full value of the members' funds invested less any returns received to date is the starting point for redress in my directions below.

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

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

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

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

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

202. A review of the Factsheet and the Determination clearly shows that a high number of 'severe' and 'aggravating' factors are present in this case. By any standard, this is an 'Exceptional' case even without/before considering the specific individual circumstances of the pension scheme members affected by the Appellant's actions over a number of years. Moreover, those who attended the Oral Hearing gave persuasive and unchallenged testimony about the impact on their lives of the Appellant's actions.

203. The circumstances of the complaint have clearly caused Mr M and the Additional Applicants an exceptional level of distress and inconvenience. They were significantly misled as to the cost, security and legality of the arrangement they were entering into. In addition, they were misled after Mr D Kench became aware of the issues that the Scheme found itself in and have lost significant sums, which has affected their quality of life detrimentally.

Putting things right

204. Within 28 days of the date of this Determination, the Trustee shall pay into the Scheme;

- the total amount of the funds transferred into the Scheme, including any amount paid to Pension Assist as commission in respect of the Scheme's members' transfers into the Scheme (see paragraph 31 above); less
- the total amount of any payments made to the Scheme's members in relation to their respective transfers into the Scheme (see paragraph 31 above); plus
- interest at the rate of 8% per annum simple to the date of payment.

205. For the exceptional maladministration causing injustice, within 28 days of the date of this Determination, the Trustee shall pay the sum of £6,000 to each of Mr M and the Additional Applicants.

Reporting to TPR

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

Pensions Ombudsman

5 June 2021