PO-26647

Ombudsman's Determination

Applicants	Those listed at Appendix 1 (the **Applicants**)
Scheme	BWFS Occupational Pension Scheme (the **Scheme**)
Respondents	Mr Paul Green and Mr Michael Stanley

Complaint Summary

1. The Applicants' complaints are that:

   1.1. they are unable to access their pension fund;

   1.2. the Trustees have failed to administer the Scheme; and

   1.3. they are concerned that their pension fund has now been lost or misappropriated.

2. Throughout this Determination, I have referred to Mr Green and Mr Stanley collectively as the "Respondents". Where I refer to each individually, in their capacity as a trustee of the Scheme or otherwise, I refer to them as Mr Green and Mr Stanley. Where I refer to both Respondents in their capacity as express or constructive trustees, I refer to them as the "Trustees".

Oral Hearing

3. I held an oral hearing on 25 November 2021 (the **Oral Hearing**), as part of The Pensions Ombudsman's (**TPO**) investigation. I considered it necessary to do so because it appeared to me, from the evidence that I had received, that the Trustees, might be personally liable for their acts and omissions.

4. Mr Stanley did not attend the Oral Hearing nor did he send a representative. A recording of the Oral Hearing was shared with Mr Stanley, alongside a number of questions, the consequences of not engaging with TPO were highlighted to Mr Stanley but no substantive responses were received following the Oral Hearing.

5. The Oral Hearing was attended by Mr Green and three of the four Applicants: Ms E, Mr N and Mr T.

Summary of the Ombudsman's Determination and reasons

6. Having fully considered the evidence and submissions presented on paper and those provided at the Oral Hearing, I uphold the Applicants' complaints. My reasons are as follows:

    6.1. the Trustees have breached their fiduciary duty to manage conflicts of interest and their duty not to profit from their position as trustees;

    6.2. The investments made by the Trustees were made in breach of their statutory and trust law duties;

    6.3. the Trustees failed 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;

    6.4. the Trustees breached their statutory duties to have in place adequate controls to: manage conflicts of interest; and ensure the effective administration of the Scheme; and

    6.5. the Trustees provided false information to members in breach of their fiduciary duties to act honestly and in good faith.

    6.6. There has also been maladministration by the Trustees in relation to:

        6.6.1. Making unauthorised payments to members;

        6.6.2. failing to have regard to the Pensions Regulator's (**TPR**) 2013 and 2016 Code of Practice number 13;

        6.6.3. failing to ensure that the Scheme's investments were, and remained, appropriate for the Scheme's members.

7. I have concluded that the Trustees are not excused from liability by the terms of any exoneration or indemnity clause in the Scheme's paperwork, or by section 61 of the Trustee Act 1925 (**Section 61**). I have further concluded that the Trustees' liability is not reduced or extinguished by any defence of member consent or contributory negligence.

Jurisdiction

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

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

10. Any money recovered by the Scheme as a result of my directions is available for the general benefit of any member, including the 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."

11. 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

12. On 17 May 2012, Black & White Financial Solutions Ltd. (**BWFS**) was incorporated. Mr Green and Mr Stanley were, initially, the only Directors and Shareholders. BWFS was unregulated and the nature of its business was stated as 'Pension funding' at Companies House. BWFS purchased details of potential clients and contacted them offering a 'review' of their pensions.

13. At the Oral Hearing, Mr Green indicated that BWFS' initial business model was to create leads, as an unregulated introducer, for Gladstone Associates Provident Ltd. (**Gladstone**), a company registered in Belize. However, Gladstone was unable to accept a number of these leads. Consequently, Mr Stanley decided to set up the Scheme.

14. On 15 May 2013, the Scheme was established by Trust Deed (the **2013 Trust Deed**). This listed BWFS as the 'Provider' and Mr Stanley as sole trustee and administrator.

15. On 10 June 2013, Mr Stanley filed a bankruptcy petition and received a bankruptcy order.

16. On 8 October 2013, Mr Stanley registered the Scheme with The Pensions Regulator (**TPR**). This contained the following details:

- It listed the Scheme as a defined contribution occupational pension scheme, with 55 active members.
- Mr Stanley was named as the sole trustee, listed as an 'Employer-appointed Trustee', as well as the sole contact for the Scheme.
- BWFS was also named, with an 'Employer trading effective date' of 15 May 2013.

17. Potential clients received various similar iterations of an Information Pack that outlined a 'Cash Rebate Pension Strategy'. The Information Pack received by the complainants contained the following statement:

> "This is NOT a 'pension busting' product, which can potentially create a 55% tax charge from HMRC. ALL of your pension remains within a UK pension structure. Your cash rebate is provided from the pension administrator. All investments generate significant commissions for the companies involved. We pay commissions to you, equal to 20% of your pension, less a small Administration Fee of £999.00."

18. The Information Pack also indicated that members would receive: a fixed return of 3.5% per annum; 100% of their initial transfer upon retirement or transfer after 10 years; and their pension invested into a portfolio of "Up Market Residential Properties In London And The Home Counties".

19. On 11 February 2014, a new establishing Trust Deed was created (the **2014 Trust Deed**), that named Mr Green as the sole trustee and Mr Stanley as the administrator. The 2013 Trust Deed had apparently, been accidentally destroyed by a Scheme member's ceding scheme. At the Oral Hearing, Mr Green stated that there had been no discussion or advice sought about how the loss of the 2013 Trust Deed ought to be rectified, but there had been no intention to set up a new trust.

20. Members were admitted to the Scheme between August 2013 and September 2014 inclusive, transferring in funds from other pension arrangements to BWFS' bank account as the Scheme did not have a separate account. Based on the information provided by Mr Green, there are 18 members in the Scheme, who transferred in a total of £768,685.04. However, the Scheme entered into seven loan agreements, the terms of which are summarised in paragraphs 31 and 32 below, for an aggregate total of £858,679.38 (the **Total Loan Sum**), and which appear to have been executed between December 2013 and 27 June 2014.

21. It appears that the Applicants had their funds transferred to BWFS on the following dates:

    - Ms E: £96,757 on 22 November 2013;
    - Ms S: £77,280.43 on 5 December 2013 and £18,114.85 on 3 March 2014;
    - Mr N: £24,286.64 on 30 April 2014; and
    - Mr T: £46,301.71 on 22 September 2014.

22. In addition, there is evidence of BWFS receiving pension transfers amounting to approximately £2,403,500 from what appears to be a further 26 individuals. However, the information suggests that BWFS was acting as an unregulated introducer to other entities and that these individuals were transferred into a number of different pension schemes, and not into the Scheme. No complaints from the Applicants relate to these other schemes.

23. On 22 September 2014, Mr Green entered into an Individual Voluntary Arrangement (**IVA**).

24. On the same date, Mr Green wrote a resignation letter to Mr Stanley. In the letter, Mr Green said that as a result of the IVA, he could not "be joint trustee of your pension scheme," and asked to be removed from any further documentation that concerned him as a trustee.

25. There is no evidence of written confirmation from BWFS or a written instrument removing Mr Green as Trustee of the Scheme. However, Mr Green claims that Mr Stanley informed him that he would take care of the matter and "inform the appropriate departments."

26. On 27 March 2016, Mr Green wrote a further resignation letter to Mr Stanley. Mr Green claims that he actioned this after he had discovered that he had not been removed as Trustee of the Scheme.

27. On 25 July 2017, Mr Green dissolved BWFS. Scheme members were not notified of BWFS' dissolution. A timeline of the director appointments and resignations for BWFS according to records at Companies House, and according to Mr Green, can be found at Appendix 2.

A.2 Investment of the Scheme's funds

28. Based on the information available, it appears that the entirety of the Scheme's funds were loaned to two companies: Loxwood Real Estate Ltd. (**Loxwood**) and Prosperity Global Partners Limited (**Prosperity**) (collectively the **Investment Companies**).

29. According to the records at Companies House, Loxwood was originally incorporated as Tillingbourne Capital Limited on 24 July 2013, with a share capital of £1. In a brochure provided to some of the Applicants, it is described as a "property development and investment company focusing on areas of strong demand and growth in the mid-to-high end property market within central London and the Home Counties."

30. Prosperity appears to be a company based in Hong Kong, that was incorporated on 31 December 2013. In its brochures, it describes its product as intended for "experienced and institutional investors", investing funds in a range of foreign exchange, contracts for difference and other strategies with an aim to provide a fixed return over a minimum of 10 years.

31. Based on the information available, the Scheme's assets were lent to Prosperity and Loxwood by way of loan agreements. The material terms of each loan agreement were identical:

    - A term of ten years, during which simple interest accrues at 3.5% per annum.
    - Clause 8 in each agreement provides: "Repayment will begin on the date set in accordance with Schedule 1." Schedule 1 set out the "Loan + interest Repayment date" as the date "within 28 days of the tenth anniversary of commencement of the loan." There are no provisions in the loan agreements to accelerate the loans except where the borrower was insolvent.
    - Clause 6 provided: "Notwithstanding the terms of any charge created by the Borrower to secure other sums due to the Lender, this Agreement is and will remain unsecured."

32. I have been provided with copies of seven loan agreements between the Scheme, and in one case BWFS, and Loxwood or Prosperity, all on the terms set out in paragraph 31 above:

- Loan Agreement for £259,019.33 dated 8 December 2013 between the Scheme and Loxwood. The agreement was executed by Katherine Gittins and witnessed by Richard Almond on behalf of the Scheme, and executed by Gordon Laurie and witnessed by Chamila Welengoda on behalf of Loxwood (**Loan Agreement 1**);

- Loan Agreement for £5,462.48 dated 11 February 2014 between the Scheme and Prosperity. The agreement was executed by Katherine Gittins and witnessed by Michael Stanley on behalf of the Scheme, and executed by Phillip Turner and witnessed by Yang Yang on behalf of Prosperity. (**Loan Agreement 2**);

- Loan Agreement for £44,168.44 dated 11 February 2014 between the Scheme and Prosperity. The agreement was executed by Katherine Gittins and witnessed by Michael Stanley on behalf of the Scheme, and executed by Phillip Turner and witnessed by Yang Yang on behalf of Prosperity. (**Loan Agreement 3**);

- Loan Agreement for £14,710.37 dated 13 February 2014 between the Scheme and Prosperity. The agreement was executed by Katherine Gittins and witnessed by Michael Stanley on behalf of the Scheme, and executed by Phillip Turner and witnessed by Yang Yang on behalf of Prosperity. (**Loan Agreement 4**);

- Loan Agreement for £13,179.00 dated 20 February 2014 between the Scheme and Prosperity. The agreement was executed by Katherine Gittins and witnessed by Michael Stanley on behalf of the Scheme, and executed by Phillip Turner and witnessed by Yang Yang on behalf of Prosperity. (**Loan Agreement 5**);

- Loan Agreement for £407,428.00 dated 12 March 2014 between BWFS and Loxwood. The agreement was executed by Katherine Gittins on behalf of BWFS and by Gordon Laurie on behalf of Loxwood. The agreement was not witnessed. (**Loan Agreement 6**); and

- Loan Agreement for £114,711.76 dated 27 June 2014 between the Scheme and Prosperity. The agreement was executed by Michael Stanley and witnessed by Katherine Gittins on behalf of the Scheme, and executed by Peter Chang and witnessed by Yang Yang on behalf of Prosperity (**Loan Agreement 7**), collectively the **Loan Agreements**.

33. Although Loxwood was the named borrower on Loan Agreements 1 and 6, BWFS' bank records show that on at least two occasions, the Scheme transferred a member's funds to Albury Capital Ltd. This was a company incorporated on 15 March 2013, by the same director as Loxwood, which subsequently dissolved on 20 August 2019.

34. There is also evidence that at least two members transferred their funds to the Scheme after the date of Loan Agreement 7, and that their funds were subsequently transferred to Prosperity. However, the corresponding loan agreements have not been provided.

35. On 15 June 2021, Loxwood was dissolved by compulsory strike-off. Little reliable information is available about Prosperity or its current status.

36. For the purposes of TPO's investigation, no evidence of any due diligence having been carried out in relation to either of these investments has been provided.

37. At the Oral Hearing, Mr Green made the following comments in relation to the Scheme's investments:-

    37.1. He confirmed that commission payments were paid by Gladstone in respect of investments made by the Scheme. The commission payments BWFS received were predominantly used to pay BWFS' employees' wages but he and Mr Stanley would receive ad hoc payments as well.

    37.2. Members' funds were transferred to either Prosperity or Loxwood before a formal agreement was in place. However, the Scheme would subsequently receive a loan agreement recording the loan. No legal or professional advice was taken in relation to the loans.

    37.3. He acknowledged that bank records for BWFS showed a transfer made to Albury Capital Ltd., a company with the same director and shareholder as Loxwood. He believed these funds were invested in Loxwood but acknowledged that this was unclear on the basis of the bank records.

    37.4. The loan agreements with Loxwood may have been drawn up by Loxwood or Gladstone.

    37.5. Loan Agreement 6 ought to have been between Loxwood and the Scheme, not BWFS. He was unable to offer an explanation as to why the party to the agreement was BWFS and not the Scheme, but agreed that the sums loaned under Loan Agreement 6 were sums that had been transferred into the Scheme.

    37.6. Due to timings, Loxwood, and sometimes Prosperity, instead of issuing a loan agreement for each Scheme member's transfer, combined multiple transfers of the Scheme members' funds and issued one loan agreement for them.

    37.7. Although a number of the loan agreements to Prosperity were of an identical sum to a member's transferred pension fund, the monies held by Prosperity were held as a single fund in the Scheme's name.

    37.8. Had he known about Loxwood's incorporation date, he would not have invested the Scheme's money into the company.

    37.9. He did not know what due diligence had been undertaken in relation to Prosperity. Nor did he ask Mr Stanley about the due diligence in general or whether any security had been put in place for any of the investments.

37.10. He did not consider that he was responsible for how the Scheme's funds were invested. He believed that due diligence had been done on the investments and he thought they were safe.

37.11. He did not think that any consideration had been given to the importance of diversifying the Scheme's investments.

37.12. He confirmed that he did not monitor the investments once the agreements were in place, nor did he receive any updates from Prosperity or Loxwood. He also took no steps to ensure that there was sufficient liquidity in the Scheme.

37.13. At the time, he believed that due diligence had been carried out by Mr Stanley. However, looking at the Investment Companies now, he thinks it is possible that they had acted recklessly with these investments.

37.14. He also considered that the terms in the Loxwood loan agreements were favourable to Loxwood, leaving the Scheme with no control.

37.15. He was not sure that the Scheme had records of all its members and their transferred benefits.

37.16. He was not sure why he did not sign Loan Agreement 1 as Director of BWFS, but suggested that he might not have been in the Office at that time.

37.17. Similarly, he was not sure why he did not sign Loan Agreement 2, but thought it was a 'control thing' for Mr Stanley.

37.18. He reiterated that for Loan Agreements 3 to 7, he did not sign these as Mr Stanley and his partner "wanted to keep control of everything." He had never been asked to sign the Loan Agreements.

37.19. Upon reflection, he did not think it was appropriate that someone without the appropriate authority had signed a number of the Loan Agreements.

A.3 Commission payments

38. Scheme members received a commission payment of 20% of their transferred funds less the administrative fee of £999. Based on the information provided, it appears that this was paid by Gladstone irrespective of which investment company received the funds. On the front page of Loan Agreement 1, Gladstone are referred to as "Fiduciary Agents" to Loxwood and "Arranged and Facilitated" the loan.

39. BWFS also received commission payments in respect of the Scheme's investments, but these were not disclosed to members of the Scheme. Based on BWFS' bank account records, and confirmed by Mr Green at the Oral Hearing, Gladstone paid BWFS a commission rate of 15% of the Total Loan Sum. Between August 2013 and November 2014, BWFS received commission payments from Gladstone that totalled over £140,000 and this is the only significant income BWFS received during this period. From this, bank records provided by Mr Green show substantial transfers to

Mr Stanley, Mr Green, Mr Green's wife, payments to BWFS employees and sums withdrawn in cash.

40. There is insufficient evidence to establish with certainty whether the 20% payments to members or the 15% commissions to BWFS were paid out of the transferred funds, or whether the whole fund was invested and a 35% commission paid by Gladstone or the investee companies.

41. Regarding the 20% paid to members, it should be noted that a letter was sent from BWFS to Mr N and Ms E dated 2 October 2013, when their transfer requests were being processed, which stated:

> "Things are progressing however with the stigma that is attached to pension liberation and new pension schemes etc, they [the ceding scheme] are asking a lot of questions of us…Pension companies do not like people accessing their pension funds before the age of 55, this is pension liberation and although not illegal, it is not liked by pension companies."

42. When questioned about the rebate at the Oral Hearing, Mr Green said that there was a possibility that this was being paid using the members' funds and so could have been a method for members to access 20% of their pension fund before age 55.

A.4 Relevant provisions of Scheme documents

43. I have set out below, in paragraphs 44 to 52, a summary of the provisions of the Scheme's documents that I consider relevant to my investigation:

- Whether the Trustees acted in breach of trust in their investment of the Scheme's funds and the extent, if any, to which they might rely on any exoneration or indemnity contained in any of those documents.
- Whether Mr Green and Mr Stanley took appropriate steps in accordance with the 2013 and 2014 Trust Deed (collectively the **Trust Deeds**) following Mr Stanley's bankruptcy order and Mr Green's IVA.

A.4.1 Relevant provisions of the Trust Deeds

44. The Scheme's trustees' investment powers are set out in Clauses 13, 14 and 15 of both the Trust Deed dated 15 May 2013 and the Trust Deed dated 11 February 2014. Those clauses are set out in Appendix 3.

45. In addition, the following clause, which seeks to limit the Scheme's trustees' liability to members, is contained in each Trust Deed:

> "No Member or any other person shall have any claim right or interest under the Scheme or any claim against the Provider or the Trustees in connection with the Scheme except under or in accordance with the provisions of this Establishing Deed. Neither the Provider nor the Trustees shall be personally liable for any acts or omissions not due to their own wilful neglect or default

and, in particular, shall have no responsibility to or in respect of a Member in connection with investments made at the option or direction of that Member or any person authorised to exercise such option or make such direction on the Member's behalf."

46. The Scheme's trustee resignation process is set out in Clause 23 of the 2013 Trust Deed:

"A trustee may resign subject to the written consent of the Provider. Any trustee will, by written instrument, be removed from office by the Provider, if the trustee becomes unable or unwilling to act as a trustee. The Provider or Trustees with the consent of the Provider may, by written instrument, appoint additional trustees or a new trustee in place of any trustee of the Scheme whose office has otherwise been vacated."

47. Clause 23 of the 2014 Trust Deed is identical, with the addition of the following words at the end of the sentence: "If the removal would leave no remaining trustees the scheme administrator would become responsible for appointing a new trustee(s)."

A.4.2 Other relevant provisions of the Scheme Rules

48. The following Scheme Rules relate to the Scheme's investments:

"13 Investments or Deposits

Subject to the restrictions within this section, the scheme may invest in any funds or assets permitted by law. […]

Rule 13.2 General

It is a decision for the trustees as to how scheme funds are invested and the degree of investment choice open to a member. It is the responsibility of the scheme administrator to ensure that any investments made conform with the requirements of these rules, the legislation and Revenue & Customs practice.

If the trustees so permit, a member may choose or direct how contributions and any transfer payment accepted by the scheme in respect of the member should be invested, subject to the requirement that any investment made conform with the requirements of these rules."

A.4.3 Members' Scheme application forms

49. Before transferring to the Scheme, a number of members were asked to sign a contract of employment for BWFS. In doing so, they agreed to the following declaration:

"I the above named individual, hereby agree, as from the date shown to be a new member of the BWFS Occupational Pension Scheme, in accordance with the trust deed and rules of the scheme."

50. At the Oral Hearing, Mr Green confirmed that these were not intended to be genuine employment contracts whereby members would undertake work for BWFS.

51. In addition, as part of the transfer paperwork to the Scheme, members were required to sign an 'Existing Pension Scheme Transfer Instruction'. In doing so, they accepted the following declaration:

> "I the above named individual and member of the transferring scheme wish to transfer all benefits to the BWFS Occupational Pension Scheme with immediate effect. I can confirm that I have been advised that as an employee of Black & White Financial Solutions Administration any lump sum transfers or contributions will be applied to the scheme with zero charges. I can also confirm that I have been advised that the scheme will only permit 'Regulated Investments' which are provided by FSA regulated investment companies, and 'Non-Regulated' Alternative Investments are not permitted to be held within the scheme. This letter provides written authority to provide Black & White Financial Solutions Ltd with any information that they require regarding my pension benefits held within your scheme."

52. As part of their application, members were also asked to provide their bank account details for the 20% rebate. Based on the available information for Mr T, it appears that Gladstone paid the 20% rebate within five working days of receiving a member's funds. Ms E, Mr N and Mr T have confirmed that they received the 20% rebate. Ms S has stated that she did not receive a rebate.

A.5 Communications with Scheme members

53. The information provided by Mr Green demonstrates that the Scheme issued a number of annual statements to its members on BWFS letterheaded paper. It appears that these were identical for each member and contained the following wording:

> "Thank you for becoming a member of the BWFS Pension Scheme. We are writing to confirm that your pension is safely transferred to us and will be available to you to either re-invest or transfer to another provider on the tenth anniversary of the completion of your transfer. We would also like to confirm that your pension will grow at 3.5% (simple interest) each year until the tenth anniversary when it matures. Our pension scheme is regulated by the pension's [sic] regulator and registered with HMRC as a UK registered pension scheme. The trustee and administrator of the scheme are both qualified financial advisers and have carefully selected the investment vehicles for their safety and assurance. The utmost due diligence was exercised when selecting the investment vehicle and we have and will be monitoring this over the ten years term to ensure your investment is safe and secure."

54. For 2015, the wording above was again issued to members, with the following statement added at the end:

> "Please also find enclosed our brochure which contains information about the investment vehicles we currently use. We have as you are aware focused mainly on the Property fund as the property market in London and the Home Counties have consistently grown over the years. Your pension is currently valued at […] and will accrue a coupon of 3.5% each year until its maturity on […]. Your pension was invested on […]. On […] your pension will be worth […]."

55. For subsequent years, the wording in paragraph 53 above was used with the following added depending on the relevant year:

> "Your pension matures on […] (tenth anniversary) and was initially worth […] when initially invested on […].
>
> On […] it accrued its first coupon taking it up by 3.5% to […]
> On […] it accrued its second coupon taking it up by a further 3.5% to […]
> On […] it accrued its third coupon taking it up by a further 3.5% to […]
> On […] it accrued its fourth coupon taking it up by a further 3.5% to […]"

56. There is no evidence that any other form of communication, initiated by the Scheme, was issued to Scheme members.

57. At the Oral Hearing, Mr Green explained that there was a possibility that not all Scheme members received annual statements, as it was dependent on the information to which he had access. He also stated that he was unaware that the Scheme had to have an internal process in place to seek to resolve member complaints.

58. It appears that Ms E did not receive her annual statement in 2018 and contacted Mr Green and Mr Stanley about this. After a number of exchanges, Mr Green wrote to Ms E with the following:

> "I would like to apologise about the confusion of the administration of your pension with The BWFS Occupational Pension Scheme. Unfortunately the pension scheme administration has now become a dispute between myself and Mr Michael Stanley, this has only recently been brought to my attention since our recent telephone conversation. After the business relationship broke down between myself and Mr Stanley quite some time ago I was led to believe that Mr Stanley would be taking up administrational duties of his pension scheme.
>
> Never the less [sic], I can assure you that your investment funds are still invested within the pension scheme which are still tied up in the original property fund. You originally invested £96,757 on 27th November 2013 and was made aware that it would be tied up for the term of 10 years.

> The funds would accrue a growth of 3.5% each year but will not be added until the end of year 10, so will be worth 35% above the original value on 27th November 2023 when it matures.
>
> I will be in touch with the pensions regulator this week concerning the dispute of administration of the scheme. Mr Stanley owns the scheme and is a trustee (please see enclosed document). I have also enclosed the statement which was sent to you in April 2018.
>
> If you require any further clarification on this, please contact me at your earliest convenience."

59. Similarly, when Mr T questioned where his funds had been invested, Mr Green replied with the following:

> "I appreciate your concern about your pension investment. In April I responded to your request even though I was no longer in partnership with Mr Michael Stanley. I can assure you that your funds are still invested in the same property scheme within The BWFS Occupational Pension Scheme. Mr Stanley is the owner/administrator and trustee of the scheme. I resigned from been [sic] a trustee of The BWFS Occupational Pension Scheme back in September 2014. I am currently in a legal dispute with Mr Stanley in relation to another issue, however I am now seeking legal advice as Mr Stanley is abdicating his responsibility to administer his scheme. Unfortunately Mr Stanley has embroiled you in a dispute in regards to our termination of business relation ship [sic] in December 2016. I am also in contact with the pensions regulator concerning this matter."

60. After Ms E submitted a formal complaint to the Scheme, Mr Green issued the following responses on 21 November 2018:

> "In response to your previous email I have contacted The Pensions Regulator regarding your concerns about your pension and the scheme. I have gone down the route of whistleblowing about the administration of the BWFS Occupational Pension Scheme. Again I was advised that I am no longer a trustee of The BWFS Occupational Pension Scheme since September 2014. Therefore I am unable to respond to your request of your complaint under the schemes internal dispute resolutions procedure, this is a matter for the Administrator Mr Stanley.
>
> I have logged the details of your complaint with The Pensions Regulator. I advise you to contact the Whistleblowers at The Pensions Regulator. The contact phone number is 0345 6007060.
>
> Furthermore you can also contact The Pensions Advisory Service with your concerns, contact number 0800 0113797. This will help form part of an investigation with the Regulator."

61. He then provided a further response on 23 November 2018:

> "Once again I sincerely apologise that you have become entangled in a dispute with Mr Stanley and myself.
>
> All original documentation regarding Mr Stanley as a trustee can be verified by The Pensions Regulator as a true record. Mr Stanley continues to deny any responsibilities for the scheme. However, The Pensions Regulator does not adopt this view. The entire running of the scheme is now under investigation by The Pensions Regulator.
>
> Mr Stanley's response is a knee jerk reaction since I embarked on Whistle Blowing to the Pensions Regulator about the administration of his scheme. Again he is trying to abdicate from his responsibility to address the situation with the scheme. I again urge you to contact The Pensions Regulator regarding Whistleblowing, and also The Pensions Advisory Service with your concerns.
>
> The current problems with the administration of the scheme does not effect [sic] your investment within the property scheme where your funds were transferred.
>
> I intend to fully cooperate with the investigation and to respond appropriately to resolve the matter with the scheme."

62. After a number of further exchanges with Mr T, Mr Green also sent Mr T the following in a text:

> "I will contact the Regulator next week about the scheme. Michael is saying to them that he is nothing to do with the scheme (bizarrely) now been [sic] though he set up the scheme and is administrator of it. He is the original trustee who sorted all of the investments out. I later became a trustee of the scheme for a while. All of the money is still stuck into the same property fund as it is tied up for the 10 years. The fund grows at 3.5% every year as what will be shown on previous statements."

63. Approximately eight months later, Mr T asked for an update and Mr Green responded with:

> "I have been instructed by the Pensions Regulator to not contact or speak to anyone regarding the BWFS Pension Scheme. I am cooperating with them about the scheme and Mr Stanley."

64. When Mr T sent similar text messages to Mr Stanley, he either received a response saying that Mr T should ring Mr Green or the following:

> "I didn't sign [the last statement Mr T received] [Mr Green] did that fraudulently. I'm not a trustee I've sent proof I went bankrupt before your pension came to the scheme. Stop bothering me. I can't even discuss the

scheme with the pension regulator because they know fully [sic] well it's nothing to do with me ONLY PAUL GREEN. […]

Nothing to do with me
I can't sign documents. Paul has forged them […]

He even forged letters with my signature to the pension regulator claiming I was saying I'm trustee when I can't be because I'm bankrupt
It's Paul you need to pursue on this. Ring the pension regulator and ask them […]

The pensions regulator won't even talk to me only Paul Green. I am not the trustee and documents you have received are forged by Paul Green. Call [TPR representative] at the pension regulator and ask her who the trustee is […]

Nobody will talk to me because I went bankrupt so can't ask anyone anything. Only Paul Green can. […]

Paul as I said has blocked my numbers so I can't call him to find anything out and [TPR representative] won't tell me anything because only Paul Green has authority as the sole trustee so my hands are tied. All I know is your money is invested an hasn't gone anywhere […]

Paul has all information you really need to liaise with him […]

I just wish Paul would take responsibility and communicate with you because he makes it look like there is a problem when there isn't other than him not communicating".

A.6 Management of the Scheme

A.6.1 Mr Stanley's involvement in the management of the Scheme

65. In the 2013 Trust Deed, Mr Stanley was appointed as administrator and sole trustee of the Scheme. Mr Stanley received his bankruptcy order on 10 June 2013.

66. There is no evidence that Mr Stanley: sought a replacement Trustee at that time; notified The Pensions Regulator (**TPR**) of his bankruptcy; or processed a Deed of Removal for the purposes of the Scheme's records.

67. Further, when Mr Stanley registered the Scheme with TPR on 8 October 2013, he listed himself as the sole trustee and contact for the Scheme. As a result, when TPR issued a penalty notice on 16 July 2018, it was sent to Mr Stanley.

68. On 20 November 2018, after further exchanges with Mr Stanley, TPR considered, based on the information available, that Mr Stanley ceased to be a trustee of the Scheme from 10 June 2013. However, it considered that Mr Stanley had continued to be involved with the Scheme beyond 10 June 2013.

69. Mr Stanley's continued involvement in the Scheme is supported by the following:-

- He was named as the Scheme administrator in the 2014 Trust Deed.
- He executed Loan Agreement 7 on behalf of the Scheme as "Michael Stanley (Administrator)."
- He witnessed the Scheme's signatory for Loan Agreements 2, 3, 4 and 5.
- He signed a prospective Scheme member's transfer paperwork, naming himself as a trustee of the Scheme, on 3 February 2014.
- At the Oral Hearing Mr T stated that he had spoken to Mr Stanley and Mr Green about transferring to the Scheme in August 2014, and believes Mr Stanley explained the offer and sent him the paperwork.
- There are a number of communications where he has confirmed that he has been in contact with parties from the Investment Companies in 2017 and 2018.
- He sent Mr Green a number of urgent emails in relation to the Scheme and the dissolution of BWFS between September 2017 and 2018.

70. Mr Stanley has provided no evidence that he was formally removed as a trustee. At the Oral Hearing, Mr Green confirmed that he did not think Mr Stanley had ever been removed as a trustee, irrespective of his bankruptcy. He also claimed that it had been Mr Stanley, in both his role as trustee and administrator of the Scheme, who had completed Scheme administration paperwork required by TPR, on 8 October 2013.

71. There is no evidence that Mr Stanley received any training regarding his duties and responsibilities as a trustee of an occupational pension scheme.

A.6.2 Mr Green's involvement in the management of the Scheme

72. On paper, Mr Green's involvement with the Scheme was limited to his role as director of BWFS until he was appointed as trustee on 11 February 2014. However, it appears that Mr Green carried out administration on behalf of the Scheme, believing it was BWFS' administration. Namely, issuing and processing Scheme transfer paperwork.

73. At the Oral Hearing, it appeared that Mr Green believed that 'Scheme' administration related to Scheme returns, communicating with TPR, issuing annual statements and carrying out the due diligence into the Investment Companies.

74. He also confirmed the following:

- There was no legal or pensions advice sought before setting up the Scheme.
- He did not receive any training regarding his duties and responsibilities as a trustee of an occupational pension scheme. He believed that everything was up and running, so he just put his name on the 2014 Trust Deed. He did not notify TPR when he was appointed as he was unaware that he would need to do so.

- He did not take any steps to acquire the necessary knowledge so that he was aware of his ongoing duties as a trustee.
- He did not know that the Trust Deed referred to Rules. Nor did he know that members of an occupational pension scheme may have a statutory right to transfer the cash equivalent value of their benefits to another scheme.
- After informing Mr Stanley of his IVA, he thought that he would be removed as trustee. It was only when TPR contacted him that he realised that he had not been removed. However, he could not establish a Deed of Removal as he did not have access to the Scheme documents at that time. He did not seek to replace himself as, at that point he thought Mr Stanley was still a trustee.
- He did not believe that he continued to act as a trustee from September 2014 to March 2016, but did carry out administrative duties.
- He was not aware that Scheme accounts were prepared.

A.6.3 Others involved in the administration of the Scheme

75. There is evidence of two other people who were also involved in the administration of the Scheme, despite no formal appointment: Richard Almond and Katherine Gittins. At the Oral Hearing, Mr Green confirmed that Mr Almond worked for BWFS, and that Ms Gittins was Mr Stanley's partner at the time and worked as the office manager at BWFS. Companies House records state that Ms Gittins was a director of BWFS between October 2013 and 27 January 2015, and then again between 28 January 2015 and 1 January 2016.

76. Similar to Scheme paperwork addressed to Mr Green, there is Scheme transfer paperwork that is addressed to Mr Almond, suggesting that he carried out certain Scheme administration duties. In addition, it appears as though it was Mr Almond's role to prepare the Information Packs that were issued to prospective members to demonstrate how their funds would be invested. I have seen no evidence that Mr Almond was involved in the Scheme beyond his role as an employee of BWFS.

77. With regard to Ms Gittins, aside from the periods in which she was recorded as being a director of BWFS, her signature appears on all but one of the Scheme's loan agreements variously as a signatory on behalf of the Scheme or BWFS, and on the remaining loan agreement as a witness.

78. Ms Gittins stated to TPO that she was unaware that she had been appointed as a director of BWFS and did not agree to act as a director. She stated that she worked for BWFS as a receptionist and processed paperwork for BWFS' claims business. She stated that she did not sign any of the Loan Agreements, that her signature had been forged, and that she had no involvement in the Scheme.

79. Neither Mr Almond nor Ms Gittins were included as respondents to the Scheme complaints that TPO had agreed to investigate and Mr Green confirmed at the Oral

Hearing that neither was a trustee of the Scheme. Accordingly, I make no findings as to Mr Almond's or Ms Gittins' roles in relation to the Scheme.

B The Respondents' submissions on their roles in the management of the Scheme

B.1 Mr Green

80. He was not often present at BWFS between late 2012 until June 2014, as he was helping his parents run their business due to his father's ill health.

81. He became a trustee of the Scheme on 11 February 2014, after transfers had already been made to the Investment Companies, and ceased being a trustee on 22 September 2014. He had been informed by his IVA advisor that he was no longer legally permitted to remain as a trustee for the Scheme while in an IVA.

82. Mr Stanley had all the original files relating to the Scheme. He only downloaded what he had access to before he terminated his working relationship with Mr Stanley. It was Mr Stanley that completed the Scheme returns and the annual statements and Mr Stanley remained actively involved throughout. During Mr Stanley's periods of absence, he did not have any control or access to the Scheme's accounts.

83. The loan agreements are proof that Mr Stanley was actively involved in the administration of the Scheme after June 2013. Although he was appointed as a trustee on 11 February 2014, Mr Stanley and his family (Ms Stanley and Ms Gittins) held "control of the [Scheme]." He claims that Mr Stanley has always been in control of the Scheme, and used other people as "pawns to coercively manipulate and control to do his work." He claims that Mr Stanley had been using bullying tactics and harassment to try and get him to send the annual statements.

84. At a certain point, he decided that he would 'whistle blow' to TPR about, what he perceived to be, Mr Stanley's abdication of responsibility to administer the Scheme.

85. He was not responsible for the success of "economic growth or decline of investments". He claims that Scheme members gave written consent to transfer their pension funds into Loxwood (Mr Green did not mention Prosperity).

86. As far as he was aware, the Scheme did not have an IDRP. He said that he was never involved in the establishment and development of the Scheme. As a result, he did not have any knowledge of what policies were required to be in place to form a pension scheme.

87. He may have inadvertently provided incorrect information to Scheme members regarding which Investment Company their funds were invested in. He claims that there was no intention to mislead anyone, as he was not the administrator of the Scheme and was trustee for only a few months.

88. At the Oral Hearing, Mr Green also said the following:-

    88.1. No Trustee meetings were held.

88.2. He dissolved BWFS [in 2017] as he thought it and the Scheme were separate and so did not think it would impact the Scheme.

88.3. He believed that there had been up to £2 million transferred into the Scheme.

88.4. Mr Stanley prepared all of the employment contracts and the Scheme documentation, so the wording used had been chosen by Mr Stanley. He was unaware whether legal or any other advice had been sought on the contents of the welcome pack sent to prospective Scheme members.

88.5. He did not think that the 20% rebate was taken from the value of the member's fund. The rebate was paid directly to Scheme members from the Investment Companies.

88.6. He could not remember how the £999 administration fee worked, nor could he remember whether these fees were transferred to BWFS' bank account.

88.7. There was no formal split of Trustee duties between him and Mr Stanley.

88.8. He sent out statements on behalf of Mr Stanley from 2015 onwards.

88.9. Prior to 'whistleblowing', he had never contacted TPR to discuss the ongoing issues with the Scheme.

88.10. He did not take any steps to assure himself that the Scheme's funds were secure.

88.11. When he responded to Ms E's complaint, he presumed that the Scheme funds were still invested. When Mr Green was asked whether he thought that was inaccurate given that Mr Stanley had sent urgent emails about reincorporating BWFS, Mr Green responded saying he had not thought about that.

88.12. He confirmed that he did not respond to all of the complaints he received. He did, however, tell the members to approach TPO.

88.13. If he did not think this Scheme would have worked he would have walked away. He did not know why they spread the investments between Loxwood and Prosperity if the returns were all the same.

89. After the Oral Hearing, Mr Green made a number of further comments, which are summarised below. While I have noted his other comments, I do not consider that they are pertinent to the outcome of these complaints.

89.1. He did not receive any external advice or information before he became a trustee. Rather, he received a short brief from Mr Stanley, who indicated that it would be similar to being a director of a company. He was not aware or informed of any conflict of interests, he did not think he had to review Mr Stanley's "dealings" when he became a trustee, nor was he aware that he would be held liable for poor decisions previously made by the Scheme.

89.2. He believes that an understanding of the law and requirements is a prerequisite to establishing a pension scheme, prior to it becoming operational. Given that he had multiple other responsibilities at the time he became trustee, he does not think he could have been able to learn the role of a trustee and carry out investigations into the Scheme. As a result, he should not be held liable as a trustee, on the basis that he became one without the appropriate knowledge of the Scheme's status.

89.3. He indicated that a person could only act properly as a trustee if they were aware of their role and duties, and given space to carry out those duties. He does not believe that this happened in his case.

89.4. He did not receive any proper induction or information regarding the duties and requirements of a trustee. He was ignorant of his role as trustee in 2014 and was not given any clear direction, advice or any of the "TPR documentation" from Mr Stanley before he signed the documentation to become a trustee. He states that he acted in error when he did not use his own initiative and seek out advice beforehand.

89.5. During his time as a Trustee of the Scheme, he was uncertain of what systems were in place, what should have been in place and how operational systems should have worked. The Scheme's administration was in disarray before he became a trustee, and he does not believe he had the proper powers or authority to execute his duties as a trustee.

89.6. He had no control over any investment during the time he was trustee and believes that he was deliberately "kept out of the loop" in relation to the development and organisation of the Scheme. He inherited a scheme that was disorganised, without any clear governance nor procedures. This is demonstrated by the information he had gathered as a trustee, and later shared with TPO. He believes that the "founder and administrator of the scheme" should be held liable for these omissions.

89.7. He believes that on paper, in his role as trustee, he was responsible for the Scheme's investments. However, in practice, he had no responsibility or decision-making power "to intervene with the functioning of the Scheme."

89.8. There is no proof or evidence to indicate that he was working as a professional trustee prior to 2014. He acted in good faith to the members when he was a trustee and for the period afterwards.

89.9. As the documentation is the responsibility of the Scheme administrator, he should not be held accountable for the wording and language used in any scheme-related document from when it was established. In addition, as he did not have the exact details of all the investors and investments, and he ceased being a trustee in 2014, he believes the monitoring of the investments was Mr Stanley's duty.

89.10. He was not involved in the establishment or development of the Scheme, so the inadequate systems were in place when the Scheme was developed and set up by Mr Stanley. Therefore, he could not have turned a blind eye from learning that the investments made for the Scheme were not in any members' best interests.

89.11. He was not privy to most of the conversations between Mr Stanley and the directors of the Investment Companies. He had no reason to believe that Mr Stanley had not carried out any due diligence into these companies, particularly given Mr Stanley's background as a stockbroker and experience in the finance industry.

89.12. He believes that Mr Stanley was aware of the duties involved with being a trustee, and used his bankruptcy to avoid any long-term responsibility for the administration of the Scheme. He noted that any acknowledgement of Mr Green's resignation would not have been in Mr Stanley's best interests.

89.13. Mr Stanley had no intention of releasing Mr Green from his role as trustee, as this gave Mr Stanley the opportunity to distance himself from the Scheme. He believes that he was controlled and manipulated by Mr Stanley.

89.14. Payments from the Investment Companies to BWFS were business transactions between BWFS and the Investment Companies.

89.15. Any payments made to Mrs Green were as a result of Mr Green having issues with his own banking or business banking.

B.2 Mr Stanley

90. He has not been a trustee of the Scheme since 13 June 2013, when he went bankrupt. Mr Green became the Trustee and remained so on a permanent basis. He believes that the documents about Mr Green entering into an IVA are fabricated and, in any case, only bankruptcy would have prevented him from being a trustee. He believes that this is Mr Green's attempt to shift the responsibility of the Scheme to him.

91. He has said that Mr Green was aware that an IVA would not impact his role as Trustee of the Scheme or Director of BWFS. As a result, the letters and 'verbal instructions' regarding Mr Green's resignation are also untrue.

92. It was Mr Green who issued the Scheme's annual statements every year as he (Mr Stanley) did not know how to do them or what was required for them. He relied on Mr Green to sort out 'his' (Mr Green's) Scheme. However, he had contacted Mr Green to remind him to send the annual statements to the Scheme membership as he had forgotten to do them in previous years.

93. As TPR recognised that he was not trustee of the Scheme from June 2013, they would no longer discuss the Scheme with him. So, any complaints made by members have to be directed to Mr Green.

94. In addition, Mr Green closed BWFS' Office in 2016 and took all the client documentation at that point. So, he could not access the Scheme's accounts or information.

95. In later communications to Mr Green (October 2018), he claimed that he never was and never had been the Trustee of the Scheme. he also denied being a trustee at all to TPR, on 22 November 2018, when he questioned why he would be a trustee for less than a month.

C The Applicants' submissions

C.1 Ms E

96. She is concerned about the legitimacy of the Scheme as although she had been informed it had been registered with HMRC and TPR, BWFS had dissolved. In addition, she did not know where her funds had been invested.

97. Since transferring into the Scheme, she received no communication, no annual statements, nor any correspondence informing her about her investments. Despite contacting Mr Green and Mr Stanley, she has not received any clarification.

98. Mr Green informed her that her funds were invested in Tillingbourne Ltd. but as this company was not incorporated until November 2013, she did not believe that this could be the case.

99. She has tried requesting a transfer but all she received was an annual statement in response.

100. She believes that the Trustees have committed fraud by taking her money and claiming to have put it into a pension scheme.

101. At the Oral Hearing, Ms E made the following comments:-

- She thought the Scheme was legitimate and was never told that her investment would be going to one company. The investments were not described as high risk, rather they mentioned 'proper' companies that were very low risk.
- She thought the Scheme sounded good, with reasonable returns that were guaranteed. However, she thought compound interest applied, rather than simple interest.
- She had no prior experience making investments before transferring into the Scheme.
- She was not told that she could not transfer out of the Scheme for 10 years.
- She did not think the 20% rebate was illegal, as she thought it was covered by TPR and did not think her ceding scheme could transfer to a scheme that was doing something illegal.

- She understood Mr Green's and Mr Stanley's roles to be both the Trustees and the provider.

C.2 Ms S

102. In 2019, she looked to see whether she could take early retirement and found out that BWFS had been dissolved.

103. She has been unable to access her pension, is unhappy with the way it has been administered and is concerned about the legitimacy of the Scheme.

C.3 Mr N

104. At the age of 55 he tried to draw down some of his pension in the Scheme. However, despite contacting the Trustees, he did not receive any response.

105. He is now concerned that he is unable to access his pension and so would like his pension monies returned to him.

106. At the Oral Hearing, Mr N made the following comments:-

- He had received cold calls from BWFS, every other day until he agreed to transfer into the Scheme. He said the callers emphasised the 20% rebate on offer, which he did not think was illegal.
- He was told that his funds would be invested in Loxwood, and while his ceding scheme hesitated at first, it did not see anything to prevent the transfer from completing.
- He did not speak with either Mr Stanley or Mr Green until after he had transferred.
- He was unaware that his funds would have been 'locked in' for 10 years.
- He remembered the 20% rebate payment being paid by BWFS, not Gladstone. He recalled speaking to someone at BWFS who said that the payment would be coming from BWFS.

C.4 Mr T

107. When he joined the Scheme in August 2014, he remembers talking to both Mr Stanley and Mr Green, so both were actively involved.

108. He stopped getting annual statements from the Scheme in 2018, so he made some enquiries and found out that BWFS had been dissolved. He had not received any correspondence about this.

109. He believes that the Trustees are responsible for losing his pension, which has caused him considerable distress and inconvenience.

110. He would like his financial loss replaced.

111. At the Oral Hearing, Mr T made the following comments:-

- He was not initially interested in transferring his pension benefits into the Scheme, but he kept on receiving telephone calls and eventually had a conversation with Mr Stanley who outlined what the Scheme could offer. Namely, a 20% cash rebate with 3.5% interest on the funds. He believes that Mr Stanley organised this and sent him the paperwork.
- He did not think anything was illegal as the Scheme was registered. He also did not know where the investment was being made, but he thought it was going into Loxwood. He found out that Loxwood was a legitimate company.
- When he was due to receive a rebate, he had to provide a statement, from BWFS for work that he had carried out, for his bank to accept the commission payment.
- He had no experience of making investments before he transferred into the Scheme.
- He thought Mr Stanley and Mr Green were partners and did not think there was anything suspicious when he transferred. However, he did think it was odd that the phone numbers and addresses for BWFS kept changing.

D Conclusions

Order of conclusions

112. I will consider the Applicants' complaints under the following headings, to determine whether the Respondents committed any breaches of trust as Trustees of the Scheme and/or committed acts of maladministration:

D.1 The Scheme's status
D.2 The Respondents' roles in relation to the Scheme
D.3 Investment of the Scheme's funds
D.4 Administration of the Scheme
D.5 Information provided to members
D.6 Member consent/Contributory negligence
D.7 The Trustees' liability
D.8 Accessory Liability for dishonest assistance in a breach of trust

D.1 The Scheme's Status

D.1.1 The Scheme's status as an occupational pension scheme.

113. It is not in dispute that the Scheme is an occupational pension scheme. It has been registered with both HMRC and TPR, so I have no reason to doubt the Scheme's existence.

D.1.2 Structure of the Scheme's funds

114. Loan Agreements 2, 3, 4 and 5 to Prosperity appear to be for sums equivalent to certain individual members' transfer values. However, Mr Green stated at the Oral Hearing that the monies held by Prosperity were held as a single fund in the Scheme's name. Loan Agreements 1 and 6 to Loxwood, and Loan Agreement 7 to Prosperity, appear to aggregate a number of member transfer values, and there is no suggestion that these were invested or held separately. All sums were paid into unsegregated BWFS bank accounts. The suggestion from the Loxwood marketing literature was that the funds would be used collectively to develop real estate projects. Additionally, all sums were loaned on identical terms. Consequently, I have seen no suggestion that Scheme assets were intended to be held in segregated funds. So, I shall proceed on the basis that the Scheme's assets were pooled among its members.

D.2 The Respondents' roles in relation to the Scheme

115. In this section, as a result of the dispute between the Respondents concerning their involvement in the Scheme, I consider: the duration of the Respondents' formal appointments as trustees; whether they were disqualified from acting as a trustee by operation of section 29(1)(b) or (ba) of the Pensions Act 1995; whether they were automatically removed as a trustee by operation of section 30(1) of the Pensions Act 1995; and whether each acted as a constructive trustee during the periods in which each was not formally appointed as a trustee.

D.2.1 Mr Stanley's involvement in the Scheme as Trustee or otherwise

D.2.1A Trustee

116. There is no dispute that Mr Stanley was appointed as Trustee of the Scheme on 15 May 2013 by the 2013 Trust Deed. However, a review of Mr Stanley's actions following this, requires consideration of the effect of his bankruptcy order dated 10 June 2013.

117. Section 29(1) of the Pensions Act 1995, outlines the circumstances where a person is disqualified for being a trustee of any trust scheme. The pertinent situations are the following:

> "(b) he has been made bankrupt or sequestration of his estate has been awarded and (in either case) he has not been discharged or he is the subject or a bankruptcy restrictions order or an interim bankruptcy restrictions order,
>
> (ba) a moratorium period under a debt relief order (under Part 7A of the Insolvency Act 1986) applies in relation to him or he is the subject of a debt relief restrictions order or an interim debt relief restrictions order (under Schedule 4ZB of the Insolvency Act 1986)."

118. Section 30 of the Pensions Act 1995, outlines the consequences of such a disqualification:

> "(1) Where a person who is a trustee of a trust scheme becomes disqualified under section 29 in relation to the scheme, his becoming so disqualified has the effect of removing him as a trustee.
>
> …
>
> (5) Things done by a person disqualified under section 29 while purporting to act as trustee of a trust scheme are not invalid merely because of that disqualification.
>
> (6) Nothing in section 29 or this section affects the liability of any person for things done, or omitted to be done, by him while purporting to act as trustee of a trust scheme."

119. As Mr Stanley became bankrupt on 10 June 2013, this had the effect of disqualifying him for being a trustee under section 29(1)(b) and automatically removing him as trustee of the Scheme in accordance with section 30(1) of the Pensions Act 1995. Mr Stanley has claimed in his submissions that he ceased to be a trustee on 13 June 2013, albeit he appears to have been unaware that he was automatically removed by operation of law.

120. However, I consider that the evidence set out in paragraph 69 above clearly shows a high level of involvement in the Scheme after June 2013, and the application of its assets, that is entirely inconsistent with his claim that Mr Green was solely responsible for the Scheme after June 2013.

121. Mr Stanley continued to perform acts that were consistent with being a trustee, in particular naming himself as trustee for the purposes of the Scheme's registration with TPR in October 2013 and executing Loan Agreement 7. Although he purported to sign this agreement in his capacity as an administrator, under Clause 14 of the 2013 Trust Deed, set out in Appendix 3, the power to invest Scheme assets vests solely in the trustees of the Scheme.

122. Mr Stanley was not, by operation of section 30(1) Pensions Act 1995, a formally appointed trustee of the Scheme after 10 June 2013. However, under section 30(6), section 29 (1)(b), it does not affect the liability of any person purporting to act as a trustee. By his actions I consider that he continued to assume the character of a trustee and act in that capacity after June 2013. I find that Mr Stanley was a constructive trustee in relation to the Scheme from June 2013 until 22 September 2014, the date Loan Agreement 7 was executed.

D.2.1B Manager

123. If my finding in paragraph 122 is incorrect, I have considered whether Mr Stanley was a "manager" of the Scheme between 10 June 2013 and 22 September 2014, the date

on which the Scheme's records show the last member's transfer to the Scheme, Mr T, was completed.

124. The term "manager," as it relates to occupational pension schemes, is not defined in the Pension Schemes Act 1993 (**the 1993 Act**), but its meaning in Part X of that Act was considered in *Century Life plc & Or v Pensions Ombudsman* [1995] OPLR 351. Dyson J held that:

> "The starting point is that the word "managers" is an ordinary English word, and… where the [party] carries out the day to day running of the scheme, the interested onlooker would be bemused if it was suggested that the [party] was not managing, and not therefore the manager of the scheme."

Dyson J went on to consider whether the expression "manager" should be given a more restrictive definition to the ordinary English word "manager" and concluded it should not. He accordingly concluded that (in that case) an insurance company providing full or partial administrative services to the trustees of an occupational pension scheme could be a manager.

125. For the reasons set out in paragraph 69 above, I consider that Mr Stanley maintained a close involvement with the Scheme. He arranged transfers into the Scheme by members and submitted information to TPR. In addition, he communicated with prospective Scheme members, the Investment Companies' representatives, helped organise the secondary Trust Deed and appeared to hold/oversee all the original files relating to the Scheme. Consequently, if my finding in paragraph 122 is incorrect, I am satisfied that Mr Stanley acted as a manager of the Scheme. I find that Mr Stanley was a manager of the Scheme between June 2013 and 22 September 2014.

D.2.1C Administrator

126. If my findings in paragraphs 122 and 125 above are incorrect, I have considered whether Mr Stanley was an Administrator of the Scheme within the meaning of the 1993 Act, section 146(4A), and Regulation 1(2) of The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996.

127. Mr Stanley was appointed as Scheme Administrator in both the 2013 Trust Deed and in the 2014 Trust Deed.

128. The 1993 Act, section 146(4A), provides:

> "For the purposes of subsection (4) a person or body of persons is concerned with the administration of an occupational or personal pension scheme where the person or body is responsible for carrying out an act of administration concerned with the scheme."

129. Regulation 1(2) of The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 provides:

> "In these Regulations –

[…]

"administrator" –

(a) In relation to an occupational pension scheme, means any person concerned with the administration of the scheme, other than a person responsible for the management of the scheme (as defined in section 146(3) of the 1993 Act[1] for the purposes of Part X of that Act)…"

130. Given that both Mr Green and Mr T gave accounts of Mr Stanley's involvement of certain aspects of Scheme administration in paragraphs 82 and 111 above, in conjunction with his appointment as Scheme Administrator in both Trust Deeds and resignation from director of BWFS, there is sufficient evidence that Mr Stanley acted as an administrator from May 2013 onwards. If my findings in paragraphs 122 and 125 are incorrect, I find that Mr Stanley was a Scheme Administrator between May 2013 and 22 September 2014.

D.2.2 Mr Green's involvement in the Scheme as Trustee or otherwise

D.2.2A Trustee

131. Mr Green was appointed as trustee of the Scheme in the 2014 Trust Deed on 11 February 2014. I have considered the effect of Mr Green executing a new trust deed, rather than a deed of appointment, and the validity of Mr Green's appointment as trustee.

132. Clause 23 of the 2013 Trust Deed provides:

"The Provider or Trustees with the consent of the Provider may, by written instrument, appoint additional trustees or a new trustee in place of any trustee of the Scheme whose office has otherwise been vacated."

The power to appoint a new trustee vests in the Provider, BWFS. I have seen no evidence that such an appointment was made. As at 11 February 2014, the remaining directors of BWFS were Mr Green and Katherine Gittins, so it would have been possible for Mr Green to have approved his appointment as trustee in his capacity as director of the Provider.

133. Mr Green submitted at the Oral Hearing that the intention of executing a new deed was to replace the original 2013 deed that had been inadvertently destroyed by a ceding scheme, and to appoint him as trustee of the Scheme. He confirmed that the intention was not to establish a separate trust or a new occupational pension scheme.

[1] "For the purposes of this Part, the following persons (subject to subsection (4)) are responsible for the management of an occupational pension scheme or a personal pension scheme—
(a) the trustees or managers, and
(b) the employer;
but, in relation to a person falling within one of those paragraphs, references in this Part to another person responsible for the management of the same scheme are to a person falling within the other paragraph."

134. Both deeds purport to establish the BWFS Occupational Pension Scheme and are almost identical. While it would, at the very least, have been prudent for Mr Green and Mr Stanley to have sought advice on how to properly address the issue of the lost original 2013 Trust Deed and on how to appoint Mr Green as trustee, I do not consider that the intention was to create a new scheme. So, I find that Mr Green is a validly appointed trustee of the same trust that was established by the 2013 Trust Deed.

135. Even if that were not the case, Mr Green accepts that he was a trustee of the Scheme between 11 February 2014 to 22 September 2014, and believes that he was validly appointed as such. So, if signing a new version of an establishing deed rather than being validly appointed by the Provider, under the terms of the 2013 Trust Deed, amounted to a fatal defect in law in his appointment as a trustee of the Scheme, I find that he was in any event a constructive trustee during this period.

136. Mr Green has provided a letter from Re10, a restructuring and advisory company, dated 22 September 2014, informing him that his creditors had voted in favour of his proposal to enter into an Individual Voluntary Arrangement (IVA). On the same date, he states that he sent Mr Stanley a handwritten letter resigning as Trustee from the Scheme. Mr Green states that he sent a further letter to Mr Stanley on 27 March 2016, again resigning as trustee.

137. Under clause 23 of the Trust Deed, a trustee's resignation requires the consent of the Provider, BWFS. Companies House records show that in September 2014, Mr Green and Ms Gittins were directors of BWFS, and Mr Green as sole director in March 2016. If these records are correct, it is unclear why Mr Green wrote to Mr Stanley, who was not able to provide consent on behalf of the provider. However, Mr Green stated in the hearing that Mr Stanley amended records at Companies House to present an incorrect record of who was a director of BWFS at various times. In the absence of any evidence from Mr Stanley on this point, it is not possible to draw any firm conclusions as to who was able to provide consent on behalf of the provider in September 2014 and March 2016.

138. In any event, regardless of whether the resignation letters were effective or not, section 29(1)(e) Pensions Act 1995, provides that a person is disqualified for being a trustee if:

> "he has made a composition contract or an arrangement with, or granted a trust deed for the behoof of, his creditors and has not been discharged in respect of it".

As set out in paragraph 118 above, section 30 Pensions Act 1995, operates to remove a trustee automatically in law if section 29(1) applies. I consider that the letter from Re10 provides sufficient evidence to support Mr Green's statements that he entered into an IVA on 22 September 2014. As an IVA is a contractual arrangement between a debtor and his creditors, I find that Mr Green was automatically removed as a trustee of the Scheme under section 30 Pensions Act 1995, on 22 September 2014.

139. So, I find that Mr Green was a trustee of the Scheme between 11 February and 22 September 2014.

D.2.2B Manager

140. In addition to my finding above that Mr Green was a trustee of the Scheme between 11 February and 22 September 2014, I have considered Mr Green's involvement in the Scheme prior to 11 February 2014. Mr Green stated in the hearing that he did not act as a trustee of the Scheme before 11 February 2014, and his role was administrative. On balance, I do not consider that there is sufficient evidence that Mr Green acted as a manager of the Scheme, as defined in paragraph 124 above.

D.2.2C Administrator

141. Mr Green resigned as director of BWFS on 1 October 2013 and has admitted to having been involved in the administration of the Scheme by means of processing transfer paperwork. As a result, it follows that Mr Green acted as an administrator, for the purposes of the 1993 Act, section 146(4A), and Regulation 1(2) of The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996, from 1 October 2013 to 11 February 2014.

D.3 Investment of the Scheme's funds

142. I consider, in this section: to what extent the investment of the Scheme's funds via the Loan Agreements satisfied the statutory and common law requirements in relation to investing pension scheme funds; and the extent to which the Respondents have committed maladministration in connection with their investment acts and/or omissions.

D.3.1 Investment powers and duties

143. The duties imposed on pension scheme trustees in relation to investments are contained in: the pension scheme's documents, such as the Trust Deeds; the Scheme Rules; Part I of the Pensions Act 1995; and case law, as set out below.

D.3.2 Investment powers/duties under the Trust Deed and Rules

144. The relevant provisions of the Trust Deeds, which govern the Scheme's trustee investment powers, are contained in Clauses 13 to 15, see Appendix 3.

145. The relevant provisions of the Scheme Rules can be found at paragraph 48 above.

D.3.3 Statutory investment duties under the Pensions Act 1995 (the **1995 Act**)

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

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

D.3.4 The Investment Regulations

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

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

150. There is no evidence of diversification of investment of the Scheme's funds. The Loan Agreements contain the same terms, set out in paragraph 31 above. Mr Green admitted at the hearing that he did not think that the requirement to have regard to the need for diversification of the Scheme's investments, in accordance with Regulation 7(2) of the Investment Regulations, had been considered at any point leading up to the Scheme's transfers to the Investment Companies. None of the limited submissions made by Mr Stanley suggest that he was aware of the requirements of Regulation 7(2).

151. However, any ignorance of these requirements provides Mr Green and Mr Stanley with no excuse. Knowing, as they did, that they would be directly involved in the investment of other people's pension funds in their role as Trustees, had they acted reasonably, they would have made, at the very least, basic enquiries about the role and 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 each from acting as trustee during the periods I have found they acted as such. But, at the very least, assuming they were acting with the best interests of the members in mind, they would have become aware of the requirement to have some diversification in the Scheme's portfolio.

152. Neither of the Trust Deeds nor the Scheme Rules mention the availability of different types of investments. However, the Information Pack issued to the applicants indicated that the sole investment offered by the Scheme was Loxwood, despite evidence of funds having been transferred to Prosperity, and funds were only invested in those companies. Additionally, the declaration signed by members stated that the Scheme would only invest in "'Regulated Investments' which are provided by FSA regulated investment companies". It is clear, therefore, that there was no attempt to diversify the Scheme's investments outside of the Investment Companies whatsoever. As I have explained in paragraph 167 below, the investments in

Loxwood and Prosperity are high-risk in nature and, as set out in Section D.3.5 below, the Trustees had carried out no due diligence in relation to the investments. Accordingly, I find that the Trustees acted in breach of the requirements of Regulation 7(2) by failing to have regard to the need to diversify investments taking into account all of the circumstances of the Scheme.

D.3.5 Section 36(3) and (4) (Choosing investments: requirement to obtain and consider proper advice)

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

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

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

155. Under subsection (7) of section 36, 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.

156. Mr Green has said that no legal or professional advice was sought in relation to the loan agreements, and Mr Stanley has not disputed this. There is also no evidence of the information each may have received from the directors of the Investment Companies nor any due diligence into their backgrounds. So, based on the information made available to me, the Scheme's investments were completed without having taken any written investment advice whatsoever.

157. Given the statutory requirement, imposed by Regulation 7(2), to diversify Scheme investments, it is more likely than not that, had either of the Trustees obtained investment advice in accordance with section 36, they would have been advised against investing the Scheme's assets in the form of loan agreements with Loxwood and Prosperity.

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

D.3.6 Delegation of the Trustee's power of investment

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

160. Section 34(4), 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".

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

D.3.7 Duties under case law

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

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

163. 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."

164. 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."

165. I find that, in investing the entirety of the Scheme's assets via the Loan Agreements, without taking investment advice, the Trustees cannot be considered to have met the above requirements. The investment was high-risk in nature, rendered the funds illiquid and there was a complete lack of diversification of investment. This showed 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*. I find that the Trustees failed in their equitable duty to exercise due skill and care in the performance of their investment functions.

166. Regarding the investments themselves, I have made the following observations:

- Neither Prosperity nor Loxwood had any trading history as they had both been recently incorporated before the Scheme's investments were made, with no proven track record of profitability or even published accounts;
- Prosperity is located overseas and the information sheet provided to members refers to investments in foreign exchange and contracts for difference, which are recognised to be high-risk, as some of its investment strategies;
- Loxwood's investments involved property development, which would have rendered the majority of the Scheme's assets illiquid;
- Both investments were unregulated, without any means of regulatory redress; for instance, via the Financial Services Compensation Scheme;
- None of the Loan Agreements had any form of security against the Investment Companies, nor did they have any break clauses from the 10-year term.
- The Loan Agreements only provided for payment of interest and repayment of capital after 10 years from the date of each Loan Agreement.

167. Bearing in mind the points set out in paragraph 166 above, the investments would most likely have been classed as exceptionally high-risk and hazardous by any competent financial adviser.

168. The only evidence that the Trustees conducted any due diligence is Mr Green's account of having had a meeting with the director of Loxwood. He believes that

further discussions took place between Mr Stanley and the parties involved in Loxwood. However, there is no record of what was discussed or agreed, and there is no evidence of any independent due diligence. There is no evidence of any due diligence in relation to Prosperity.

169. I find that, by entering into Loan Agreements 2 to 7, the Trustees have failed to meet the minimum standards imposed on them by case law, outlined above in paragraphs 162 to 164 above, regarding their investment of the Scheme's funds. The Trustees have failed to discharge their equitable duty to exercise due skill and care in the performance of their investment functions, which constitutes a breach of trust on their part.

170. It is not in dispute that Mr Green was a trustee from February to September 2014, the period in which Loan Agreements 2 to 7 were executed and funds transferred to Loxwood and Prosperity, but he was not a trustee at the point that Loan Agreement 1 was executed and funds transferred. So, I have considered the extent to which Mr Green is also responsible for the breach of trust identified in relation to Loan Agreement 1.

171. Upon his appointment as a trustee of the Scheme on 11 February 2014, Mr Green was under a duty to inquire what the trust property consisted of[2] and to take appropriate measures as may be necessary for the protection of that property. Although an incoming trustee is entitled to assume that a predecessor or fellow trustees have behaved properly prior to his appointment, in this case Mr Green would have been fully aware that Loan Agreement 1 had been executed two months previously and the funds transferred to Loxwood. Indeed, Mr Green admitted at the Oral Hearing that he might have authorised the transfer of the sum under Loan Agreement 1 to Loxwood from BWFS' bank account himself. Accordingly, Mr Green should, on appointment as trustee, have immediately investigated the circumstances behind Loan Agreement 1, the Scheme's only asset at that time, and raised appropriate requests with Mr Stanley about the due diligence that had been undertaken and the nature of the trust property for which he was now responsible as trustee. He conceded at the Oral Hearing that he made no such requests and carried out no investigation into Loan Agreement 1. I find that his failure to do so amounts to a breach of trust by Mr Green in his capacity as a trustee of the Scheme after 11 February 2014 and a breach of section 36(4) 1995 Act.

D.4 Administration of the Scheme

D.4.1 Trustee duties toward Scheme administration

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

[2] *Hallows v Lloyd* (1888) 39 Ch.D

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

173. Neither of the Trustees have indicated that they had in place, or operated, internal controls in relation to the Scheme's administration. In any case, given the following observations on the Scheme information shared with TPO, I am not satisfied that they had an effective system of governance:

- They did not have a separate Scheme bank account;
- There is no evidence of any formal documentation confirming the Scheme's membership;
- From the records shared with TPO, there was nothing distinguishing the documents held for the Scheme membership from those held as 'leads' created for other pension schemes;
- The 2015 annual statements appear to be missing;
- There is no documentation confirming the total of the Scheme's finances and/or assets.

174. I have seen nothing to suggest that the Trustees were aware 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 Trustees of the Scheme. Mr Green admitted at the hearing that he undertook no training before or after his appointment as Trustee and I have seen no evidence that either Trustee completed any modules of TPR's Trustee toolkit.

175. I note Mr Green has admitted that he did not understand the role or know the duties and responsibilities of a trustee and he did not have the time to learn about these. He has stated that this was because he was not provided with relevant information and that he inherited a disorganised Scheme from Mr Stanley. However, this does nothing to lessen his responsibility as a trustee. Both Mr Green and Mr Stanley should have made the appropriate enquiries to ensure they knew what being a pension trustee entailed before accepting appointment as such. Consequently, I find that the Trustees acted in breach of section 247 and 249A of the Pensions Act 2004.

D.4.2 Conflict of Interest

176. As explained in paragraphs 116 and 119 above, Mr Stanley was validly appointed as a trustee of the Scheme from 15 May to 10 June 2013. Mr Green was validly

appointed as Trustee of the Scheme from 11 February 2014 to 22 September 2014. While Mr Stanley was automatically removed as a trustee by operation of the 1995 Act, section 30(1), he continued to act as a constructive trustee of the Scheme until 27 June 2014. Further, despite Companies House records showing multiple resignations and appointments as directors of BWFS, which may be inaccurate in any event, by the commissions paid by Gladstone, Mr Stanley and Mr Green personally gained financially from the Scheme's funds being transferred to the Investment Companies. This gain was by payments made to each directly, and generally in supporting the operating viability of BWFS.

177. The Trustees were under a fiduciary duty not to profit from their position in relation to BWFS at the expense of the Scheme's beneficiaries and not to be in a position of conflict of duty or interests.

178. The Trustees were also under a common law duty to act with prudence, requiring them to take such care as an ordinary prudent man of business would take in managing their own affairs[3]. Case law[4] has further established that the standard of prudence is to be determined by reference to the actions of an ordinary man of business, who was under a moral obligation to provide for others.

179. 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 Trustees. The 2013 Code was replaced by a new code[5] in July 2016 (the **2016 Code**).

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

181. Paragraph 143 of the 2013 Code also states that the statutory requirement under the Pensions Act 2004, section 249A, 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.

182. Given that the undisclosed commission received from the Investment Companies was being used both to support BWFS' operations, as well as being paid to Mr Stanley, Mr Green and Mr Green's wife, their roles in relation to BWFS, and as Trustees, clearly resulted in their interests being conflicted.

183. Therefore, Mr Green and Mr Stanley have breached the requirement of the Pensions Act 2004, sections 247 and 249A, and have acted in breach of their fiduciary duty not to be in a position of conflict of duty or interests. The Trustees also failed to act in

[3] Speight v Gaunt [1883] EWCA Civ 1.
[4] Re *Whiteley* (1886) 33 ChD 347.

accordance with the 2013 Code, and I find that such failure, to have regard to the 2013 Code, amounts to maladministration by the Trustees.

184. By taking secret commissions Mr Green and Mr Stanley also acted in breach of their fiduciary duty not to personally profit from their position as fiduciaries. Irrespective of Mr Green seeking to characterise the payments as a “business transaction" between BWFS and the Investment Companies, the sums being loaned were Scheme assets and I have seen no evidence that the commission payments were disclosed to, or authorised by, the scheme members. Indeed, the Scheme’s explanatory literature referred only to an administration fee of £999. As set out in paragraph 17 above, the explanatory literature stated that commissions would be rebated to members. I have seen no evidence to suggest that members consented to commissions being paid to BWFS or Mr Stanley, Mr Green or Mr Green’s wife personally. I find that the taking of secret commissions amounts to a breach of fiduciary duty by Mr Green and Mr Stanley.

185. While the Trustees may argue that they were unaware of any duty or requirement to avoid conflicts of interest, they cannot have been oblivious to the fact that, as Trustees, they were responsible for large sums of money transferred into the Scheme by members, which would be relied upon to sustain themselves during their later years. I have seen no evidence that the Trustees made enquiries regarding the requirements imposed on them in their role as Trustees. 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. I also find it extremely concerning that Mr Green, when giving oral evidence, did not appear to consider that the taking of secret commissions was in conflict with his and Mr Stanley’s duties as Trustees.

186. It should be noted that Mr Green’s later engagement with TPR does not alter the fact that at the outset he chose not to ascertain the duties imposed on him as a Trustee and, crucially, during the period in which members’ funds were invested. It seems that Mr Green chose not to take any action until the circumstances made it necessary to do so, by which time all of the Scheme’s assets were already invested in either Loxwood or Prosperity, in flagrant breach of his fiduciary duties.

187. I find that Mr Stanley and Mr Green acted in breach of trust by failing to fulfil their duty to avoid conflicts of interest and duty not to profit from their position as Trustees. I also find that Mr Green and Mr Stanley acted in breach of sections 247 and 249A of the Pensions Act 2004, and committed maladministration, by failing to have regard to the Code in relation to managing conflicts of interest.

D.4.3 Other payments

188. I do not have sufficient evidence to make a finding as to whether all members of the Scheme received a rebate. However, I understand that Ms E, Mr N and Mr T, who have confirmed the receipt of 20% of their transferred fund value, received it in the form of a commission rebate. BWFS claimed this rebate was being paid by the

Investment Companies. However, a number of Scheme members (prospective members at the time) also received a letter from BWFS when their transfers to the Scheme were being processed. This suggested that the time taken was due to questions raised by the ceding scheme in relation to the possibility of members accessing their pension before age 55, which BWFS described as "pensions liberation and although not illegal, it is not liked by pension companies." Although not conclusive, this strongly suggests that the 20% "commission rebates" were, in reality, sums paid out of the transferred funds by those members who received a rebate.

189. At the Oral Hearing Mr Green conceded that it was possible that the commission rebates had been taken from members' funds. In conjunction with the fact that Loxwood had been recently incorporated and had no declared assets in 2013, it is extremely unlikely that the company would have been in a position to pay a commission of 20% to scheme members, and 15% to Gladstone, on the loaned sums, even if such an excessive level of commission represented the commercial cost of funds for a company such as Loxwood, that had been recently incorporated with no trading history.

190. The Respondents have provided no substantive information regarding Prosperity, and there is nothing to suggest that the payment structure of commissions by Prosperity to Gladstone would have been different to those paid by Loxwood.

191. As a result, I find, on the balance of probabilities, in respect of those members who received a 20% rebate, that rebate and the 15% secret commission received by BWFS from Gladstone, in respect of those members' transfers, were both taken from those members' transferred funds. Therefore, it appears that the 20% rebates paid were unauthorised payments under section 160(2) of the Finance Act, and a form of pension liberation. In allowing these unauthorised payments to be made, Mr Green and Mr Stanley have committed maladministration.

D.4.4 Administrator duties toward Scheme administration

192. Mr Stanley has not demonstrated that he, either had the necessary skills, experience or knowledge to act as the Scheme's administrator, nor that he had acquired them. So, if Mr Stanley acted solely as an administrator, as set out in my finding in paragraph 130 above, I find that the findings in sections D.4.2 and D.4.3 above, in conjunction with his failure to issue annual reports, respond to members' queries and report any concerns about Mr Green's acts and/or omissions to TPR, amounts to exceptional maladministration.

D.5 Information provided to members

193. The benefit statements, which I understand were issued to members on an annual basis (see Section A.5 above), gave the impression that members would be due to receive back the amount of their fund that had been transferred into the Scheme, plus 3.5% simple interest, on the loan agreement's tenth anniversary. These benefit statements continued to be issued on BWFS letterheaded paper after BWFS' dissolution.

194. Mr Green explained at the Oral Hearing, that he did not monitor the investments once the agreements were in place, nor did he receive any updates from Prosperity or Loxwood. So, when he issued the annual statements from 2015 onwards, there was no way of knowing whether the investments were performing as both the Investment Companies and the Trustees had hoped and that the 3.5% simple interest was applicable.

195. The Trustees were under a duty to act honestly and in good faith. Although it appears to have been Mr Green who issued the annual statements on behalf of Mr Stanley, who was aware that he owed a responsibility to the Scheme (see paragraph 88 above), given the repetitive nature of the annual statements, I find that both Trustees would have known of their content. By providing members with false information, failing to verify the status of the investments with the investee companies, withholding the fact that BWFS had been dissolved, and disregarding the impact this would have on the Scheme and its investments, the correspondence was clearly not carried out honestly or in good faith. Mr Stanley and Mr Green have, therefore, clearly acted in breach of their duty to act honestly and in good faith.

D.6 Member consent/Contributory negligence

D.6.1 Member consent

196. 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).

197. 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."*

198. 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."*

199. Underhill and Hayton: Law of Trusts and Trustees[6] [7] 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[8]"; "had full knowledge of the facts and knew what he was doing[9] and the legal effect thereof[10], 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[11]) that he should himself have directly benefited by the breach of trust[12]"; and "no undue influence was brought to bear upon him to extort the assent or release[13]."

200. 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."

201. In this case, I have seen no indication that any of the Applicants were acting under the undue influence of another, and none of the Applicants have stated that they did not transfer their funds to the Scheme freely. Each Applicant was also of full age and capacity. However, the Scheme membership, upon joining the Scheme, signed a Transfer Instruction that said that they had been advised that the Scheme would only permit 'Regulated Investments' which were provided by FSA (as it then was) regulated investment companies and that 'Non-Regulated' Alternative Investments were not permitted to be held within the Scheme. As highlighted throughout this Decision, this is not what actually happened and I have seen no evidence that members were aware that the Scheme and investments were being operated contrary to what they had been told, or that they consented to this.

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[6] Paragraph 1 of Article 95 of the 19th edition.
[7] 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).
[8] *Lord Montford v Lord Cadogan (1816) 19 Ves 635; Overton v Banister (1844) 3 Hare 503 at 506.*
[9] *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
[10] *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.
[11] *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].
[12] *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.
[13] See paragraph 200 above.

202. Moreover, members also received false annual statements, as outlined in section A.5 above, that stated their pension had grown at 3.5% simple interest, and would continue to grow at that rate for 10 years from the date of investment. The statements also stated that the selected investment vehicles were chosen for their safety and assurance, and that the "utmost due diligence was exercised when selecting the investment vehicle" which would be monitored to ensure the members' investments were safe and secure.

203. Taking this into account, I consider that none of the Applicants had full knowledge of the facts or terms of the underlying investments and consequently did not concur or acquiesce to the Trustees' multiple breaches of trust. So, I find the Applicants are not prevented from taking action against the Trustees in respect of those breaches of trust.

D.6.2 Contributory negligence

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

205. 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'"[14].

206. It is explained, in Underhill and Hayton, that "Where the trustee has acted fraudulently, a further reason for denying him the defence would be the rule that it is no excuse for someone guilty of fraud to say that the victim should have been more careful and should not have been deceived"[15].

207. As I have stated in section D.3.7 above, duties imposed on the Trustee by case law required him to invest members' funds prudently and with regard to members' best financial 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 Trustees have breached all of those duties.

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

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[14] 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].

[15] 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.

D.7 The Trustees' liability

209. I shall now consider the effect of the statutory provisions under section 33 (**Section 33**) of the1995 Act, and also, to the extent that section 33 might not apply, for example in respect of administration breaches, or the extent to which the Trustees might be able to rely on the exoneration provisions under the Scheme's Trust Deeds. Finally, I shall consider Section 61 (assuming it applies), and the extent to which the Trustees should be afforded relief from personal liability under its provisions.

D.7.1 The Pensions Act 1995, Section 33

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

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

211. The Trust Deed contains an exoneration clause for the Trustees, which I have set out at paragraph 45 above. However, 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).*

212. 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. I have not seen any evidence that members indemnified

the Trustees, however, I consider in paragraphs 213 to 214 whether section 33 would apply to any such indemnity.

213. 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 section D.7.2 below), 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.

214. I consider that the written indemnity in this case would properly be regarded as forming part of the documents comprising the Schemes. "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".

215. On that basis, I consider that section 33 applies to the exoneration clauses under the Trust Deeds[16]. This renders the exoneration clauses ineffective in preventing the Trustees from being held personally liable for any loss suffered by members in relation to the Trustees' breach of their investment duties, imposed by statute (see Sections D.3.3 to D.3.5 above) and/or common law (see Section D.3.7 above) by having invested the Scheme's assets in Prosperity and Loxwood.

D.7.2 Exoneration Clauses under scheme documentation

216. The exoneration clauses under the Trust Deeds are set out in paragraph 45 above. Of particular relevance are the following provisions under those clauses:

> "Neither the Provider nor the Trustees shall be personally liable for any acts or omissions not due to their own **wilful neglect or default** and, in particular, shall have no responsibility to or in respect of a Member in connection with investments made at the option or direction of that Member or any person authorised to exercise such option or make such direction on the Member's behalf." (bold emphasis added).

217. The leading case on the meaning of wilful default is Re Vickery [1931] 1 Ch 572, where Maugham J construed the words as meaning a "consciousness of negligence or breach of duty, or a recklessness in the performance of a duty". In Armitage v Nurse, Millet LJ said that wilful default meant "a deliberate breach of trust" and that to establish wilful default "nothing less than conscious and wilful misconduct is sufficient". Referring to Re Vickery, he said:

[16] 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 D.7.2.

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

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

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

219. 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."

220. 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".

221. 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.

222. 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…"

223. 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.

224. In the later case of *Fattal v Walbrook Trustees (Jersey) Limited* [2010] EWHC 2767 (Ch)[17], 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*[18] the test for dishonesty, at least in

[17] 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.

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

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.

225. While Mr Green and Mr Stanley received no remuneration in respect of their office as Trustees, their position could be regarded as analogous to that of professional trustees. Both Trustees benefitted from the commission payments paid by Gladstone to BWFS, which were remitted to them personally and also used to fund the business operations of BWFS generally.

226. Although Mr Green, by his own admission, lacked any experience as a pension scheme trustee, and I have seen no evidence that Mr Stanley had any such experience, I cannot see how the existence of a duty of care in relation to members' funds can reasonably have escaped the Trustees' notice, particularly so given that both had previously held qualifications as financial advisors and had worked in the financial industry. Each also acted as a director of BWFS and, in Mr Stanley's case, multiple other companies so would or should be aware of the concept of director's fiduciary duties, which are akin.

227. I have already found that the Trustees acted in breach of trust by: breaching their fiduciary duty to manage conflicts of interest and their duty not to profit from their positions as Trustee (see Section D.4 above); 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 D.4 above); 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 D.4 above); failing to have regard to the 2013 Code and the 2016 Code (Section D.4 above) and providing false information to members, in breach of the Trustees' fiduciary duty to act honestly and in good faith (Section D.5 above). All of these breaches of duty and findings of maladministration are intertwined and have led, directly or indirectly, to the loss of Scheme funds.

228. Mr Green submitted at the Oral Hearing, that he believed the investments offered through the Scheme to be a good opportunity and one in which he would have invested himself had he had the money to do so; and he was unaware of his duties and responsibilities as a pension scheme trustee. I have received no response from Mr Stanley.

229. As I have explained, the applicable test, which has been developed by case law since Armitage, is partly objective. Here the circumstances cast significant doubt on the Trustees' honesty because both profited, on their own account and as principals of BWFS, from secret commission payments received from Gladstone. By promoting the Scheme to prospective members, both would receive 15% commissions from any transferred sums.

230. Mr Green's honesty may be questioned further because, on his own submissions, he failed to ask any questions concerning his duties and necessary level of knowledge as a Trustee, or to take any advice before further investments were made. On his own submissions he did not raise any concerns with Mr Stanley or attempt to take any advice before further sums were loaned to Loxwood and Prosperity.

231. 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 in paragraphs 232 to 241 below, I consider that both Trustees' perception of the interests of the Schemes' beneficiaries was so unreasonable that no reasonable trustee could have held such a belief.

232. No evidence has been presented that the Trustees carried out any due diligence into Loxwood or Prosperity. Mr Green submitted that Mr Stanley was responsible for identifying the investments and any due diligence but, even if this was the understanding between them, Mr Green chose to take Mr Stanley's word that the investments were sound. On his own submission Mr Green asked no questions of Mr Stanley and agreed to become a Trustee. Once he had been appointed as a Trustee, he knew so little of the requirements of that role that he was unaware that he was required to act in members' best financial interests in investing their funds.

233. Mr Green and, on the evidence available, Mr Stanley, chose to regard Loxwood and Prosperity as safe investments in circumstances where the most cursory investigation would have revealed that Loxwood was a recently incorporated company with no assets or trading history. Notwithstanding the highly opaque investment strategy offered by Prosperity, it was also clear that Prosperity was based in Hong Kong and that this fact alone would necessitate enhanced consideration of the security of members' funds held outside the UK.

234. It is not disputed that the Trustees took no investment advice whatsoever before lending the Scheme's assets to Loxwood and Prosperity. Without any proper professional advice, I cannot see how the Trustees 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. I find that the Trustees were only able to sustain the belief that the Loan Agreements were suitable because they turned a blind eye and refrained from asking obvious questions. Each closed his eyes and ears for fear of learning information they would rather not know, that is, they were under certain fiduciary and statutory duties as Trustees which, if fulfilled, would have forced them to conclude that the investments in Loxwood and Prosperity were not in the members' best financial interests, so that investing in that manner would amount to acting in breach of their fundamental fiduciary duties.

235. A reasonable and honest trustee in the Trustees' position would have raised questions to assure themselves that the Scheme's investments in Loxwood and

Prosperity, as well as taking secret 15% commission payments and 20% payments to the members, were proper transactions in the members' best financial interests and accorded with their duties and obligations as Trustees. 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, regardless of when they became Trustee or their involvement in establishing the Loan Agreements. That the Applicants were not informed that BWFS would receive secret commissions is further evidence of the Trustees' awareness that that payment was not in the members' best financial interests.

236. The receipt by the Trustees of secret commissions via Gladstone for sums loaned by the Scheme to Loxwood and Prosperity suggest that such investments would be pursued regardless of the members' interest. The Trustees placed themselves in an obvious conflict of interest yet proceeded regardless to loan Scheme assets, as Mr Green admitted at the Oral Hearing, recklessly and on highly favourable terms given the risk profile of Loxwood and Prosperity. I do not accept that a reasonable trustee could have believed that making these payments and investments would be in the members' financial interests. A reasonable trustee would have had regard to the circumstances known to him, including the nature and purpose of the proposed transactions, the nature and importance of his roles and any conflicts of interest and the seriousness of the adverse consequences to the beneficiaries. By loaning the Scheme's assets to Loxwood and Prosperity the Trustees took a decision to benefit themselves and BWFS in their capacity as principals of BWFS and not to exercise independent judgment as Trustees.

237. Mr Green has, throughout TPO's investigation and at the Oral Hearing, sought to characterise his role and responsibility as less than that of Mr Stanley. On his own submissions, he placed a great deal of reliance on Mr Stanley. While I agree that any such reliance was certainly misplaced, I do not consider that this is remotely exculpatory of Mr Green's conduct. By his own submissions, Mr Green asked no questions and carried out no due diligence into Loxwood and Prosperity. He has claimed that he believed that Mr Stanley had carried out due diligence but has admitted that he asked no questions as trustee to confirm that belief was reasonable. Mr Green has stated that he inherited a disorderly scheme, but on his appointment as trustee it was his responsibility to address that disorder. He has presented no evidence that he attempted to do so. To the contrary, BWFS' bank records show Mr Green and Mr Green's wife personally received significant sums paid by BWFS from the secret commission payments during the period he acted as trustee. As set out above in paragraph 194 above, after September 2014 Mr Green wrote to members to assure them of the safety of their investments, even after BWFS had been dissolved. He provided false statements to members which blindly added yearly interest onto the value of their benefits within the Scheme, despite carrying out no checks to confirm the accuracy of that information. He continued to provide false information to members alleging Mr Stanley's sole responsibility to the Scheme, despite his appointment as trustee between 11 February and 22 September 2014. He has since claimed that his provision of inaccurate information to members was at the insistence

of Mr Stanley. But he was free to refuse. I have seen no persuasive evidence to suggest that his overall role or responsibility was less than that of Mr Stanley.

238. I conclude, on the balance of probabilities, having regard to the evidence and submissions received, that the Trustees' belief that: loaning Scheme assets to Loxwood and Prosperity, was in the members' best financial interests; making unauthorised payments to members under the age of 55; taking secret commissions out of members' funds via BWFS; and their failure to take proper advice on the Loan Agreements, or inform themselves of their responsibilities and duties as pension scheme trustees were so unreasonable that no reasonable trustee could have held such a belief that such actions were reasonable. Alternatively, looking at the first limb of the test set out in Fattal v Walbrook, I find that the Trustees were recklessly indifferent as to whether their various breaches of trust and maladministration were contrary to the interests of the beneficiaries.

239. I have also considered the subjective test set out in Armitage, which would apply if the Trustees are not to be regarded as quasi-professional trustees. As I have explained, the Trustees' failure to make even basic enquiries as to the existence of any duties or obligations imposed on them as Trustees, clearly amounts to reckless indifference regarding their duties and obligations as Trustees, such that, they cannot rely on the exoneration clauses under the Trust Deeds in respect of any of my findings of breach of trust or maladministration.

240. 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". The willingness by the Trustees to take secret commissions for their and BWFS' benefit out of trust assets and without informing members, means that the Trustees cannot be said to have acted honestly or in good faith.

241. Therefore, even if the Trustees' 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 Trustees beliefs were not honest or reasonable and they cannot be excused for the breaches of trust that they have committed.

D.7.3 Section 61 of the Trustee Act 1925

242. Under Section 61, I may direct relief, wholly or partly, of a trustee's personal liability if it appears to me that: (1) the trustee acted honestly and reasonably; and (2) it would be fair to excuse the trustee from personal liability, having regard to all the circumstances of the case.

243. Having already found, in Section D.7.2 above, that the Trustees failed to act honestly or reasonably, I cannot see that the criteria set out in Section 61 can apply to the Trustees' acts and omissions. Therefore, I find that the Trustees are unable to rely on

Section 61 for any relief from personal liability for the various breaches of trust that I have found them to have committed.

D.8 Accessory Liability for dishonest assistance in a breach of trust

244. As explained in paragraphs 119 to 122 above, I found that Mr Stanley was a constructive trustee of the Scheme between 10 June 2013 and 22 September 2014. I found that Mr Green was an express trustee of the Scheme between 11 February and 22 September 2014, or alternatively trustee of a constructive trust between those dates. I have found in paragraphs 242 and 243 that Mr Green and Mr Stanley are personally liable as trustees of the Scheme and are unable to rely on Section 61.

245. If my finding in paragraph 122 is incorrect, I have considered whether Mr Stanley is liable in his capacity as a manager or, if my finding in paragraph 125 is incorrect, as administrator of the Scheme, as a dishonest accessory to a breach of trust. A dishonest accessory to a breach of trust is liable to account to the beneficiaries in respect of the breach of trust as though he were a trustee.

246. The test for accessory liability was set out by Lord Nicholls in Royal Brunei v Tan as follows:

> "A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation. It is not necessary that, in addition, the trustee or fiduciary was acting dishonestly, although this will usually be so where the third party who is assisting him is acting dishonestly."

247. The first requirement in Lord Nicholls' formulation is that there must be a trust. It is not in dispute that the Scheme was constituted as a trust between May 2013 and September 2014. I found that, despite the execution of a new trust deed, the intention of the parties was to appointment Mr Green as trustee of the Scheme, not to constitute a new trust. In the alternative, I found that the Scheme assets were held in a constructive trust (see paragraphs 134 to 135 above). So, the first stage is met.

248. The second requirement is that there has been a breach of trust. I found that entering into Loan Agreements 2 to 7 amounted to breaches of trust by Mr Green (see paragraph 68 above).

249. The third requirement is that the trustee, Mr Green, was assisted in committing the breach of trust by another person, the accessory to the breach of trust. Assistance in this context means conduct which in fact assists the commission of the breach of duty[19] and must enable the breach by the trustee to be committed[20].

[19] *Madoff Securities International v Raven* [2013] EWHC 3147 (Comm)
[20] *Goldtrail Travel Ltd v Aydin* [2014] EWHC 1587 (Ch)

250. The final requirement is that the accessory to the breach of trust must have acted dishonestly. The relevant test to establish dishonesty is set out in Royal Brunei v Tan at paragraph 218 above. In applying the test, Lord Nicholls held that:

> "unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless."

D.8.1 Mr Stanley – alternate liability as a dishonest accessory

251. I found that investing Scheme funds with Loxwood and Prosperity via Loan Agreements 2 to 7 amounted to breaches of trust (see paragraph 169 above). When each agreement was signed, Mr Green was trustee of the Scheme, or alternatively trustee of a constructive trust in which the members' transferred sums were held for the benefit of members. Accordingly, there was a trust, and Mr Green was responsible for multiple breaches of trust which meet the first two stages of the Royal Brunei test.

252. I consider that Mr Stanley's actions in executing Loan Agreement 7, in his stated capacity as an administrator of the Scheme, and witnessing, at least, the signatures of Loan Agreements 2, 3, 4, 5 and 7, amounts to assisting Mr Green in carrying out those breaches of trust. The Loan Agreements were the sole documents governing the terms on which the Scheme's funds were invested. In the absence of any evidence to the contrary, Loan Agreements 2, 3, 4, 5 and 7 would not otherwise have been executed.

253. The final requirement is that Mr Stanley must have acted dishonestly in assisting in the breach of trust. Returning to the statement by Lord Nicholls in Royal Brunei concerning investment (see paragraph 219 above):

> "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 if the transaction serves another purpose in which the person has an interest of his own**." [My emphasis]

254. The bank records provided during the course of the investigation show that Mr Stanley personally received commission payments, which were not disclosed to members. Mr Green confirmed at the Oral Hearing that the commission payments were paid by Gladstone in respect of transfers to Loxwood and Prosperity. It is clear that the more funds were invested through Gladstone with Loxwood and Prosperity, the more commissions would be paid to BWFS, which in turn could be disbursed to Mr Green and to Mr Stanley.

255. I consider that Mr Stanley was not merely acting imprudently by assisting in arranging and executing the Loan Agreements. Mr Stanley had a clear financial interest in the

Scheme entering into the Loan Agreements, his receipt of a proportion of the commission payments. The receipt of these payments fundamentally changes the complexion of his actions from imprudence to a degree of recklessness, given the nature of the Loan Agreements. I believe that the degree of recklessness was far beyond that, which an imprudent but honest individual in Mr Stanley's position, knowing what Mr Stanley knew, would have taken.

256. Applying Lord Nicholl's test for dishonesty (see paragraph 250 above), I consider that it could not have escaped Mr Stanley's attention that executing or witnessing illiquid unsecured loan agreements, under which no capital or interest payments were due for ten years, could not possibly have been in the best financial interests of the beneficiaries. In the context of Mr Stanley's willingness to receive significant undisclosed commissions, which derived from entering into those loan agreements, I consider that, at the very least, he deliberately closed his eyes and ears and failed to ask obvious questions of the investee companies, lest he learn something he would rather not know, and proceeded regardless. I find that Mr Stanley acted in a manner that meets the Royal Brunei test for dishonesty.

257. So, in the alternative that set out in paragraph 241 above where I found Mr Stanley personally liable as a trustee of the Scheme, I find that Mr Stanley, in his capacity as manager or, if my conclusion in paragraph 125 is incorrect, as administrator of the Scheme, dishonestly assisted Mr Green in entering into Loan Agreements 2 to 7. He is therefore liable to account for the sums transferred by the Applicants as if he were a trustee of the Scheme alongside Mr Green.

Decision

258. The Trustees have committed multiple breaches of trust, and have committed many acts of maladministration, as summarised in paragraph 227 above, which have caused the likely loss of the members' pensions.

259. The Trustees are not entitled to rely upon any defence of member consent of contributory negligence (see Section D.6 above).

260. The Trustees cannot rely upon any exoneration provisions or indemnity, as explained in Section D.7.2 above, and are afforded no relief from personal liability for the consequences of their multiple breaches of trust and acts of maladministration, as explained in Section D.7.3 above.

261. There is no real prospect of the sums being repaid by Loxwood or Prosperity under Loan Agreements 1 to 7. Although the terms of the Loan Agreements provide that a balloon repayment of capital plus interest falls due on the tenth anniversary of each Loan Agreement, between December 2023 and June 2024, Loxwood has been dissolved and the sums loaned to Loxwood under Loan Agreements 1 and 6 amount to £666,447.33. In addition, Loan Agreement 6 was entered into between BWFS and Loxwood, and BWFS is also dissolved. In relation to Loan Agreements 2, 3, 4, 5 and 7, the parties have been unable to provide any information regarding the current

status of Prosperity. No information is currently available regarding Prosperity's business, it is located overseas, and the brochures provided to members refer to investments in foreign exchange and contracts for difference, which are recognised to be high-risk. So, even if Prosperity still exists, the prospect of recovering the sums loaned is remote. On the basis of the evidence available, I find that the Loan Agreements have no monetary value.

262. My power to award redress, including those with regard to distress and inconvenience, comes from the 1993 Act, s151(2):

> "Where the Pensions Ombudsman makes a determination under this Part of 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…"

263. 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 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.

264. 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 (that it fell above the non-exceptional level).

265. It was as a direct result of the judges' comments in the *Smith* and *Baugniet* cases that TPO 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 (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.

266. 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 Respondents' actions over a number of years.

267. The circumstances of the complaint have clearly caused the Applicants an exceptional level of distress and inconvenience. They were significantly misled as to the cost and security of the arrangement they were entering into. In addition, they have not been kept informed with the issues that the Scheme found itself in, which has affected their quality of life detrimentally.

Putting things right

268. Within 28 days of the date of this Determination, the Respondents shall pay into the Scheme:

- the sum of £825,210.32, which represents the Total Loan Sum less:
  - the current value of the Loan Agreements (£0); and
  - the sums paid to members which have been evidenced (£33,469.06); plus
- interest on the above sum at the rate of 8% per annum simple from the date of the Determination to the date of payment.

269. For the exceptional maladministration causing injustice, within 28 days of the date of this Determination, the Respondents shall pay the sum of £6,000 to each of the Applicants.

270. For the avoidance of doubt, the Respondents shall be liable to pay the sums in paragraphs 268 and 269 on a joint and several basis.

Reporting to TPR

271. On issuing this Determination, I intend to pass a copy of it to TPR.

Anthony Arter

Pensions Ombudsman
6 October 2022

Appendix 1

Applicants

Pensions Ombudsman's Reference	Name of Applicant
CAS-13509-L3N4	Ms E
CAS-33704-S3F0	Ms S
CAS-44432-G8X6	Mr N
CAS-77082-C4B0	Mr T

Appendix 2

BWFS Director appointments and resignations – Companies House

17 May 2012	BWFS Incorporation with Mr Green and Mr Stanley as Directors
09 June 2013	Mr Stanley resigned and Ms Stanley was appointed.
01 October 2013	Mr Green resigned.
24 October 2013	Ms Stanley resigned and Ms Gittins was appointed.
01 January 2014	Mr Green was appointed.
27 January 2015	Ms Gittins resigned and Mr Green and Mr Stanley were appointed.
28 January 2015	Ms Gittins was appointed.
01 January 2016	Mr Stanley and Ms Gittins resigned.
19 December 2016	Mr Green resigned.

BWFS Director appointments and resignations according to Mr Green

17 May 2012	BWFS Incorporation with Mr Green and Mr Stanley as Directors.
09 June 2013	Mr Stanley resigned and Ms Stanley was appointed.
01 October 2013	Mr Green resigned.
24 October 2013	Ms Stanley resigned and Ms Gittins was appointed.
27 January 2015	Ms Gittins resigned and Mr Green and Mr Stanley were appointed.
19 December 2016	Mr Green resigned.
10 March 2017	Mr Stanley filed several entries at Companies House and backdated them. These included: Mr Green's appointment on 01 January 2014, and Ms Gittins and Mr Stanley's resignation on 01 January 2016.

PO-26647

Appendix 3

Extract of the Scheme's Trust Deed

Clause 11: "The Trustees shall ensure that, in relation to each Arrangement of a Member, all contributions and other amounts paid by or in respect of the Member to the Scheme as permitted by the Rules are applied in accordance with the Arrangement and that, in the case of each and every Arrangement, a separate and clearly designated record is maintained in respect of each Member's Fund under the Scheme."

Clause 12: "An option conferred on a Member in accordance with an Arrangement under the Scheme may be exercised only by giving notice -
12.1 in writing to the Scheme Administrator at such address as is nominated by the Trustees for that purpose; or
12.2 by such electronic means as may be approved by the Trustees for that purpose."

Clause 13: "All assets, investments, deposits and monies held for the purpose of the Scheme shall be in the legal ownership and under the control of the Trustees, whether jointly or by one or more trustees acting on behalf of them all. However, the Trustees may, with the written consent of the Providers, place those assets, investments, deposits and monies in the name of or under the control of a body corporate as nominee."

Clause 14: "The Trustees shall have and be entitled to exercise all powers, rights and privileges necessary or proper to enable the Trustees to carry out all or any transaction, act, deed or matter arising under or in connection with the Scheme but the Trustees shall, subject to the restrictions contained in this Deed and any requirements of the Board of Revenue & Customs at the time, take into account any specific written wishes of a Member (or of any person acting on a Member's behalf with the Member's prior written authorisation) as to the manner in which such Member's Fund is invested."

Clause 15: "The Trustees may, with the consent of the Provider, engage in any lawful transaction not specifically authorised by the other provisions of this Deed which would, in the opinion of the Trustees, benefit the Scheme or any Arrangements under the Scheme. This is however subject to the status of the Scheme as a Registered Scheme under Part 4 of the Finance Act 2004 not being prejudiced, whether by reason of a breach of the requirements and restrictions concerning permitted investment issued by the Board of Revenue & Customs in respect of pension schemes or otherwise."