PO-25984

Ombudsman's Determination

Applicant	Mr N
Scheme	The N 1953 Ltd Executive Pension Scheme (**the Scheme**)
Respondents	Rowanmoor Group plc (**Rowanmoor**), including specifically its subsidiary, Rowanmoor Trustees Limited (**RTL**)

Complaint Summary

Mr N has complained that Rowanmoor failed to perform sufficient due diligence in relation to his proposed investments in a hotel suite being developed by the Resort Group at Dunas Beach (Cape Verde) (**Dunas Beach**). He says these investments were high risk and not suitable for him. He would like Rowanmoor to put him back into the position he would have been in had the investments never occurred.

Summary of the Ombudsman's Determination and reasons

The complaint is not upheld against Rowanmoor as Administrator, as it was not its responsibility to carry out the level of due diligence suggested by Mr N, and because it fulfilled the duties it did have in relation to the Scheme adequately.

However, the complaint is upheld against RTL because it did not fulfil its duties as a trustee of the Scheme. As a part of these duties, it had a responsibility to consider whether the investment in Dunas Beach was appropriate in the circumstances. However, it failed to do so, the investment was not appropriate and thereby its actions caused the financial loss incurred by Mr N.

Detailed Determination

Material facts

1. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.

2. Mr N says that in 2013 he needed to raise capital and decided to do so by 'cashing in' personal pensions with Phoenix Life, Zurich and Legal & General, totalling £90,535. At that time Mr N had also been making enquiries about a mortgage through JT Private Finance Limited, and they put Andrew McLennaghan of the unregulated firm First Review Pension Services (**First Review**) in touch with him. He was advised by First Review to invest in Dunas Beach. He was then contacted by Sequence Financial Management Limited (**Sequence Financial**), a firm regulated by the Financial Conduct Authority (**FCA**), who introduced him to Rowanmoor.

3. On 5 January 2014, Mr N completed an application to establish the Scheme with Rowanmoor (**the Application**). The Scheme is a Small Self-Administered Scheme (**SSAS**), which is a type of Occupational Pension Scheme with fewer than 12 members, all of whom are trustees and take responsibility (together with any professional trustees appointed through the Scheme's Trust Deed and Rules) for how scheme funds should be invested in accordance with the Scheme's Rules. Mr N is the only member of the Scheme. The application showed that Sequence Financial was providing advice to Mr N in his role as the Member Trustee. The proposed investment was shown as 'The Resort Group – Cape Verde'.

4. On the same day, Mr N completed and signed a 'Property Development Information Schedule' which showed that he intended to invest £62,500 in a 33% share of a Dunas Beach hotel suite being developed by The Resort Group (TRG). The purchase was to be financed through the Scheme, following transfers from other pension arrangements.

5. The Scheme was established by an Interim Deed dated 16 January 2014. This appointed RTL as the first Trustee. A subsequent Deed of Appointment and Amendment, and Definitive Trust Deed and Rules (**TD&R**), dated 5 February 2014, appointed Mr N as Member Trustee, alongside RTL as the 'continuing trustee'. The TD&R was signed by Mr N, both in his role as the sole director of the principal employer and in his individual capacity as the Member Trustee, and RTL as the continuing Independent Trustee. The TD&R replaced the Interim Deed as the governing documentation of the Scheme.

6. On 17 January 2014, Rowanmoor wrote to Mr N regarding his proposed investment (**the Reason Why Letter**). It was headed 'Dunas Beach Hotel Suite 162/3 Limited' and said that it understood that he wished to invest in a fractional ownership certificate relating to property in Cape Verde. It said:-

> "Whilst we are able to inform you of the eligibility of such an investment under current pension legislation and the Trust Deed and Rules of the pension scheme,

> we do not endorse or recommend the services of any particular investment company, nor can we advise on the suitability of and risks attached to the proposed investment. In addition we cannot advise on the complexities of the legal process of acquiring property in an overseas territory or in relation to the contractual documentation. Nor are we able to advise on the developer's title to the land.
>
> As with all complex investments we would strongly recommend that before proceeding you take appropriate legal and other professional advice in the matter, as this may prevent issues going forward and reduce the possibility of incurring unnecessary costs in the future. You should also ensure that before proceeding you have seen and read the purchase contract and associated documentation related to the investment…
>
> …Rowanmoor Group excludes, to the maximum extent permissible by law, all liability in connection with your proposed purchase of the investment or resulting from such purchase, having drawn your attention in this letter to potential issues involved."

It is not clear to me whether this was written by Rowanmoor as Administrator, in respect of RTL's (a subsidiary of Rowanmoor) role as Independent Trustee, or was intended to cover all aspects of Rowanmoor's involvement.

7. On 31 January 2014, Mr N completed and signed an acknowledgement to the Reason Why Letter in which he confirmed that he understood that there were risks inherent in the proposed investment and that Rowanmoor would not be liable. He confirmed that he did not wish to appoint legal advisers.

8. Also on 31 January 2014, Mr N, as the Client, signed a Client Agreement (**the Client Agreement**) and this, in turn, was signed by Rowanmoor and RTL on 5 February 2014. The Client Agreement set out, amongst other things, the services to be provided to Mr N. As well those services to be provided by Rowanmoor, RTL would also provide "trustee services," including specifically ongoing "professional responsibility as Independent Trustee for the Scheme."

9. On the same day, Mr N wrote (in a letter seemingly prepared for him), as Member Trustee, to Rowanmoor to say that in accordance with the power of investment under the TD&R and after due consideration of the advice he had received from Sequence Financial he wished to proceed to invest £62,500 of his SSAS fund in the Cape Verde investment opportunity offered by TRG. However, at that time, Mr N of course had not yet been appointed as a trustee of the Scheme. Rather RTL was, at that time, the sole trustee.

10. On 21 February 2014, Mr N signed an Agreement for Sale of Membership of a Company with Dunas Beach Resort LDA, RTL and TRG.

11. As explained in Paragraph 5 above, the Scheme is governed by the TD&R. The TD&R defines 'Independent Trustee' as RTL and 'Member Trustees' as the trustees of the Scheme other than the Independent Trustee. In this case the only Member

Trustee was Mr N. The meaning given to 'Trustees' is "the Member Trustees and the Independent Trustee collectively for the time being appointed."

12. Clause 3 of the TD&R appoints Rowanmoor Group plc as the sole Administrator of the Scheme.

13. I set out other key clauses of the TD&R, in so far as they are relevant to this complaint, in paragraph 50 below.

14. On 22 June 2018, Mr N wrote to Rowanmoor to complain about the Dunas Beach investment. He said that based on his experience of the previous four years the promise of yearly income had fallen far short of guarantees and expectations, largely due to the high fees from both Rowanmoor and TRG. He said he questioned whether Rowanmoor had acted with due diligence in assessing whether the Dunas Beach investment was suitable, and in dealing with an unregulated company. He added that he had tried to sell the property through TRG but had been unsuccessful.

15. In its response dated 8 August 2018, Rowanmoor said:-

- Rowanmoor Executive Pensions Limited (**REPL**), as scheme administrator, was responsible to HM Revenue & Customs (**HMRC**) for the establishment and ongoing running of the Scheme and to carry out day to day administration.
- REPL would advise Mr N, as the Member Trustee, on the regulations which affect the Scheme and the requirements of legislation, but it was not authorised to give financial advice or pronounce on the suitability of a SSAS for the member's current or future needs.
- REPL would ensure the criteria for establishing and registering a scheme are met but would not perform due diligence on the suitability of a scheme for the member. It was the role of the adviser, in this case First Review Pensions Services, to undertake its own due diligence on the appropriateness of the SSAS.
- With regards to the investments made by the Scheme, REPL followed "the instructions of the Member Trustee" and would permit any asset provided:
    - the asset did not give rise to an unauthorised payment tax charge;
    - REPL could obtain satisfactory title to the asset; and
    - ownership of the asset would not give rise to an unacceptable liability or risk.
- REPL did not assess the suitability of any proposed investment the Member Trustee may wish to make. Extensive due diligence checks were carried out before accepting an investment and it also carried out regular reviews of existing investments to check they were operating as expected.
- The Member Trustee is free to appoint an investment adviser of their choice to take advantage of the wide range of investment opportunities open to them under the SSAS. In its response it also highlighted and acknowledged that "Under the terms of Section 36 of the Pensions Act 1995, the trustees of the SSAS are

required to take investment advice", albeit there is no mandatory requirement for the investment adviser to be regulated by the FCA.

- As with any investment which carried with it a greater element of risk, it was Rowanmoor's process to write to clients to explain that it did not endorse such investments. In Mr N's case it had done this on 17 January 2014 and Mr N had acknowledged this and confirmed he wished to proceed with the investment on 31 January 2014.

16. Rowanmoor also said, with regards to comments made by Mr N about the resale of the Dunas Beach (Cape Verde) investment, that if other investors did not want to increase their shares, Mr N was free to sell the investment on the open market.

Summary of Mr N's position

17. He was put in touch with First Review by a firm he had been talking to about a mortgage. He did not realise at the time that First Review was unregulated.

18. He was told by First Review that he could take a lump sum out of his pensions if he transferred them to the scheme they were recommending. The provider of that scheme was Rowanmoor.

19. He was only offered this one option and he is now aware that he could probably have achieved the same outcome with the pensions he previously held.

20. He was told by the adviser that he was buying an asset that would provide a regular income and that for the first three years he was guaranteed 7.5% interest.

21. After his initial meetings with First Review all further contact was with Rowanmoor. It was Rowanmoor which handled the transfers of his three pensions and set up the Scheme.

22. The amount of paperwork and the wording used in the transactions was overwhelming. He fails to see how an individual such as himself can be held totally responsible.

23. He has no previous investment experience and no other private pension provision.

24. Of the £90,000, approximately £62,000 was invested in Dunas Beach, £8,000 was invested in a portfolio managed by Parmenion and £3,000 was held in cash to cover fees. The balance was drawn down by Mr N as a tax-free cash sum.

25. He realised within the first two years that the income he was receiving was less than the fees he was being charged. He tried unsuccessfully to sell the Dunas Beach investment. He now believes he has lost that money.

Summary of Rowanmoor's position

26. The Scheme was established on 16 January 2014 following receipt of application forms received via Sequence Financial – a firm acting as Mr N's Financial Adviser, as confirmed on the Application Form. Its records indicate that Mr N also took advice

from First Review in respect of the establishment of the SSAS, the transfers and the investment.

27. It understands the role of Sequence Financial was to provide limited advice to Mr N as Trustee on the permissibility of the Dunas Beach investment to sit within the Scheme.

28. As the Scheme Administrator, Rowanmoor is responsible for certain HMRC administrative matters relating primarily to the establishment and ongoing running of each SSAS pension scheme and to carry out the day-to-day administration. In contrast to its administrative responsibilities, Rowanmoor does not involve itself in the provision of financial advice (as defined by the Financial Services and Markets Act 2000 (**FSMA**)) on any matter related to the SSAS scheme, to any sponsoring employer company or Member Trustee. Similarly, Rowanmoor does not involve itself in any assessment of the suitability of a SSAS scheme arrangement for a company or for a Member Trustee.

29. The Scheme invested in a fractional ownership membership with TRG, and a discretionary managed portfolio with Parmenion. Prior to making the investment with TRG, Rowanmoor wrote to Mr N with a clear and appropriate warning, outlining the risk associated in making the investment. Mr N confirmed he wished to proceed with the investment. He also signed a Property Development Information Schedule which confirmed he had taken written advice on the suitability of the investment, as well as a letter confirming he had taken financial advice concerning the investment.

30. Rowanmoor undertook due diligence reviews on the proposed Dunas Beach investment prior to any funds being remitted; the investment was considered an approved investment by HMRC for a pension scheme. Rowanmoor's position is that its due diligence assessment in this matter was adequate and compliant with its limited obligations in all materially relevant respects. Rowanmoor's obligations as regards due diligence in respect of proposed investments is limited to ensuring that such investments are acceptable to HMRC (i.e. they will not lead to an unauthorised payment tax change on the Scheme), that satisfactory title to the investment can be taken, and that ownership of the asset will not give rise to an unacceptable liability or risk (e.g. legal, practical or environmental). Rowanmoor at all times complied with those obligations. [*Ombudsman's comment: I note that this submission by Rowanmoor, in relation to due diligence, appears to relate to its duties as an administrator and does not acknowledge its separate and greater trustee duties*].

31. While acknowledging that its fees relate to "the duties we must carry out as administrator/trustee in line with overarching regulations and the Client Agreement", Rowanmoor goes on to argue that it did not provide any suitability advice nor make any representations as to the suitability of the investment on which Mr N could have relied as the services it undertook to provide to Mr N were "limited and specific" . Notably, Rowanmoor needed to ensure they would hold good title to the investments, under explanation that "TRG Dunas Beach Hotel Suite 162/3 Ltd hold legal title and the SSAS interest is by way of membership of that Limited By Guarantee (LBG)

company". [*Ombudsman's comment: Again, I note that, notwithstanding some passing recognition that there are duties it must carry out as a trustee, this submission by Rowanmoor in relation to due diligence appears to concentrate on the Administrator's duties and not those required of a trustee*] .

32. Mr N's investment with TRG was not invoiced as a complex asset as defined in the Fee Schedule. Rowanmoor raised investment-related fees which were specific to the ownership of property.

33. The Client Agreement between Rowanmoor Group Limited, RTL and Mr N confirms that Rowanmoor would provide establishment, actuarial, administration and consultancy services to Mr N in respect of the establishment and administration of his SSAS. The agreement also expressly states: "This Agreement does not cover the provision of investment advice or any other matter which is regulated under the Financial Services and Markets Act 2000". As such, the services which Rowanmoor undertook to provide Mr N were limited and specific and did not include the provision of advice on the suitability of the investments Mr N chose to make.

34. After ensuring the asset met the above requirements, it followed the investment instructions of Mr N, in his capacity as sole Member Trustee. [*Ombudsman's comment: I note, again, that this appears to refer to the administrator and disregards the duties and instructions of RTL as joint trustee*].

35. While it is unfortunate Mr N feels his chosen investments – particularly the Dunas Beach investment - have not performed as expected, Rowanmoor has not provided advice on the investments, nor is it responsible for the performance of those investments.

Conclusions

Rowanmoor as Administrator

36. Notwithstanding the statements made by Rowanmoor regarding the role of REPL at paragraph 20 above, the TD&R states that "Rowanmoor Group plc will be the sole Administrator with effect from the Commencement Date", while the Client Agreement entered into between Mr N, Rowanmoor and RTL dated 5 February 2014 states that Rowanmoor will provide administration services. I shall therefore address my conclusions as to the role of the Administrator to Rowanmoor.

37. Under the terms of the Client Agreement, "RGPLC shall provide establishment, actuarial, administrative and consultancy services and RTL shall provide trustee services to the Client. These services are specified in Schedules 1 and 2."

38. Schedule 1 of the Client Agreement sets out the services included in the establishment of the Scheme; Schedule 2 details the services included in the Annual Administration Fee; and Schedule 3 specifies the Additional Services not covered by that fee.

39. The Annual Administration Fee in Schedule 2 covers:

> "Ongoing responsibility as the Independent Trustee for the Scheme.
>
> Ongoing responsibility as Scheme Administrator.
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> Routine administration of the Scheme including executing allowable investment instructions…
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> Processing a request to make a direct investment (basic)…
>
> Guidance on the day to day running of the Scheme, the acceptability of investments (other than those to be held offshore or overseas), interpretation of the Trust Deed and HMRC practice…"

40. Having carefully considered the role and responsibilities of the Administrator under the Client Agreement and the TD&R, I find that Rowanmoor discharged its responsibilities in this aspect in a broadly satisfactory manner, and I therefore do not uphold Mr N's complaint against Rowanmoor insofar as it relates to the overall administration of the Scheme.

RTL as Trustee

41. However, in this case, there is more than just the role of Administrator to consider.

42. Mr N has also complained about the suitability of investments chosen and held by the Scheme, which is the responsibility of the Trustees. In this case, Mr N is not the sole trustee. Rather, he and RTL are the joint Trustees of the Scheme.

43. The Pensions Ombudsman has seen a number of complaints from individuals who have transferred their pensions in order to buy fractional ownership of hotel rooms in Cape Verde. Previously these have, in the most part, been made via transfers into SSASs where the member is the sole trustee and thus solely responsible for investment decisions. The only other entities involved are unregulated advisers and administrators – the former falling outside of my remit, while the latter have limited duties in respect of due diligence etc (see my predecessor's decision in PO-16688 from January 2022).

44. Here a different model and set of responsibilities arise. Although it was under no obligation to do so, RTL has installed itself as a joint Trustee (and prior to 5 February 2014 it was the sole trustee of the Scheme). RTL was providing its professional services as an "Independent Trustee" to this Scheme, and I understand other schemes, for a fee. Therefore, it was also, in my view, acting as a professional trustee, which brings with it added responsibilities and duties (and I explore this further below).

45. With that in mind, I must judge the actions of RTL against the obligations it assumed under the TD&R (as well as any other contractual provisions), together with the legislative requirements and standards expected of a professional pension scheme

trustee, at the time that the relevant investments were made, taking into account the applicable case law.

46. To do this, I firstly set out the relevant obligations that fall on RTL under the TD&R and then legislation below. I then set out the standard of care required of RTL as a trustee in meeting those obligations, before analysing whether RTL met those standards.

The role and duties of RTL as Independent Trustee under the TD&R

47. As I have noted, RTL was, at all material times, a trustee of the Scheme – initially as the sole trustee under the Interim Deed dated 16 January 2014 and then, once the TD&R was executed, alongside Mr N who was acting as the Member Trustee.

48. Even though case law has previously shown there to be an 'irreducible core' of obligations owed by a trustee to a trust's beneficiaries, the drafting of trust documentation can in some circumstances attempt to limit trustee obligations (for example, in a Self-Invested Personal Pension (**SIPP**), the establishment of "bare trustees", with limited decision-making powers and obligations to follow the instructions of other parties). As such, it is necessary to look in detail at the TD&R to ascertain what obligations fall on RTL, and whether there has been any attempt to limit those obligations.

49. In the case of the TD&R, it does not appear that there has been an attempt to limit RTL's obligations – for example, by establishing it as a bare trustee or attempting to ensure that it only follows member direction in relation to investment.

50. Rather, I note that the key powers lie squarely with the Trustees (i.e. jointly between the "Member Trustees and the Independent Trustee"). In particular:

- Clause 1.7 provides that, except where provided for otherwise in the TD&R, "…the Trustees in making any decision … shall do so … at their absolute and unfettered discretion."
- Clause 8 provides that Trustee meetings must include the Independent Trustee to be quorate and that, at Trustee meetings, "decisions … must be unanimous".
- Although delegation is permissible under Clause 9 of the TD&R, it is specifically subject to the limitations contained in Section 34 of the Pensions Act 1995 (**PA95**). I shall turn to Section 34 PA95 again, but so far as I am aware no attempt was made to delegate decision making powers relevant to this case, and no attempt was made to delegate investment related decisions in accordance with Section 34.
- Clause 7 gives the Trustees a wide general power:

  "7.1(b) to take any action or make any arrangement relating to the Scheme;…

  … (d) to enter into agreements or give undertakings, indemnities or guarantees … which are binding on them which they decide are necessary and proper for the purposes of the Scheme...."

- Importantly, in the Scheme's power of investment, which is to be found in Clause 17, wide powers of investment are granted to the Trustees (again noting that this includes the Independent Trustee). It also states that no investment may be made without the prior written agreement of the members (unless the Trustees have delegated their investment powers). This does not amount to a member instruction that the Trustees are obliged to follow – rather it provides a veto, to the member, of the Trustees' decision. Therefore, the investment decision, in the absence of a proper delegation, remains with the Trustees.

51. For completeness, I also note that the power of investment in the Interim Deed, which applied prior to 5 February 2014, lies with RTL alone as the Independent Trustee.

52. Finally, for the purposes of this section, and as set out in paragraphs 36 to 39 above, the Client Agreement makes clear that RTL provides trustee services to the client, in this case Mr N, and Schedule 2 shows that the Annual Administration Fee includes the provision of ongoing Independent Trustee services for the Scheme. Notwithstanding the duties it had assumed under the TD&R, RTL was therefore also contractually obliged to perform its role as Independent Trustee.

53. Therefore, it is clear to me that RTL, as the Independent Trustee for the Scheme, has a responsibility, in conjunction with the Member Trustee, to carry out the Trustee duties according to the TD&R.

54. Importantly, it also means that it shares responsibility with the Member Trustee for the consideration of potential scheme investments and their subsequent selection if deemed suitable, and for monitoring their ongoing suitability.

RTL's legislative obligations

55. As a trustee of the Scheme, RTL (as well as Mr N as the sole Member Trustee) has obligations that it needs to meet in legislation. These requirements are tempered by virtue of the nature of the Scheme. SSASs are small schemes with a limited number of members, all of whom are trustees, and so benefit from some exemptions in pensions legislation.

56. In this case, there are a number of key requirements to meet when considering, making and then continuing to hold an investment, of which RTL should have been aware.

57. Section 34 PA95 limits when, and how, a trustee can delegate a discretion to make any decision about investments. Notably, and in summary, delegations may only be made (i) to a fund manager that meets certain requirements in FSMA; (ii) via a delegation under Section 25 of the Trustee Act 1925; (iii) to a committee of 2 or more trustees; or (iv) to a fund manager not caught by limb (ii), where that fund manager is not carrying on a regulated activity. In the latter two cases, the trustees as a whole will remain liable for any default, whether or not a successful delegation was achieved.

58. Section 36(3) PA95 requires trustees to obtain advice before making investments:

> "Before investing in any manner (other than in a manner mentioned in Part I of Schedule 1 to the Trustee Investments Act 1961) 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…….",
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> 'Proper advice' in this case is defined by Section 36(6) PA95 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".

59. The reference to the "requirements of regulations" in Section 36(3) points trustees towards The Occupational Pension Schemes (Investment) Regulations 2005. Some of these regulations do not apply to small schemes, such as the Scheme. In particular, although regulation 4 (which sets out some of the key factors to consider when making an investment) does not apply to the Scheme, the Trustees must nonetheless still "have regard to the need for diversification of investments, in so far as appropriate to the circumstances of the scheme".

60. Once an investment has been made, there is also an ongoing obligation to consider its continued suitability contained in Section 36(4), which states that:

> "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."

The common law duties and standards to be reached by RTL when acting as a trustee of the Scheme.

61. It is now necessary to turn to the duties and standards that RTL was expected to attain when performing its duties as the Independent Trustee, specifically in relation to the Trustees' power of investment.

62. Trustees should exercise their power for the proper purpose for which the trust was created[1]. In doing so, they owe duties of care and skill[2].

63. In relation to investment duties specifically, the starting point is that a trustee's duty, including RTL as the Independent Trustee, is "to take such care as an ordinary

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[1] *Re Merchant Navy Ratings Pension Fund; Merchant Navy Ratings Pension Trustees Ltd v Stena Line Ltd [2015] EWHC 448 (Ch)* – in which Asplin J agreed with Lord Nicholl's conclusion that ". . . to define the trustee's obligation in terms of acting in the best interests of the beneficiaries is to do nothing more than formulate in different words a trustee's obligation to promote the purpose for which the trust was created."

[2] For example, in *Nestle v National Westminster Bank PLC [1992] EWCA Civ 12,* Dillon LJ agreed with leading counsel for the Bank when he "…rightly stressed the duty of a trustee to act prudently".

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" (*Re Whiteley (1886) 33 Ch D 347*)[3].

64. Further consideration was given to how that duty might be met in practice in the House of Lords case of *Learoyd v Whiteley [1887] 12 AC 727* (page 733), where a distinction was made between investments made by a business-person and those made by trustees – the requirement of trustees being that they must avoid "all investments attended with hazard"[4]. Importantly, avoiding "hazard" does not mean avoiding all risk. Courts have recognised that "prudent businessmen in their dealing incur risk"[5], rather that "the distinction is between a prudent degree of risk on the one hand, and hazard on the other"[6].

65. Even then, it is recognised that the test of whether a trustee has met its duties is based on the prevailing standards at the time that the investment is made[7].

66. The obligations of trustees of a pension scheme specifically when exercising their power of investment was further considered in *Cowan v Scargill [1984] 2 All ER 750*. In this case, 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, …. 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."

67. Citing the case of *Re: Whiteley*, Megarry V-C went on to say, 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

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[3] Extending the position in *Speight v Gaunt [1883] EWCA Civ 1* that "…it is clear that a trustee is only bound to conduct the business of the trust in such a way as an ordinary prudent man of business would conduct his own."

[4] The full quote, from Watson L, is worthy of repeating: "Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character, but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise avoid all investments of that class which are attended with hazard".

[5] *In Re Godfrey (1883) 23 Ch.D. 483,* cited in *Bartlett v Barclays Bank [1980] Ch 515.*

[6] *Bartlett v Barclays Bank [1980] Ch 515*

[7] *Nestle v National Westminster Bank PLC [1992] EWCA Civ 12,* Dillon LJ: "what the prudent man should do at any time depends on the economic and financial conditions of that time - not on what judges of the past … have held to be the prudent course in the conditions of 50 or 100 years before".

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."

68. However, as I have noted previously, RTL is more than a lay trustee. Rather, it is a company that held itself out as providing, for a fee, "Professional responsibility as Independent Trustee for the Scheme" (as set out in the Client Agreement). I understand it provided a similar service for other SSAS schemes.

69. In *Bartlett v Barclays Bank [1980] Ch 515*, Brightman J was of the view that "a higher duty of care is plainly due from someone like a trust corporation which carries on a specialised business of trust management". The judge went on to say that "a professional corporate trustee is liable for breach of trust if loss is caused to the trust fund because it neglects to exercise the special care and skill which it professes to have."

70. In my view, RTL fits this description and is a professional trustee that should be held to a higher standard of care than Mr N when engaging in the selection of investments.

Has RTL met these requirements?

71. Having set out the role and obligations of RTL, as Independent Trustee, it is now necessary to test whether it has performed that role and met the duty of care required.

72. As I have set out in paragraphs 47 to 54 above, the role of RTL as Independent Trustee does not appear to be materially differentiated from the role of the Member Trustee (Mr N) in terms of the overall trustee responsibilities in the TD&R.

73. In particular, the power of investment sits with the "Trustees" (including both the Member Trustee and RTL as Independent Trustee), subject only to a member veto and not a requirement that the Trustees follow an instruction (indeed Clause 1.7 of the TD&R confirms that Trustee decisions are for the Trustee's "absolute and unfettered discretion" unless the TD&R provides for otherwise). Furthermore, to be quorate a Trustees' meeting must include the Independent Trustee, with Trustees' decisions then having to be made unanimously.

74. Therefore, on the face of it, the Independent Trustee should have been fully involved in all investment decision making. However, I have been provided with no evidence that this was the case – notwithstanding that the Client Agreement also included, and levied a fee in respect of, trustee services.

75. Rather, on the contrary, it appears that the governance of the Scheme in practice assumed that the role of RTL as Independent Trustee was much more limited than was actually the case. For example, Rowanmoor's formal response (referred to at paragraphs 26 to 35 above) to Mr N's complaint refers to it following the investment instructions of Mr N in his capacity as sole Member Trustee. This was confirmed in Rowanmoor's email to my office on 3 March 2022: "After ensuring the asset met the

above requirements [HMRC "acceptable" and satisfactory title], it followed the investment instructions of Mr N, in his capacity as sole member trustee." However, those instructions should have come from the Trustees, including RTL, following a unanimous decision of both the Member Trustee and Independent Trustee.

76. Similarly, the earlier response from Rowanmoor to Mr N (referred to in paragraph 15 above) argued that Mr N, as the Member Trustee, is free to appoint an investment adviser of his choice and that the Administrator followed the instructions of the Member Trustee. Again, that ignores the existence and obligations of the Independent Trustee – which should have played a role in obtaining and considering that "proper advice" and been involved in the decision regarding what investment to make.

77. Likewise, as referred to in paragraph 35 above, Rowanmoor argued that it had fulfilled its due diligence requirements: "Rowanmoor's position is that its due diligence assessment in this matter was adequate and compliant with its limited obligations in all materially relevant respects" (email of 3 March 2022). These 'limited' obligations - as Rowanmoor saw them - were restricted to ensuring that such investments are acceptable to HMRC, that satisfactory title can be taken, and that ownership of the asset will not give rise to an unacceptable liability or risk. Once again, this does not reflect the extent of the obligations that sit with RTL as Independent Trustee, which are much wider than those set out here.

78. Had the Trustees delegated their investment decision making powers, in accordance with Clause 9 of the TD&R, and so that it met the requirements of Section 34 PA95, it may be possible to argue that there was no need for the Independent Trustee to involve itself with the investment decision making process. However, again, I have seen nothing to suggest that this was the case.

79. To the extent that RTL, as Independent Trustee, had not engaged with its duties, as the evidence above suggests, then that would amount to a breach of trust and a clear failure to meet its duty of care in relation to investment. However, we can also look more specifically at the legally proper decision-making process that RTL should have followed, had it been performing its role as Independent Trustee adequately, when making a decision to invest in Dunas Beach. This process should have included, at least, the following:

Investment advice prior to making the investment in Dunas Beach

80. The Trustees should have obtained 'proper advice' in accordance with Section 36 PA95, and more generally in accordance with their duty of care[8]. Although Rowanmoor obtained confirmation from Mr N that he had received investment advice in relation to the Dunas Beach investment, and had itself previously carried out some due diligence in relation to Dunas Beach to fulfil its role as Administrator, I have seen

[8] *Cowan v Scargill*: "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".

no evidence to indicate that RTL as Independent Trustee ever obtained investment advice in relation to the Dunas Beach investment, or even that it considered the advice provided to Mr N (notwithstanding that at the time the advice was provided, Mr N was not a trustee of the Scheme, and was never, as the advice suggested, the "sole trustee"). Failure to do so would constitute a breach of the trustee requirements under Section 36 PA95 (see paragraph 58 above), and a failure to meet its duty of care when exercising the investment power.

Considering only relevant factors when making the investment decision

81. A trustee, in order to meet its duty of care when exercising the investment power will need to consider all relevant factors and ignore irrelevant factors. There is no evidence to suggest that RTL went through this proper decision-making process. For example, as set out in *Cowan v Scargill*, the Trustees should exercise that power in the beneficiaries' best financial interests – and on that basis should consider the position of the beneficiary, and weigh risk and return appropriately. There is no evidence that RTL did this. Rather the contrary seems to be the case, with Rowanmoor having expressly stated that it will not consider the suitability or risks of the investment in its Reason Why Letter. In my view, while that may have been appropriate for Rowanmoor in its role as Administrator to provide such a disclaimer, it was not appropriate to the extent that it was intended to catch RTL as Independent Trustee (as it would effectively fetter its role as a trustee, contrary to Clause 1.7 of the TD&R). Moreover, any such disclaimer would be ineffective as any rule of law to take care or exercise skill in the performance of any investment functions where the function is exercisable by a trustee of a trust scheme cannot be excluded by any instrument or agreement, under section 33 PA 95. Under the TD&R, RTL as Independent Trustee had this duty (the duty was not cut down or limited by the wording of the TD&R, so as to require the Trustees to operate on an execution only basis) so the disclaimer cannot be legally effective to limit this obligation.

82. Similarly, there is also a duty to have regard to the need for diversification of investments, both as a result of regulations[9] and more generally as a part of the duty of care that applies to trustees when making an investment decision[10]. There is no evidence that RTL considered the need for diversification.

Legal advice

83. The duty of care when exercising the investment power, and the need to take advice on issues that the Trustee does not understand, does not just extend to investment

[9] Regulation 7(2) of The Occupational Pension Schemes (Investment) Regulations 2005.

[10] *Bishop of Oxford v The Church Commissioners [1991] Pens. L.R. 185* (a charity case, rather than pensions): "…trustees choice of investments should be made solely on the basis of well-established investment criteria, having taken expert advice where appropriate and having due regard to such matters as the need to diversify, …"

advice. Rather, as is shown by *Nestle v National Westminster Bank PLC*, the need to take advice, in order to meet its duty of care, can also extend to taking legal advice [11].

84. RTL should have taken legal advice if it was unsure of its role and duties as Independent Trustee generally – which, from what I have before me, looks to have been the case. More specifically, though, in my view it should have taken legal advice in relation to the investment in Dunas Beach. The Dunas Beach investment comprised fractional ownership of a hotel suite in an incomplete development on Cape Verde, in respect of which the Foreign and Commonwealth Office has since April 2013 (if not even earlier) warned:[12] "Many British nationals have experienced serious problems when buying property in Cape Verde. Before buying property anywhere on the islands, you should seek independent qualified legal advice." This warning predates the investment in this case. In addition to the lack of investment advice, I have seen no evidence to suggest that RTL sought such independent qualified legal advice prior to the purchase, and indeed the Reason Why Letter again suggests that legal advice was a matter for Mr N alone. In this case, by failing to obtain suitable legal advice, I find that RTL did not meet its duty of care.

85. The failure to take legal advice also extended beyond considering the legal risk of any investment to ensuring that the Trustees had good title to the asset.

86. RTL appears to have joined the Member Trustee in the transaction to invest in a fractional share of the hotel suite by entering into an Agreement for the Sale of Membership of a Company (in this case, a newly established private company limited by guarantee - Dunas Beach Hotel Suite 162/3 Limited (**the Company**)) dated 21 February 2014. Under the Agreement, RTL and the Member Trustee undertook to apply for membership of the Company, and to pay the purchase price of £62,500 for the fractional share of the hotel suite immediately upon signing. In return, the developer of the resort, and Founder Member of the Company, Dunas Beach Resort LDA, a company registered in Cape Verde, agreed to procure that the administrator of the Company (Fractional Administration Solutions Ltd), a UK-based dormant company, should within 14 days provide the Member Trustee and RTL with a copy of the certificate of membership in their favour, and on request, inter alia, a copy of the Directors' warranty that legal title to the property had been transferred to the Company.

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[11] *Nestle v National Westminster Bank PLC,* Dillon LJ: "It was the duty of the Bank to acquaint itself with the scope of its powers under the will. … . It is inexcusable that the Bank took no step at any time to obtain legal advice as to the scope of its power to invest in ordinary shares."

[12] See: https://webarchive.nationalarchives.gov.uk/ukgwa/20130504102115/https://www.gov.uk/foreign-travel-advice/cape-verde/

87. RTL has not provided copies of either the certificate of membership, or the Directors' warranty regarding the transfer of legal title to the property, and it therefore appears that the Member Trustee and RTL agreed to the payment of £62,500 in exchange for an undertaking from a property development company in Cape Verde to procure an unrelated third-party organisation to provide evidence of their membership of the Company at a future date. Membership of the Company would have had no value prior to the transfer of title of the hotel suite to it, and yet not only did RTL permit the payment to be made without any checks being made, and without any corresponding asset transferring to Mr N's SSAS, it also appears to have failed to obtain any evidence to confirm that Mr N and RTL have membership of the Company, or evidence that the Company holds title to the relevant hotel suite. It is therefore unclear why RTL considers that it, prudently, met its trustee duties and would hold good title to the investments. Furthermore, it is unclear how Mr N's investment might be safeguarded in the event of the winding-up of the Company. This is not the standard of behaviour to be expected of a professional trustee and I cannot see how this situation could square with Rowanmoor's assessment (see paragraph 30 above) that it was satisfied that there was no unacceptable liability or risk in this investment being made in this way, at that time, with the documentation it held (and did not hold).

Ongoing consideration of the investment

88. RTL remained the Independent Trustee of the Scheme after the initial investment had been made and continued to provide ongoing "Professional responsibility as the Independent Trustee of the Scheme."

89. The Trustees' obligations to continue to consider the investment from time to time continued after the initial investment had been made. Essentially, did it continue to be appropriate? In my view this would fall within its duty of care, as regularly checking the suitability of an investment is what "an ordinary prudent man" would do[13]. However, a similar duty also applies to RTL by way of Section 36(4) PA95, which requires a trustee to consider at what intervals to obtain and consider further, 'proper advice' in relation to the investment in Dunas Beach. Again, I can see no evidence of such consideration.

90. In allowing the major part of the Scheme's assets to be invested in Dunas Beach without fulfilling key duties and obligations under the TD&R, legislation and common law duties of care, as set out above, I consider that RTL failed in its duty to exercise due skill and care in the performance of its investment functions. I also find that I do not need to consider the higher duty of care that might apply to RTL as a professional trustee as, in my view, the failures demonstrated are sufficiently egregious to breach the duty of care that exists in respect of the "ordinary prudent man."

[13] See also *Nestle v National Westminster Bank PLC,* Leggatt LJ: "it is common ground that a trustee with a power of investment must undertake periodic reviews of the investments held by the trust".

Investment loss

91. Having found that RTL has not fulfilled the duties and obligations that attach to it as a Trustee of the Scheme, I will also consider whether Mr N has suffered any loss. As a part of this, it is necessary to consider whether or not the actual investment made was one which no other reasonable trustee might make[14].

92. In my view, there are a number of reasons why, in the circumstances of this case, had RTL properly applied itself to its trustee duties, it, and no other reasonable trustee, would have made the investment in Dunas Beach. As such, it was in breach of the duty of care owed by RTL as Trustee and fell below the standard of care owed by RTL to Mr N.

93. Firstly, as with any assessment of this type, it is necessary to look at the economic and factual circumstances of the time. Although the risks of fractional ownership investments are well known now, it would be wrong to apply that knowledge with hindsight to an investment made in 2014.

94. To assist with this, I have considered what knowledge was available at the time the investment was made.

95. In general terms, it was already known that fractional hotel investment opportunities represented a risk as early as 2010[15].

96. As highlighted earlier, the Foreign and Commonwealth Office has since 2013 warned of particular difficulties encountered by UK citizens in property purchases in Cape Verde.

97. The pensions industry was also being advised to be aware and diligent in respect of high-risk investments – and the FCA was particularly active in this area. Whilst the Scheme in this case is of course a SSAS rather than a SIPP, I note that RTL (the Independent Trustee) is also the trustee of the Rowanmoor SIPP, and so those individuals involved in the running of RTL will be familiar with the FCA's requirements in relation to SIPP investments. Although RTL is not itself FCA-regulated, the Administrator of the Rowanmoor SIPP, Rowanmoor Personal Pensions Limited, is FCA-regulated and no fewer than five of the Directors of RTL were also Directors of Rowanmoor Personal Pensions Limited at the time the investment was made, meaning that RTL should have had a good working knowledge of FCA concerns and guidance of the time. The comments made by the FCA at the time are, in my view, evidence of the factors that may also have been considered by another, reasonable,

[14] See *Nestle v National Westminster Bank PLC* Staughton LJ: "However, the misunderstanding of the investment clause and the failure to conduct periodic reviews do not by themselves, whether separately or together, afford Miss Nestle a remedy. They were symptoms of incompetence or idleness - not on the part of National Westminster Bank but of their predecessors; they were not without more breaches of trust. Miss Nestle must show that, through one or other or both of those causes, the trustees made decisions which they should not have made or failed to make decisions which they should have made. If that were proved, and if at first sight loss resulted, it would be appropriate to order an enquiry as to the loss suffered by the trust fund" and also *Wright v Olswang (No2) [2001] WTLR 291 CA*.

[15] For example, see the Guardian article from 16 July 2010 "Timeshare: tourists warned to look out for a new scam": https://www.theguardian.com/money/2010/jul/16/timeshare-tourists-scam

trustee (particularly had it obtained and considered competent investment advice at the time).

98. In October 2012, the then FSA (now FCA) issued Guidance to SIPP operators, warning of its concerns in relation to "inadequate controls over the investments held", "poor corporate governance, which in some firms may have resulted in the firm being targeted by other parties for the purposes of facilitating financial crime", "an increase in the number of non-standard investments held by some SIPP operators, with often poor monitoring of this", and "a lack of evidence of adequate due diligence being undertaken for introducers and investments." This reflected the knowledge in the pensions industry more generally at the time of the dangers of high-risk investments, and which professional trustees in particular will have been aware of.

99. Following the 2012 Guidance, the FCA then issued fresh Guidance to SIPP operators in October 2013, only three months before Mr N applied to establish the Scheme. The Guidance included the following warning in respect of Unregulated Collective Investment Schemes (**UCIS**), a designation which would include fractional ownership of overseas hotel rooms such as the Dunas Beach investment:

> "UCIS are complex, opaque, illiquid and risky, and tend to invest in high-risk ventures such as films, green energy initiatives and overseas property funds. They may not be covered by FOS or FSCS protections. We have stated previously that UCIS are high risk, speculative investments which are unlikely to be suitable for the vast majority of retail customers."

100. In my view a reasonable trustee, meeting its duty of care and exercising the powers of investment for the best financial interests of a beneficiary (let alone in respect of Mr N's circumstances specifically, which I turn to below) would not invest the vast majority of a member's fund in an 'opaque, illiquid and risky' investment, that is not covered by FSCS protections.

101. Indeed, as is shown by the FCA Guidance above, UCIS investments of this type were, at the time, identified as 'speculative.' To my mind a speculative investment of that type strays from one made with "a prudent degree of risk," to a "speculative" investment with "inherent hazard." That would breach the standard required in *Learoyd v Whiteley* and in *Bartlett v Barclays Bank* (referred to in paragraph 64 above), such that no reasonable trustee would make that investment.

102. Five months after the Dunas Beach investment was made, the FCA wrote to the CEOs of SIPP providers, warning of their ongoing concerns about the protection of consumer interests, particularly in relation to non-standard investments. The "Dear CEO" letter highlighted the need for providers to understand the nature of any non-standard investment, especially contracts for rights to future income, and sale and repurchase agreements, and also made reference to the need for providers to ensure that an investment can be independently valued, both at point of purchase and subsequently. More generally, the letter warned of the need for providers to ensure that assets allowed into a scheme are appropriate for a pension scheme. Although

not addressed specifically in the Dear CEO letter, the extension of this is that it is unlikely that a high risk, illiquid investment with inherent difficulties in transferring or selling the asset in order to take retirement benefits, would be considered appropriate for a 60-year-old.

103. While this warning came after the Dunas Beach investment had completed, and was directed at SIPP providers rather than SSASs, it reflected the wider knowledge of the pensions market and, for the reason given above, Rowanmoor would have been aware of it. In my view, the risks of fractional ownership were clear in the market at the time of the investment. However, to the extent that the risks continued to become clearer after the investment had been made, as is demonstrated here, I would have expected a reasonable trustee, in accordance with its duties to revisit the suitability of its investments from time to time, to review this investment and take steps to dispose of it. I have seen no evidence that RTL sought to do this.

104. In deciding whether this amounted to a reasonable investment, one should also consider the context – and in particular, the circumstances of the individual member and the nature of a pension scheme. One should also have regard to the requirement to consider diversification of investments.

105. I have already found that, in general terms, it was known at the time of the investment in Dunas Beach that it was 'speculative,' reflecting its categorisation as a UCIS. In my view, for the reasons given above, the nature of the investment was such that no reasonable trustee would have made it. However, in some circumstances, a contrary argument might be deployed that such an investment could be appropriate as a small part of a balanced and diverse portfolio or in respect of a sophisticated individual with other sources of wealth. That is not the case here. In my view, the level of diversification was such that the risk attached to the portfolio as a whole was very, and unacceptably, high – to the extent that, again, I find that no reasonable trustee would have made such a decision. Indeed, as I set out in paragraph 19, the actual sum invested through the Scheme, once the lump sum was drawn down by Mr N, was only £73,000. Of this around £62,000 was invested in Dunas Beach – representing just under 85% of the portfolio. Even on the basis of advice given by Sequence Financial, that is not sufficient diversification – with that advice suggesting that "…where a member of a SSAS is looking to retire within ten years, then no more than 75% of their investment should be invested directly with Cape Verde." In my view that would still not amount to sufficient diversification in these circumstances, but putting that to one side, it does suggest that it is difficult to argue that another reasonable trustee would have made the Investment in Dunas Beach.

106. Furthermore, the circumstances of Mr N are such that, in my view, a trustee exercising its powers in the best financial interests of the (sole) beneficiary would not have invested in Dunas Beach. Mr N was, at the time of the investment, aged 60 and, following the transfers in, the Scheme represented by far his most significant private pension provision. In my view speculative investments of this type, having regard to those circumstances, were clearly inappropriate.

107. As a result, I find that investing the bulk of the Scheme's assets in Dunas Beach was very high-risk and speculative in nature. Having regard to the circumstances of the member, the lack of diversification of investment and the knowledge of the time, I find that the investment was one which no reasonable trustee would have made and was in breach of the standard of care in relation to investments owed by RTL as a trustee to Mr N. It showed a lack of regard for the member's financial interests and amounted to a failure to avoid hazardous investments, contrary to the requirements imposed on trustees by *Cowan v Scargill* and *Learoyd v Whiteley*, amongst others.

Where liability rests

108. Having now decided that RTL failed to meet its obligations as Independent Trustee, by failing to perform its duties or meet the standard of care required of it, and found that the investment in Dunas Beach was one that no reasonable trustee would have made, it is now necessary to decide where the liability for those errors sit.

109. At first glance, that may seem a simple proposition. Mr N has complained about Rowanmoor's actions as trustee and administrator. I have found RTL did not meet its trustee obligations and so liability should sit with it. However, that would ignore the trust law position that trustees are, as a starting point, joint and severally liable for the decisions made:

> "Each trustee is ordinarily liable for the whole loss caused by any joint default of all the trustees, even if they are not all equally blameworthy…"[16]

110. This is important in this case as, although Mr N is bringing his complaint as the beneficiary of the Scheme, he is also the Member Trustee. RTL and Mr N are jointly the Trustees and exercise the power of investment together. So, in order for Mr N to succeed with his complaint, I need to consider (i) whether as a beneficiary he is entitled to sue/hold liable the professional trustee in relation to an investment he agreed to make; and (ii), if so, whether any redress should be directed on a joint and several basis against the trustees (including, of course, himself) or apportioned between them.

111. In relation to the above, I need to take into account, amongst the other factors already mentioned:

    111.1. that Mr N did (at a time he was not a Member Trustee) request that RTL make an investment in a fractional ownership certificate relating to property in Cape Verde;

    111.2. Mr N made that request on the basis of advice given to him by First Review and Sequence Financial;

[16] Underhill and Hayton Law of Trusts and Trustees, 20th Edition, Article 92.1.

111.3. Mr N was very much a lay investor, and in no way 'sophisticated' or knowledgeable about such investments (or indeed investments generally). In contrast, RTL was a professional trustee;

111.4. on 31 January 2014 (again when Mr N was not yet a Member Trustee) Mr N completed the acknowledgement to the Reason Why letter;

111.5. on 31 January 2014 Mr N wrote as 'Member Trustee' (even though he was not yet appointed), to Rowanmoor to say that in accordance with the power of investment under the TD&R and after due consideration of the advice he had received from Sequence Financial he wished to proceed to invest £62500 of his SSAS fund in the Cape Verde investment opportunity offered by TRG – so presumably Rowanmoor as sole trustee at that point, and a professional trustee, had already completed its 'limited' due diligence; and

111.6. the investment was then made jointly by the Member Trustee and RTL.

Re Paulings

112. It is an established trust law principle 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 (**Re Paulings**)*).

113. The test for concurrence is as laid down in Re Paulings and subsequently applied in later cases:

> "The … Court has to consider all the circumstances in which the concurrence of the cestui que trust was given with a view to considering whether it is fair and equitable, that having given concurrence, he should afterwards turn round and sue the trustees… subject to this, it is not necessary that he should know he is concurring to a breach of trust, providing that he fully understands what he is concurring in, and…it is not necessary that he should himself have directly benefitted from the breach of trust."

114. In the later case of *Holder v Holder [1968] Ch 353* at [394] the dicta of Wilberforce J in *Re Paulings* was followed by Cross J at first instance and expressly approved and applied by the Court of Appeal, Harman LJ stating:

> "There is therefore no hard and fast rule that ignorance of a legal right is a bar [to the trustee's defence] but the whole circumstances must be looked at to see whether it is just that the complaining beneficiary should succeed against the trustee."

115. The principle was restated more recently by Lawrence Collins J in *Chellaram v Chellaram (No 2) [2002] EWHC 632*:

> "The court can consider all the circumstances with a view to seeing whether it is fair and equitable that a beneficiary, who has acquiesced in, or given his concurrence to, a breach of trust should be able to turn round and sue the trustees…[but] that inquiry is concerned with the requisite degree of knowledge. There is no principle of the law of…trustee which makes a release ineffective simply because it is unfair."

116. Mr N undoubtedly did know he was investing in relation to a property in Cape Verde. Mr N does not however appear to have had any real understanding of the nature of the investment and how inappropriate it was for his circumstances or retirement provision generally. He was not aware of the Foreign and Commonwealth Office guidance warning in relation to Cape Verde property purchases. He was seemingly not aware of the potential difficulties in establishing title, valuing the investment or how it might be sold in the future. RTL on the other hand as a professional trustee should have had a detailed knowledge of its duties as a trustee and had the capability to carry out extensive due diligence to establish whether this was an investment which a reasonable pension scheme trustee should make. As a lay investor, it appears to me that Mr N did not fully understand the issues (such that he might be considered to be providing informed consent to the investment), while RTL (for the reasons given earlier in this determination) either were or should have been well aware of the issues associated with the investment. There is a clear disparity of respective knowledge. As a result, in my view it is fair and equitable that a beneficiary who has acquiesced in or concurred to the making of such an investment, but without the necessary knowledge[17] and understanding to know what he was concurring in (when the professional trustee did have, or should have had if it had fulfilled its duties correctly, that knowledge) should not be precluded from suing RTL as Independent Trustee. I find that Mr N can proceed.

Mr N's position as a Trustee – joint and several liability?

117. I now need to consider Mr N's responsibilities as co-trustee, rather than as a beneficiary, and whether there is any reason to depart from the trust law starting point of joint and several liability for any loss found.

118. As I set out in paragraphs 50 to 57, the Member Trustee has largely the same obligations and duties as RTL acting as the Independent Trustee. Also, for many of the same reasons as I gave in relation to RTL, Mr N as the Member Trustee also fell short of fulfilling his duties as a trustee. For example, ensuring that decisions were made unanimously in conjunction with RTL, that the investment was not imprudently hazardous or speculative, material factors weighed up and the investment subject to appropriate reconsideration. Likewise, for the same reasons as I have already given, the investment itself is not one that, in my view, a reasonable trustee could have entered into. For that reason, it is possible to say that Mr N, in his role as Member Trustee is also culpable – and, to the extent that liability should result from that, what

[17] Lewin 21-122 - requirements for a valid acquiescence release or contribution: for acquiescence to be valid the beneficiary must have the requisite degree of knowledge.

is sauce for the goose (RTL) should also be sauce for the gander (Mr N as Member Trustee).

119. Clearly, Mr N would say that his inexpert role as Member Trustee should be recognised, and that RTL as a 'professional' Independent Trustee should instead assume responsibility for the failure to meet the duties of care in relation to the Scheme's investment in Dunas Beach. However, just as RTL appear to have laboured under the misapprehension that its role as a trustee was limited, so I must recognise that Mr N was also a trustee with duties (albeit with a lower standard than that applied to RTL as a 'professional' trustee).

120. When considering the scope of those duties and the liability of failure, in appropriate cases, the courts have shown a willingness to treat professional and lay trustees differently on three bases:

    120.1. that they are paid, and so might be characterised as having derived a benefit from their breaches of trust in the form of remuneration for work done badly (as suggested by *R v Waterman's Will Trusts [1952] 2 All ER 1054*);

    120.2. by reason of their greater knowledge and experience they owe a duty to explain the ins-and-outs of trusteeship to less well-informed lay trustees, so as to give them the opportunity to raise objections; hence a professional trustee's failure to do this constitutes a more potent cause of the trust losses than the failure of the lay trustee to keep themselves informed of such matters; and

    120.3. the beneficiaries are entitled to expect more of professional trustees who have held themselves out as possessing special skill and knowledge, and that their breaches are therefore more morally reprehensible than those of lay trustees who have made no such false promises.[18]

121. In *Wohlleben v Canada Permanent Trust Co*.[19] the Court held that the lay trustee "tried to the best of her ability to keep herself informed but Canada Permanent failed to make known to her the contents of papers which were essential to inform opinion. She made all decisions which she had to make within the limits of her experience and knowledge, and I cannot find that she failed to listen to reason or that she responded irrationally or obdurately…she ought fairly to be excused from her breach of trust."

122. In *Re Partington*[20], a solicitor co-trustee's advice and control caused the lay trustee's participation in the breach of trust, the latter being indemnified due to the former's actions.

123. The Civil Liability (Contribution) Act 1978 now deals with claims for contribution and indemnity between trustees but prior to this, equitable claims of this nature were

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[18] See Underhill and Layton Law of Trustees and Trustees [20th Edition, Article 101.20]

[19] (1976) 70 DLR (3d) 257 at 275

[20] (1887) 57 LT 654

allowed by the Chancery Courts.[21] S2(1) says that the amount of the contribution recoverable from any person is to be "such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question."

124. My powers under s150(2) Pension Schemes Act 1993 permit me to direct any person responsible for the management of the scheme to take such steps as I may specify in my Determination. I cannot provide redress where a court cannot[22] but generally I can provide equivalent remedies to a court unless specifically precluded from doing so by the wording of the legislation at hand (or relevant case law). I also note that one of my predecessors directed apportionment in the case of Chidgey (G00702).

125. I am satisfied, therefore, that in an appropriate case I have the power to direct a specific apportioned contribution by a trustee responsible for breach of trust, and not simply fall back on the joint and several liability between trustees.

126. For reasons given previously, I am further satisfied that RTL failed to understand its trustee duties, failed to carry them out properly and ultimately permitted a high-risk investment on the sole instruction of Mr N without reasonably exercising any trustee powers as joint trustee and professional trustee. In all the circumstances RTL fell far below the standard of a reasonably competent professional trustee. I find its overall actions including its subsequent refusal to accept its responsibilities as a trustee particularly egregious. Subject to the following subsection, apportionment of contributions, rather than joint and several liability, is therefore in my view appropriate in this case.

Exonerations and Indemnities

127. Having found the Trustees in breach, we should now turn to whether they are afforded any protection. In particular, the Trustees benefit from exoneration and indemnity provisions in the TD&R.

128. Clause 13 provides an exoneration provision:

> "13.1 To the extent permitted by law and subject to clause 14 and sections 33 and 34 of [PA95] no Trustee shall incur any liability for:
>
> (a) the exercise or failure to exercise any power or discretion;
>
> (b) acting as a Trustee of the Scheme;
>
> (c) the acts and omissions either of co-Trustees, agents, employees, delegates or Advisers or any other person; or
>
> any other act or omission."

[21] Underhill at 101.3

[22] *Arjo Wiggins v Ralph [2009] EWHC 3198 (Ch)*

130. Furthermore, the Trustees benefit from an indemnity from the Employer (and in the absence of such indemnity, from the Scheme) under Clause 13.2. This is drafted very widely:

> "13.2 …the Employers...shall indemnify each and all of the Trustees against any costs, claims, demands, expenses, proceedings, and liabilities which they may incur through acting as a Trustee of the Scheme except in cases of fraud by any Trustee… . Subject to section 31 [PA95], should the Employer fail to indemnify them (whether in full of in part) the Trustees shall be entitled to be indemnified from the Fund."

131. Rowanmoor (expressed as the Rowanmoor Group, and so on the face of it looking to include RTL) also look to limit its liability contractually. For example, the Reason Why Letter states that "Rowanmoor Group excludes, to the maximum extent permissible by law, all liability in connection with [Mr N's] proposed purchase of the investment or resulting from such purchase."

132. However, while the exoneration provisions in the TD&R and Reason Why Letter may protect RTL from most activities, as this complaint is in relation to the Trustees performance of its investment function it will be limited by Section 33 PA95. This provides that:

> "(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; …
>
> cannot be excluded or restricted by any instrument or agreement."

133. It goes on to add colour to the meaning of excluding or restricting liability, by stating (in regulation 33(2)) that this includes:

> "(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, or
>
> (c) excluding or restricting rules of evidence or procedure."

134. 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.

135. 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 would render section 33 open to circumvention and ineffective in practice. Certainly, in situation where there has been a complete avoidance of trustee duties, it cannot be correct to give effect to any indemnity.

136. As a result, I find that the exoneration and indemnity provisions in respect of the Trustees (or RTL specifically under the Reason Why Letter) are not effective in relation to this claim.

Quantification of the loss

137. The final issue to address is whether Mr N has suffered a quantifiable loss which is capable of remedy and apportionment.

138. The investment is in a hotel suite in a hotel development by TRG. It appears the hotel has been completed in Cape Verde and investors purchased a right to benefit from the profits and interests of specific pieces of the development. Investors do not own the land, nor do they have a charge over it. An investor simply has a right to share in any profit generated from the hotel rooms.

139. The investment could not be exited prior to completion of the hotel rooms. Now that these have been completed, they can in theory be sold on the secondary market. However, as an owner of fractional rights in a hotel, that is extremely difficult to do, indicating the inappropriateness of the arrangement for all but the most risk-taking investor.

140. Before completion of the hotel rooms, a guaranteed return was to be paid. After completion, the return is based on room occupancy with expected returns being paid to the Scheme.

141. But regardless of whether his current loss can be easily calculated, the Dunas Beach investment is unregulated, illiquid and inappropriate for the Scheme. At the time of the investment Mr N was aged 60 and this represented a significant part of his pension provision. While I do not suggest that Rowanmoor should have advised him, RTL as co-trustee and a professional trustee, for reasons given previously, had a duty to ensure that the investment was suitable and should not have agreed to it if it found it was not. RTL failed to do so, and I find this to be a breach of duty and maladministration.

142. Mr N is now aged 69 and is no doubt looking to access his pension fund. He is unable to do so because of the inappropriate investment in Dunas Beach. Whether he could sell the investment in the current market is extremely uncertain, but even if he could there is every likelihood it would be sold at a significant loss.

143. I consider that he finds himself in this position primarily due to RTL's breach of trust and maladministration, insofar as they have failed to act in his best interests, particularly in relation to the choice of investment.

144. However, I am mindful of the fact that Mr N is a co-trustee of the Scheme, and as the sole member, he is required to agree to any proposed investment and so I must consider whether an apportionment of liability for any loss that Mr N has suffered is appropriate.

145. Despite Mr N's position as a co-trustee, and the need for him to agree to investment choices as Member under the TD&R, had RTL fulfilled its professional trustee responsibilities in an appropriate manner, it would have been fully engaged in the process of selecting Scheme investments, and would have liaised with Mr N as co-trustee in the process. Had it done so, it would have become apparent at a very early stage that this was an inappropriate investment in all the circumstances.

146. Given this, and the fact that under Clause 8 of the TD&R "Decisions at Trustee meetings must be unanimous", RTL was uniquely placed, both in terms of its being able to apply its professional judgment as to the suitability of the proposed investment for the Member, and to prevent the investment from proceeding in the event that it determined that it was not suitable. However, through its multiple failures to exercise its trustee duties, RTL failed to prevent the investment from being made, and thereby exposed Mr N to an inappropriate investment which has caused him financial detriment. Although Mr N was of course also a trustee, he was not in a position and did not have the knowledge and understanding to be able to appropriately assess the suitability or otherwise of the proposed investment, and so I do not consider that he should be deemed equally responsible for the position he now finds himself in.

147. Furthermore, this is not a case where RTL tried but failed to do enough to fulfil its duties, rather it seems to me that it failed to understand its duties and make any attempt to meet them, notwithstanding that it appeared to continue to charge for those services.

148. To conclude, having considered all the evidence and relevant case law, I find that the appropriate apportionment of responsibility – taking into account RTL's status as a professional trustee with considerable experience of SSAS management and trusteeship – to be 80% for RTL and 20% for Mr N.

149. I therefore uphold Mr N's complaint against RTL.

Directions

150. It should be noted that Mr N's complaint relates solely to the investment in Dunas Beach and therefore these Directions take account of the losses arising only from that investment and any costs associated with it.

151. My intention in these Directions is to, as far as possible, put Mr N back into the position he would have been in had the investment in Dunas Beach not taken place, recognising

Mr N's partial liability as a trustee of the Scheme. As a part of that, Mr N should largely recover the costs and taxes paid in respect of that investment and should not be left with any ongoing liability for costs and charges relating to the Dunas Beach investment in the future. Furthermore, its continued presence as an investment in the Scheme should not in any way prevent or delay his ability to transfer his funds away from the Scheme to another arrangement, should he wish to do so.

152. Within 28 days of the date of this Determination, RTL shall contact Phoenix Life, Zurich and Legal & General to obtain a notional value for Mr N's former policies as at the date of this Determination, assuming that: (i) they continued to be invested in the same funds that they were at the point they were transferred out, (ii) charges continued to be deducted from the funds, and (iii) the £17,000 taken as a cash lump sum and the £5,928 invested into Parmenion by Mr N following the transfer would have been withdrawn on a pro-rata basis from the value of each of the former policies as at the date of transfer. The figure produced shall be the **"Notional Value**". Although I am unable to direct Mr N, as an applicant, to take any particular steps, I am sure he will appreciate that he may be asked to give RTL his authority to enable it to obtain this information to assist in assessing his loss.

153. The actual value of the Scheme (including any cash sum held within the Scheme and any amounts arising under paragraph 154 below, but excluding the current proceeds of the Parmenion investment or any successor investment) at the date of this Determination (**the Actual Value**) should be deducted from the Notional Value to arrive at Mr N's initial loss amount (**the Initial Loss Amount**). (Any currently outstanding administration charges yet to be applied to the Scheme should be removed from the Actual Value first.)

154. Given the illiquid nature of the Dunas Beach investment, in order to calculate the Actual Value within 90 days of the date of this Determination RTL shall:-
    - Seek to agree a commercial value of the Dunas Beach investment with The Resort Group, and then pay the agreed sum into the Scheme with RTL taking ownership of the investment. (I note that as part of the Agreement for the Sale of Membership of a Company dated 21 February 2014, Mr N and RTL undertook to apply for membership of Dunas Beach Hotel Suite 162/3 Limited, and on the assumption that this application was successfully made, there should be no issues with RTL taking ownership of the investment).
    - If an agreement on the value cannot be reached, the Dunas Beach investment shall be valued at £1 and purchased by RTL. That £1 shall be paid into the Scheme.
    - If RTL is unable to purchase the Dunas Beach investment, then it may seek to sell it on the open market, with any proceeds of the sold investment being paid into the Scheme.
    - If RTL elects not to, or is unable to sell the Dunas Beach investment on the open market within the 90 days' timescale, then it shall value the investment at nil in calculating Mr N's loss and it shall arrange for Mr N's membership of the Company to be revoked, and/or take such other steps as may be required to ensure that

neither the Scheme nor Mr N personally incurs any further costs, charges, expenses or other liabilities in relation to the investment.

155. Whichever option is followed, if the Actual Value, including any amount paid in under paragraph 153, is less than the Notional Value, RTL shall pay into the Scheme a sum equivalent to 80% of the Initial Loss Amount. Any property-specific charges deducted by RTL or Rowanmoor in respect of the Dunas Beach investment should also be reimbursed to the Scheme. The payment should also allow for any available tax relief, subject to the sum actually paid into the Scheme equating precisely to the sum equivalent to 80% of the Initial Loss Amount.

156. Finally, RTL shall pay Mr N the sum of £1,000 to reflect the materially significant distress and inconvenience that Mr N has suffered as a result of its failure to discharge its duties as co-trustee in relation to the selection of suitable investments.

Dominic Harris

Pensions Ombudsman

1 February 2024