PO-7292, PO-7951, PO-8118, PO-6703, PO-12813, PO-7616, PO-8801, PO-11753, PO-11759, PO-10259, PO-12802, PO-12801, PO-10848 & PO-10229

Ombudsman's Determination

Applicant	Mr L & Mr S, Ms R, Mr E, Mr DY, Mrs RE, Ms T, Mr ES, Mr LE, Ms N, Mrs G, Mr G, Mr ER, Mr RY (together the **Additional Applicants**)
Scheme	Henry Davison Limited Pension Scheme (the **Scheme**)
Respondents	Mr Anthony Davison and Mrs Penny Davison, as trustees of the Scheme (the **Trustees**)

Outcome

1. Mr L's and the Additional Applicants' complaints are upheld and to put matters right the Trustees shall comply with the directions set out in paragraphs 230 to 232 of this Determination.

2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr L's complaint is that the Trustees have: misrepresented the Scheme; mismanaged the funds; issued fabricated benefit statements; and that the funds that he transferred into the Scheme have been lost.

4. Thirteen 'Additional Applicants' have complained on identical issues against the Trustees. These have been associated with Mr L's complaint by my office. This means that the conclusions made below in respect of Mr L's case apply equally to the associated cases.

Oral hearing

5. On 28 August 2018, I issued my Preliminary Decision in respect of these cases (the **Preliminary Decision**). None of the parties disputed the findings that I made in the Preliminary Decision. However, as I was not able to determine all of the issues on the basis of the written submissions I had received from the parties, and because I had found, on a preliminary basis, that the Trustees might be held personally liable for their acts and omissions, I held an oral hearing on 21 January 2019 (the **Oral Hearing**). The Oral Hearing was attended by Mr Davison (on behalf of himself and Mrs Davison) and by Mr L and three of the Additional Applicants (Mr E and Mr and Mrs G).

6. Below, I set out my findings under the Preliminary Decision as well as the conclusions that I have reached as a consequence of the Oral Hearing.

Background information, including submissions from the parties

Background

7. Mr and Mrs Davison are Co-Directors of Henry Davison Limited.

8. At the Oral Hearing, Mr Davison confirmed that in 2008 he had met Mr Andrew Meeson. Mr Meeson was the owner of Tudor Capital Management (**TCM**) and former president of the Association of Taxation Technicians (see paragraphs 14 and 39 below). Mr Davison commented that Mr Meeson seemed adept in pensions and corporate trust investment.

9. The Scheme was established in May 2008, using documentation provided by TCM, under an irrevocable trust. The documentation indicates that the Scheme was intended to be a money purchase occupational pension arrangement. The Scheme's trustees were Mr and Mrs Davison and TCM as "Managing Trustee".

10. At the Oral Hearing, Mr Davison explained that:-

- He had set the Scheme up to enable him to trade in financial products, that is, contracts for differences (**CFD**) and Forex. He used his own pension, having previously lost all of his other savings, worth around £2 million to £3 million, to a scam when trading in the same financial products in 2007. Initially, Mr Davison had been the only member of the Scheme.

- He had not sought financial advice before establishing the Scheme, as he considered himself to be sufficiently qualified, having gained the following experience:

  - being employed by Equitable Life from 1985 to 1997. During which time he had been responsible for various pension schemes and had progressed to a senior

position and, from 1992, his role had been in marketing, explaining the technical detail behind AVCs (additional voluntary contributions);

- approximately eighteen months of being a partner at J Rothschild. Mr Davison left that role as he did not agree with the culture;
- forming his own IFA company, Henry Davison Associates (**HDA**), which dealt with investments and pensions-related business, for example, unit trusts, Forex and CFDs;
- from 1998 to 2005/6, being a director of McDonald Associates, a company which dealt with corporate pensions, including self-invested personal pensions and small self-administered schemes; and
- from 2004 to 2008, being an independent business consultant, having retired from the IFA business in 2004. He specialised in off-shore trusts and pension annuity business. Mr Davison pointed out that he did not give advice in respect of these investments.

- TCM's corporate lawyers, Bradley & Jefferies Solicitors (**Bradley & Jefferies**), had offered to sit in on a meeting between Mr Davison and TCM, that was held before the Scheme was established. Mr Davison did not take advice from Bradley & Jefferies in respect of setting up the Scheme but, in any event, Mr Davison had assumed that Bradley & Jefferies would have been qualified to give advice to him under the Solicitors' Code of Conduct.

11. Mr Davison explained, at the Oral Hearing, that in 2009 the Scheme's funds had been invested in derivatives with the Chicago-based Rosenthal Collins Group and Myers Futures and that those investments were performing well despite the economic crash at the time.

12. Around that time, friends and associates of Mr Davison's had been expressing an interest in joining the Scheme. Mr Davison explained that those individuals had full knowledge of the risks involved in joining the Scheme and he said that he had not given advice to any of them in that respect.

13. In 2009, the Scheme's governing rules were amended, by deed of amendment dated 8 December 2009, to grant the trustees of the Scheme the absolute discretion to permit any individual to become a member of the Scheme. When questioned at the Oral Hearing, Mr Davison confirmed that it had been TCM that had suggested extending the Scheme's membership eligibility criteria.

14. In 2010, TCM was investigated by Her Majesty's Revenue and Customs (**HMRC**), the Pensions Regulator (**TPR**), and the Financial Services Authority (now the Financial Conduct Authority (**FCA**)). As a consequence of HMRC's investigations, Mr Meeson and Peter Bradley, another director of TCM, were jailed for tax fraud in 2013.

15. When I asked Mr Davison, at the Oral Hearing, whether the investigations in 2010 into TCM gave him cause for concern, he replied that he had not been concerned about this, as he had not considered those investigations to be relevant to the Scheme. Mr Davison commented that he had not believed HMRC's case against TCM to be true or valid. Mr Davison neither took any independent advice on the matter nor approached TPR for any independent trustee recommendations.

16. TCM resigned from office, as a trustee of the Scheme, by deed dated 1 May 2010, leaving only Mr and Mrs Davison in office as Trustees of the Scheme. Mr Davison confirmed, at the Oral Hearing, that he had considered appointing an independent trustee to replace TCM. However, given that the Scheme's investments were of an unusual nature for a pension scheme, he had dismissed the idea, as he had not considered that a suitably qualified independent trustee existed. Mr Davison took no legal advice on the matter and has stated that, with hindsight, he may have been "over-confident" of his own experience and knowledge.

17. From January 2010 to the end of Oct 2012, a further 57 members joined the Scheme, including Mrs Davison. Mr and Mrs Davison have provided evidence that, in total, they transferred-in £364,769 to the Scheme.

18. At the Oral Hearing Mr Davison informed me that some of those further members were introduced to Mr Davison by Joel Friant, whom Mr Davison had first met in 2010. Mr Friant had initially introduced Mr Davison to the concept of trading in Global Managed FX, which was going to be regulated in New Zealand. Mr Davison had made an inquiry in respect of the validity and effectiveness of the New Zealand regulatory authorities and had concluded that the New Zealand regulatory regime seemed to be largely the same as it was in the UK. Mr Davison entered into a 'trial' investment with some of the Scheme's funds.

19. Having achieved successful results with trading in Global Managed FX, Mr Davison was approached by Mr Friant in late 2011 / early 2012, as Mr Friant knew of people who were trading their own money with the brokers IB Capital, and who were also keen to access that arrangement using their pension money. Mr Davison, who had an account with Mr Friant, agreed that those people could join the Scheme "at their own risk", making it clear that he could not offer financial advice. According to Mr Davison, most of those people were "well aware" and extremely keen to move their money into the Scheme. Those other members joined the Scheme in 2012.

20. Mr Davison informed me at the Oral Hearing that he considered the Scheme's membership application forms made it clear that the Scheme was not a normal type of pension scheme. Mr Davison said that, for example, clauses included in the application form made it clear that members of the Scheme were joining the Scheme at their own risk.

21. In 2012, T12 Administration Ltd (**T12**), part of TCM, became involved in the administration of the Scheme. I have not seen any written agreement in relation to T12's involvement in the Scheme's administration. Mr Davison informed me, at the Oral Hearing, that the arrangement was convenient to him, as it enabled the same individuals, who had previously been administering the Scheme, to continue to do so.

22. Mr L was admitted to the Scheme on 2 March 2012, paying in £50,660 from another pension arrangement. The application form he completed included the clauses:

> "I fully understand and agree that the trustees of the scheme are solely responsible for all decisions relating to the purchase, retention and sale of the investments forming part of the Scheme…
>
> I agree to hold the Trustees of the Henry Davison Ltd Pension Scheme fully indemnified in respect of their decisions, relating to the Scheme (both jointly and severally), except in the case of fraud."

ProphetMax

23. Mr L was a Member of an internet investment group with a high risk and high return investment strategy. At the Oral Hearing, Mr L confirmed that he had been introduced to ProphetMax via an affiliated marketed hyperlink. He had then completed an intelligence platform, which dealt with managing wealth and which was a pre-requisite for joining. Mr L said that he had responded to recommendations and the incentive of potentially doubling his investment annually.

24. Having never invested personally before, Mr L had then made an investment in ProphetMax in 2011/12, which had been limited to his private money and earned capital. Mr L had broken even after five trades and was then offered the choice of investing via Managed FX, which was a new product.

25. Mr L had been introduced to Mr Davison via a webinar, in which Mr Davison gave a presentation, promoting the option to transfer private pension funds into Managed FX. Mr L said that Mr Davison had seemed excited about that opportunity. Mr L decided to transfer monies from his SIPP to the Scheme so that he could invest in Managed FX.

26. Complying with Mr L's request the transferred fund, less £660 setup costs, was invested in Managed FX. The asset manager for the service, ostensibly ProphetMax, handled Mr L's account and the accounts of other members of the Scheme who had invested in the same service. The investment group was subsequently found to be fraudulent. £31,887.13 of Mr L's initial investment was retrieved. This, together with funds received back for other affected members, was placed in a deposit account with R J O'Brien (UK) Limited, prime broker for the Scheme.

27. At the Oral Hearing, Mr Davison stated that he considered that members who had invested with ProphetMax were very loyal to ProphetMax and required persuasion from Mr Davison before they agreed to their ProphetMax accounts being closed.

28. The ProphetMax investment is the subject of legal proceedings in the Netherlands. It is therefore outside my jurisdiction. It is only mentioned for background history and does not form part of my consideration of Mr L's complaint.

Relevant Scheme provisions and the structure of the Scheme's funds

29. Under the 2008 deed (the **Deed**) and the Scheme's governing rules (the "**Rules**"), Henry Davison Limited is "the Provider". Mr Davison and Mrs Davison and TCM ("**The Managing Trustee**" and "**Scheme Administrator**"), were the trustees of the Scheme (collectively the Trustees).

30. Recital B to the Deed states that those eligible to join the Scheme would be "all past, present or future officers and employees of [Henry Davison Limited] and their immediate family members".

31. I have not seen a copy of the Rules that were originally adopted by the Deed, and which are referred to throughout the terms of the Deed as the "Rules". The document entitled: 'Model Rules for Occupational Pensions', issued by TCM, is stated to have become effective on 21 February 2011, and so the original Rules must have been contained in a different document of which I have not had sight, and I assume that they were replaced by the Rules which became effective on 21 February 2011.

32. As explained in paragraph 13 above, the Scheme's eligibility requirements were amended by deed dated 8 December 2009, to provide the Trustees with absolute discretion to permit any individual, who would not otherwise have been eligible, to join the Scheme, to do so.

33. An amending deed in May 2010, removed TCM from its role as Managing Trustee of the Scheme and from its role as a trustee of the Scheme, following its suspension by the Pensions Regulator, leaving Mr Davison and Mrs Davison as the **Trustees**.

34. The Deed contains an exoneration clause at Clause 21, under which:

> "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 [the 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."

35. Further, Clause 22 of the Deed provides that:

> "In exercising any power or giving or withholding any consent under the provisions of this Establishing Deed, the Provider shall owe no duty to any Member or any other person in exercising such power or in giving or withholding such consent."

36. Clause 13 of the Deed provides that contributions and other amounts paid into the Scheme by or in respect of a Member, with regard to an "Arrangement" of that Member, are to be applied in accordance with that Arrangement. The term "Arrangement" is defined, under Rule 2 of the Model Rules, by reference to Model Rules 3.5 to 3.10 (although Rules 3.9 and 3.10 are not included in the copy of the Model Rules that we have been provided with), as "an arrangement made by a person with the scheme administrator to provide benefits under these rules". Broadly, Model Rules 3.5 to 3.8 set out the terms under which a Member might have more than one Arrangement.

37. Clause 13 of the Deed also provides separately for "each and every Self Invested Personal Pension Arrangement" (which is not defined in the Deed or Rules) ("**SIPP**") to be held in a "separate and clearly designated account" under the Scheme.

38. The following provisions of the Deed govern the Scheme's trustee investment powers:-

- Clause 15 permits the Trustees to "place assets, investments, deposits and monies in the name of or under the control of a body corporate as nominee".

- Clause 16 provides the Trustees with "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", subject to the requirement to take into account any specific written wishes of a Member, or a Member's appointed representative, as to the manner in which such Member's fund is invested.

- Clause 17 states that "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", subject to the Scheme's status as a registered pension scheme under the Finance Act 2004 not being prejudiced.

39. The Trustees' legal representative refers to an email dated 26 July 2012, sent to the Trustees from Mr Andrew Meeson, entitled 'Scheme description'. Mr Meeson was a director of T12 Administration and, as has been mentioned in paragraph 14 above,

was subsequently jailed for pension fraud. The legal representative believes that the email succinctly outlines the legal status of the Scheme's assets and how they are administered by the Trustees. The email says:

> "While the scheme's assets in aggregate are managed as a single pooled investment, a clear and distinct record is maintained of every individual member's "arrangement" within the scheme; each individual member's beneficial rights within the scheme do not extend beyond that fraction of the scheme's assets which represent the member's arrangement."

The Tivan investment

40. At the Oral Hearing Mr Davison said that he had been introduced to Joe Kelly, Head Trader at Tivan Fiduciaries S.A. (**Tivan**), a Swiss based investment manager, by an acquaintance of his, Mr Y. Mr Davison informed me that Mr Kelly had left his work in the City, in 2011, in order to concentrate on his work for Tivan. Mr Y became a member of the Scheme to enable his funds to be traded by Tivan.

41. On 14 February 2012, Mr Davison had a meeting with Mr Kelly in relation to the Trustees' potential engagement of Tivan in respect of the Scheme's funds. The salient points from a handwritten note by Mr Davison of the meeting are:-

- Trustees to open own account with Prime Broker in the UK.
- Tivan to manage account on a full discretionary basis.
- Asset Management Agreement (**AMA**) with Tivan.
- Power of appointment with Prime Broker.
- Mr Kelly to personally oversee day to day trading of the account.
- Account to be invested mainly in a combination of FTSE 50/100 companies using "CFDs [Contracts for Difference] and Forex pairings to maximize profit potential whilst minimizing downside risk through strict risk merit process".
- The aim is for an investment return of upwards of 1% net per month on capital, after overheads of running the account are met.
- Envisage actual returns will exceed 25% per annum.
- Trading model to include a rebate of portion of trading commission to enhance returns to fund and act as a safety net in negative trading conditions.

42. On 29 March 2012, the Trustees signed an AMA with Tivan, in Lugano, Switzerland. At the Oral Hearing Mr Davison admitted that the Trustees had not sought independent advice in relation to the AMA, as he considered that he knew and understood the investment and business model and was encouraged by emails that he had received, in relation to Tivan, from people outside the Scheme.

43. The salient points of the AMA with Tivan are:-

- The Trustees agreed to pay an annual management fee to Tivan, but the percentage of the fee (calculated monthly on the net total value of the fund at the end of each month) was shown as "TBA".

- The Trustees agreed to pay a performance fee to Tivan on the profits, but the amount was shown as "TBA".

- The Trustees chose a "VERY DYNAMIC" line of investment which was described as:

- "- …assets are invested with the highest degree of flexibility and mainly in financial instruments of the stock market and in non-traditional investments such as alternative funds (hedge funds)…expressly acknowledges that the Asset Manager is authoried to make use of the financial leverage
  - Objective: important increase of the invested assets, with a medium high level of risk, with the possibility of periods with negative performance
  - Time frame: long run".

- The AMA with Tivan complied with "the directives of the Self-regulated body of Fiduciaries of Canton Ticino (OAD-FCT) in force" (Clause 2 of the AMA with Tivan).

- Under Clause 9 of the General Conditions which governed the AMA with Tivan, Tivan reserved the right to "terminate the business relationships with immediate effect", in which case any amounts due to Tivan would become "immediately due". There was no express clause enabling the Trustees to terminate the AMA, although Clause 9 provided that, should the Trustees die, the AMA would not be considered "elapsed" until formally revoked or modified.

44. The Scheme accounts, subject to the discretionary management of Tivan, were held with FCA regulated prime brokers, RJ O'Brien (UK) Limited (**RJ O'Brien**) and Saxo Capital Markets UK Ltd (**Saxo**) (together the **Prime Brokers**), both of whom provide an online real time trading platform.

45. At the Oral Hearing Mr Davison informed me that he had conducted a search of the FCA register in respect of the Prime Brokers to ensure their suitability. However, investigations carried out by my office have revealed that: RJ O'Brien has never had FCA permission to manage investments; and although Saxo had FCA permission to manage investments in 2012, it did not have permission from 2013 to 2017, when the Trustees entered into their agreement with Saxo.

46. With RJ O'Brien, the Trustees completed:-

- A 'Customer Information Disclosure Form', dated 26 March 2012, in which Mr Davison stated that he had five years' investment experience in relation to each product type that he intended to trade through R J O'Brien.

- An agreement, dated 27 April 2012, under which RJ O'Brien would act as the Trustees' agent in dealing with Cantor Fitzgerald Europe (**CFE**) for CFDs. Under that agreement, the Trustees authorised RJ O'Brien as their agent to: determine in its absolute discretion the terms of the CFD transactions; give all instructions (including payment instructions) that RJ O'Brien considered necessary in relation to money held for the Trustees by CFE; and accept and agree to CFE's terms and conditions and any amendments made to them.

- A power of attorney form, dated 27 April 2012, under which, broadly, the Trustees permitted Tivan to carry out investment activities with RJ O'Brien on the Trustees' behalf.

47. With Saxo the Trustees completed:-

- A trust application form, dated 3 August 2012.

- A power of attorney, dated 7 August 2012, which granted Tivan power of attorney to perform all transactions and legal acts under any terms entered into between the Trustees and Saxo.

48. At the Oral Hearing, Mr Davison admitted that the Trustees had not sought independent advice in relation to either of the powers of attorney referred to above.

49. On 19 June 2012, the Trustees wrote to Mr L and other members whose funds had been placed with ProphetMax, including the Additional Applicants, but with the exception of Ms T and Mr LE, who did not opt to have funds placed with ProphetMax, and said:-

- They had been consulting with their trading team to provide an alternative course of action.

- At no stage would they be transferring pension fund money back to ProphetMax Managed FX.

- Whilst not offering advice, members had two options. The first was to keep their money in the deposit account. The second, "To use our 30 years of experience in the Financial Services and Pension Fund business and enable our Swiss Regulated, highly experienced Traders to trade your money under our direction to earn back what you have lost, safe in the knowledge that we are in control of our Traders and they can be contacted by us at any time".

50. The Trustees issued further emails that month:-

- On 20 June 2012, the Trustees circulated slides of a Tivan presentation entitled 'Investment Strategy', to all members whose funds had been transferred back from the ProphetMax arrangement, and those who initially wanted to have their funds invested with ProphetMax, but whose transfer values were not received in time. This included the Additional Applicants Mr and Mrs G. Under one of the points on a slide headed 'Equities', it says:

  "On CFD traded stocks we guarantee clients a 25% per annum return on average daily deployed capital".

  On another slide headed 'Alternative Assets' it says:

  "Tivan targets investments with annualized returns in excess of 50%".

  There was no mention in the slides of the fees or commission payable to the Prime Brokers and Tivan.

- On 22 June 2012, Mrs Davison emailed Mr L and the Additional Applicants answers to questions that members had been asked in relation to the presentation.

- On 26 June 2012, the Trustees asked members to write and confirm if they did not want the Trustees to invest their pension funds with Tivan and advised that trading would commence if no response was received by the end of 29 June 2012.

- On 29 June 2012, the Trustees confirmed to Mr L that the £31,887.13, transferred back from ProphetMax, would be traded by Tivan from the following week. The Additional Applicants, with the exception of Ms T and Mr LE, were similarly informed.

51. When this office questioned Mr L and the Additional Applicants in relation to the investment in Tivan, of the ten who responded, seven said that they had consented to invest in Tivan, and three said that they had not consented to invest in Tivan.

52. When questioned at the Oral Hearing, Mr L said that, having read the slides, he considered the Tivan investment to be well-balanced and diversified. Mr L confirmed that he was aware that members had the option not to invest under the AMA with Tivan.

53. Up to December 2012, a net total of £1,328,963 was placed with Tivan. Of the Additional Applicants, Ms T invested direct with Tivan and Mr LE did not invest with Tivan.

54. In late April 2013, the Trustees informed members that they had decided to self-administer the Scheme through their company Henry Davison Limited. No explanation was given for this. In August 2014, the Trustees terminated the accounts with the Prime Brokers.

55. On 2 August 2014, Mr Davison emailed members, acknowledging that the Trustees had received some requests for statements. Mr Davison said that statements were not being produced at that time, as the Trustees were taking the summer period to meet with Tivan to "restructure" arrangements with Tivan. Mr Davison stated that this was taking "some considerable time", and that flooding in their office (Mr Davison's and Mrs Davison's) meant that they had been unable to send or receive emails. Mr Davison said the Trustees would be in touch with members in September, but that members could contact them in the meantime.

56. On 10 October 2014, Mr L emailed Mr Davison. He referred to an agreement with Mr Davison, to wait one month to hear further in relation to his fund in the Scheme. He requested a transfer value and a copy of various documents. Mrs Davison acknowledged Mr L's email and said, that the Trustees had been in contact with the Pensions Regulator and they (the Trustees) would update him shortly.

57. Hearing nothing further, Mr L chased Mr Davison on 25 November 2014. He said he would raise a formal complaint if he had not received a satisfactory response to his request for a transfer value by the end of that working week. Mr Davison responded, on 27 November 2014, suggesting that they meet to discuss the matter. Mr L declined.

58. In response to Mr L's final request for a transfer value, Mr Davison emailed Mr L on 12 December 2014, informing Mr L that the "situation" had been reported to the Pensions Regulator and the Police Economic Crime Unit, and that the Trustees could not therefore discuss the matter further until they had heard more from the Police.

59. In February 2015, the Trustees issued an Announcement to the Scheme members. In relation to the account managed by Tivan the Trustees said:-

    - Tivan had been appointed to help form the backbone of the Scheme's future performance across a range of asset classes.

- For the first six months the funds had been managed successfully.
- It was then noticed that Mr Kelly's direct involvement, as Tivan's Head Trader, had waned considerably, and that he was increasingly relying on subordinates to make investment decisions.
- They had discussed verbally their concern with Mr Kelly at many meetings and during skype calls, throughout 2013 and up to mid-2014, but had been assuaged by his insistence that the business plan he was adhering to was providing significant inflows of new funds, which would have a substantial positive effect on returns for the Scheme, together with a projected return to the positive, of trades that had been kept open because of a lack of liquidity in the market/fund.
- By the summer of 2014 there was still no evidence of the desired outcome being achieved. At this point they decided to bring funds back onto deposit from the trading accounts.
- While they had not been directly involved with the implementation of Mr Kelly's business plan they had been, "reliably and consistently informed by other Members of our Scheme who were closely involved with the process together with personnel connected with [Mr Kelly's] team, that a considerable amount of effort was being put to effect the successful outcome of the plan which was imminent".
- Throughout the whole period they had attempted to remain in touch with Mr Kelly. A number of dates had been arranged to meet up, but so far none of these appointments had been kept. The accountant appointed to review the Scheme hoped to meet Mr Kelly in the next two weeks. They urged any Member who was in contact personally with Mr Kelly to "encourage him to attend such a meeting".
- The result of the Trustees' association with Tivan to date was that the £1,328,963 account managed by Tivan had become approximately £106,000: a loss of £1,223,000. That loss had included charges to run the accounts with a total value of approximately £1,100,000. £260,000 in finance costs; £100,000 in Prime Broker fees; and, they believed, £740,000 in commission to Tivan.
- The Trustees had understood that a large proportion of the commission paid would be held in reserve to be rebated back to the Scheme. But to date this had not occurred. Without it, or the successful implementation of Mr Kelly's business plan, it would be necessary to take further action to liquidate other assets in the fund with associated losses being crystallised. The completion of such action was anticipated to leave a near zero figure available to distribute into Member accounts in the Scheme.

- At this point it seemed that the Scheme had reached an impasse unless a route forward could be found. Nevertheless, they had undertaken the following actions:-
    - An independent accountant had undertaken a full review of the Scheme's accounting records dating back to May 2008.
    - Efforts had continued to maintain contact with Tivan to bring a positive resolution for all concerned.
    - A firm of solicitors had been appointed to advise and assist in the event that their efforts failed to produce a resolution. But one concern was that the fund had limited resources to sustain major litigation.
    - Presently no new members were being admitted into the Scheme.

60. At the Oral Hearing, Mr Davison confirmed that two of the Scheme's members were involved in Mr Kelly's trading team and Mr Y also knew Mr Kelly, hence the Trustees' request, in their Announcement to members of February 2015, for any Member who was in touch with Mr Kelly to encourage Mr Kelly to attend a meeting with Mr Davison. My office has not received any complaint in respect of the Scheme from any member who was apparently involved in Mr Kelly's trading team, or from Mr Y. Mr Davison confirmed that none of the members who were connected with Tivan had made a complaint to my office in relation to the Tivan investment.

61. In 2016 Tivan went into liquidation.

Fees and commission under the AMA with Tivan

62. As stated in paragraph 59 above, costs of £1,100,000 had been incurred in relation to running the accounts: £260,000 in finance costs; £100,000 in Prime Broker fees; and, they believed, £740,000 in commission to Tivan.

63. As mentioned in paragraph 43 above, the AMA with Tivan did not contain confirmation of the rates of either, the annual management fee payable by the Trustees to Tivan, or the performance fee payable to Tivan on the profits. Both of those amounts were marked as "TBA" in the AMA.

64. The fees and commission payable under the AMA with Tivan were not mentioned in any of the information, regarding Tivan, that was circulated to members in June 2012 (see paragraph 50 above).

65. Mr Davison did not retain a copy of the signed agreement in relation to the charges in place under the agreement. When he had tried to obtain a copy, he had been unable to do so as Tivan's offices in Lugano were empty.

66. During the Oral Hearing, when I asked Mr Davison whether he could produce evidence that the charges and costs had actually been incurred (see paragraph 62

above), Mr Davison replied that, although he had kept records of the charges and costs incurred, those records had been destroyed when the family home was flooded. Mr Davison said that he thought he might still have a record of the closing position of the trading accounts, showing the whole position. However, Mr Davison has not submitted any such record.

67. During the hearing Mr Davison confirmed that he had not taken advice in relation to the fees and commission structure under the AMA with Tivan.

68. Mr Davison also informed me that, whilst the intention had been for commission charges to be "rebated" back to the Scheme, the £740,000 commission charge that had been paid to Tivan was retained by Tivan rather than repaid to the Scheme, because an opportunity to invest that £740,000, which had been described as a "fantastic opportunity", had arisen. Mr Davison informed me that certain members of the Scheme, who were also members of Mr Kelly's trading team, had provided assurance to him about that "opportunity"

Termination of accounts with the Prime Brokers

69. One of the questions that members had asked in relation to the Tivan presentation, which Mrs Davison answered in her email to members on 22 June 2012 (referred to in paragraph 50 above), was who the brokers would be in relation to the Tivan investment. Mrs Davison's response to that question was that Tivan would use a number of brokers, all of whom would be "'on-shore' regulated firms", and that RJ O'Brien, described as "the UK arm of a large US broking firm", was "the main UK broker used for execution of trades".

70. Another question raised was whether the account would be held in sterling and in which country. Mrs Davison's response was that, to avoid the risk and potential cost of trading in foreign currency, most of the trading in equities was currently in GBP, with funds being held with RJ O'Brien in the UK. Mrs Davison assured the members that holding the funds in the UK would remove "certain operational risk elements encountered with off shore funds".

71. Mr Davison has also informed me that a significant part of the Trustees' further investigation into the potential investment with Tivan, following the presentation that Tivan made to the Trustees, consisted of a meeting between the Trustees and individuals from the Prime Brokers, the content of which is summarised in paragraph 41 above. Mr Davison has stated that, the apparently "stringent" compliance and verification procedures that the Prime Brokers applied, left him feeling "completely comfortable with the arrangements being entered into".

72. Mr Davison confirmed, at the Oral Hearing, that he had monitored the accounts with the Prime Brokers on a regular basis. Initially, he had considered the payment of £740,000 of commission to Tivan to be a sign that trading had started well. However,

he had later become concerned about the extent of the investment losses under the AMA with Tivan.

73. Following the Trustees' investigation into Tivan, and their engagement of the law firm Irwin Mitchell Solicitors, in August 2014, the Trustees terminated their accounts with the Prime Brokers. Funds that had been held by the Prime Brokers were returned to the Scheme's trust account with The Bank of Scotland.

74. No more investments, of the nature entered into under the AMA with Tivan, have been made by the Trustees. However, the funds that were placed back into the Scheme's fund account were subsequently invested in a loan of £125,000 to Radical Supplies Limited, for further details of which see paragraph 79 below.

Loans and investments made from Scheme assets

75. In October 2015, an accountant (appointed by the Trustees) issued a status review of the investments and commercial loans entered into by the Scheme. Listing the investments and loans and interest receivable he said, the free cash position of the Scheme was extremely low and would come under immense pressure should any of the members ask for their investments to be transferred. He also said that the lack of immediate cash funds precluded a mass litigation exercise with regard to any loans in default.

76. The loans entered into by the Scheme came to a total of £798,061 and were made to the following companies:

- Capitis: £54,025
- Vajazzle: £40,025
- Due to Hit: £60,050
- Novus: £15,025
- Bluewood Nextgen: £55,025
- C Beek: £308,911
- Learner Provider: £140,000
- Radical Supplies: £125,000

77. The Trustees' response to Mr L's concerns about the impact of the loans on his fund was that the loans did not affect the value of his fund as they had been entered into prior to his joining the Scheme.

78. When I questioned Mr Davison, at the Oral Hearing, as to the extent of any due diligence that the Trustees had carried out before entering into any of the loans, Mr Davison stated that:

- he had been to many meetings with each company; and

- his own accountant, Peter Hollis of Hollis & Co, based in Sheffield, had checked the accounts of some of the companies to which the Trustees made loans, that is, those to which the Trustees were proposing to lend greater amounts of money; one of those loans being £100,000 with an interest rate of 6%.

79. Mr Davison confirmed, at the Oral Hearing, that all of the loans had defaulted and none of them had been repaid. In 2014, due to a history of debtors defaulting on their loan repayments, before entering into a loan agreement for £125,000, with Radical Supplies Limited, the Trustees asked for a personal guarantee. Radical Supplies Limited is now in liquidation.

80. Mr L confirmed, at the Oral Hearing, that he had not been aware, when he transferred funds into the Scheme, that some of the Scheme's assets had been invested in loans.

Investment in Kirkpatrick Fiscal Limited

81. The Scheme had invested in preference shares, to the value of £173,461, in Kirkpatrick Fiscal Limited, which was owned by Mr Davison.

82. Mr Davison has informed me that the investment in Kirkpatrick Fiscal Limited was made in order to set up a special purpose vehicle (**SPV**), to expedite investments for a group of members of the Scheme, which does not include Mr L, or any of the Additional Applicants. Mr Davison confirmed at the Oral Hearing, that he had established the SPV on TCM's recommendation, on the basis that this arrangement would enable trading in alternative investments. The SPV had been created with Mr Davison as the sole director of Kirkpatrick Fiscal Limited, and preference shares in Kirkpatrick Fiscal Limited were purchased, with coupons of 8% per annum. This, Mr Davison said, prevented money being lent to Mr Davison himself.

83. At the Oral Hearing, Mr Davison said that he thought that TCM had taken legal advice, which Mr Davison had not seen himself, from Bradley and Jefferies. The only legal advice taken by the Trustees was given orally to Mr Davison, at a meeting arranged by TCM, by Matthew Bradley, a solicitor at Bradley & Jefferies, a brother of Peter Bradley and one of TCM's directors who also attended the meeting. Matthew Bradley advised Mr Davison that setting up the SPV would not place Mr Davison under any conflict of interest. The verbal advice was not followed up in writing.

84. Matthew Bradley is listed on the Law Society's website as a corporate lawyer and there is no mention in that listing of any pensions experience or expertise. When I questioned Mr Davison about this at the Oral Hearing, Mr Davison told me that he had assumed that Matthew Bradley had the necessary qualifications to advise him in relation to pensions law. Mr Davison also confirmed that he had not considered the potential conflicts of interest arising from: (i) Matthew Bradley's relationship with Peter Bradley; or (ii) TCM's instruction of Bradley & Jefferies.

85. At the Oral Hearing, Mr Davison confirmed that it had been TCM, when it was still the Managing Trustee of the Scheme, that had suggested setting up the SPV.

Quarterly statements issued to members

86. Mr Davison confirmed, during the Oral Hearing, that statements of account, the Trustees had been issuing to members, showed investment growth of 1% per month. Those figures had been based on information that Mr Davison had received from Mr Kelly and his close associates in Switzerland. Mr Davison said that he had checked verbally, during telephone conversations and at meetings, "what was in the bank in Lugano". Mr Davison confirmed that he had received no written confirmation of the investment growth.

87. When I questioned Mr Davison about Mr L's submission that, an Officer from South Yorkshire Police's Economic Crime Unit had informed him that Mr Davison had admitted falsifying twelve months' worth of members' statements, Mr Davison did not dispute having made that admission. However, Mr Davison submitted that the Officer concerned had visited him because South Yorkshire Police had received many reports from members concerning the loss of their funds in the Scheme, and advised Mr Davison that the best approach would be to tell the members "what they wanted to hear".

88. Mr Davison insisted that he had not falsified the statements deliberately, as he had believed that the information, on which the statements were based, was true and correct. Whilst Mr Davison had had doubts about accepting the information, on which the last members' statements that he issued had been based, having taken Mr Kelly's advice, he then decided to release the statements using the information received.

Consultancy and invoices

89. Invoices sent to the Trustees from Henry Davison Associates Limited (**HDA**), which Mr Davison set up in 1997 with Mr Robert Henry, show that HDA was paid a total of £114,803.59 from Scheme assets, in respect of the period between 5 September 2010 and 20 December 2012.

90. The invoices state that the payments to HDA were made in respect of HDA's "consultancy" services to the Trustees and HDA's participation in meetings, in relation to the loans to the various debtors to the Scheme, all of whom are now in default of their loan agreements.

91. Mr Davison clarified, at the Oral Hearing, that he had attended meetings on HDA's behalf, in his capacity as an advisor, with the Prime Brokers and those companies to which the Trustees had made loans. On behalf of HDA, Mr Davison had charged the Scheme fees for his attendance at those meetings.

92. When I asked Mr Davison, at the Oral Hearing, if he had considered using an independent consultancy firm, due to the obvious conflict of interests that arose from HDA providing consultancy services to the Trustees. Mr Davison replied that he had not; at the time, he had felt that he was himself best equipped to provide those services.

Summary of Mr L's position

93. Mr L says:-

- The Trustees failed to disclose the unreasonable fee structure of the investment with Tivan.
- He queries why his capital, and that of the Additional Applicants, should be at any risk of exposure to Tivan's status as a going concern. He says their investment capital should only be at risk in the markets it was invested in, and that Tivan's liquidation should only have meant the need to find a new service provider. He says the investor funds should have been outside of any risk of Tivan as an entity.
- Transparency and reporting were the two major deficiencies of Mr Davison's dealings with him. The Trustees have failed to provide any demonstrable evidence of where his and the Additional Applicants' funds actually went.
- He questions the Trustees' claim that loans from the Scheme did not come from claimants' monies. He says loans preceding membership of the Scheme could only have been extended from existing monies within the Scheme, but what about the life of those loans and their repayment? Unless the Trustees can evidence that claimants' monies have not been used to write off these loans, as the money all comes from the Scheme then the loans are relevant. This similarly applies to the purchase of shares in Kirkpatrick Fiscal.
- An Officer of South Yorkshire Police's Economic Crime Unit shared with Mr L, the contents of Mr Davison's interview statement. The Officer said Mr Davison admitted that, under the instruction of Mr Kelly, he falsified the last 12 months' worth of Member statements, to reflect a circa 1 per cent per month growth of the fund which was not actually accruing; and that Mr Kelly believed he could recover the unreported losses on the account in the future.

94. At the Oral Hearing, Mr L said that he did not consider himself to be a risk taker.

Summary of the Additional Applicants' position

95. The Additional Applicants are listed in Appendix 1. Their complaints are summarised below and are, in essence, identical to those of Mr L.

96. Mr RY says:-

- The Trustees fraudulently misrepresented the Scheme. They mismanaged it in the setup with Tivan and the subsequent tracking, or lack of, the funds and then tried to cover their tracks by issuing statements that did not reflect the huge commissions that they had paid out before any actual return and, also for a period, to hide the fact that the funds had gone missing.

- The statements issued to members were fabricated showing their original amounts paid-in gaining growth.

- He is confident that Mr Davison first became aware of the issues with Tivan before the statements were issued.

- Mr Davison talks about superb transparency through the trading platforms he was using. But he simply quotes a bland description from Tivan of the trading conditions and underlying growth. There is no mention of the detailed, transparent statements from the trading platforms, which if true would have given him day-to day statements for each Member not a generic one-liner from Tivan.

- The Trustees' description that the fund would be "high risk" is incredible. This was not described anywhere in the paltry literature that was provided, or in the Tivan presentation slides, which talk of conservative fund management and protection. Mr Davison knew that he and others had lost large portions of their funds with the investment through him in ProphetMax, so to move their funds into an apparently "high risk" fund, whilst promoting it as cautious, is nothing other than a deception and fraud.

- The Trustees mention too many times that they personally have lost money to garner sympathy. It is irrelevant.

- The fact that the Scheme was loaning out funds, including to Mr Davison, was never disclosed to members.

- Mr Davison makes the ridiculous statement that he could not disclose the commissions as they depended on the fund performance. But commission is represented as a percentage. Mr Davison gave up something like 80 per cent of the fund immediately, based on some kind of assurance that using leveraging he would get the money back and more.

97. Mr LE says:-

- He did not choose to invest in any particular investment and received no documentation or correspondence about any investment from the Trustees.
- He assumed the amount he paid-in was simply invested in the Henry Davison Pension Fund and that is what Mr Davison told him when he first invested with him.

98. Mr and Mrs G say:-

- They came across the Scheme on-line. It could have been through ProphetMax information, with whom they had had a small failed investment. None of their pension funds were put in ProphetMax due to the timing of their joining the Scheme.
- They decided on the Scheme due to the assurances of Mr Davison, who said it was longstanding, came under UK financial services so protection was in place and had been averaging a minimum of 1 per cent per month in interest.
- Mr Davison gave categorical assurances that no more than 10 per cent of their pensions would ever be risked with Tivan, so they would never lose all their funds.
- Regarding fees and commission, they were given information that Tivan would only earn monies made over what had been invested.
- The Trustees failed to produce accounts for the last couple of years.
- Mr Davison has not shown himself to be trustworthy.

99. At the Oral Hearing, Mr G stated that:

- he and Mrs G had presumed that Mr Davison had carried out due diligence in respect of the Tivan investment;
- he and Mrs G had not known about the loans made from Scheme funds;
- Mr and Mrs G had thought that members' funds held in the Scheme were segregated, rather than pooled; and
- initially, he and Mrs G had received monthly statements and, later, statements were issued only quarterly.

100. Mrs T says:-

- She transferred to the Scheme on the basis that Mr Davison would give her a loan of £10,000 and Mr Davison having said that her investment would make good returns.

- She received the loan from Kirkpatrick Fiscal Limited and repaid the loan by monthly payments to the end of December 2013.

- She received no information about the investment with Tivan or fees and commissions payable. The first time she heard of Tivan was in August 2014, when she received an email from Mrs Davison that the Trustees were to visit Tivan in the summer and statements would not be sent out until they returned.

Summary of Mr and Mrs Davison's position

101. Legal representatives for the Trustees have said:-

- The Scheme was initially established for the sole benefit of Mr Davison and Mrs Davison. The Trustees decided to rely on Mr Davison's extensive investment experience, which included the use of trading in equity derivatives and Forex, and decided to adopt a high risk profile for the Scheme, but which was mitigated by strict risk management strategies permitted and recognised by HMRC and the Pensions Regulator. Due to the nature of the asset classes they experienced difficulties obtaining the relevant facilities from most UK pension providers and duly sought the assistance of TCM.

- At no point did the Trustees advertise the Scheme, or approach any of the Additional Applicants to become members. All sought out, the Trustees directly, or via a representative, and specifically requested membership of the Scheme as they too were looking to invest in these types of asset classes.

- Consideration should be given to the fact that, in part, the Scheme represented the Trustees' own money and pensions and some investment decisions were, in part, decisions on the investment of the Trustees' own assets.

- The Trustees would not knowingly have taken any action detrimental to the Scheme members.

- Investment decisions took place at each Member's behest and in many cases the members asked the Trustees to invest in investments on their behalf.

- The Trustees were only required to comply with the contemporaneous version of the Pensions Regulator's Code 13, the 2013 version not the 2016 version of the Code, in place at the time that the investments were made, or which then existed. The Code did not apply to investments already made, or already in existence.

On how the Trustees have administered and invested the Scheme's assets

- The Trustees have administered the pooled assets of the Scheme throughout by strict adherence to the Deed and Rules. All occupational money purchase schemes have notional pots or accounts for their members. This does not prevent

the assets notionally contained in one such pot or account being invested in the same way as those contained in other pots or accounts.

- The Scheme assets for Mr L, and relating to the Additional Applicants with the exception of Mr LE and Ms T, were invested in accordance with Clause 16 of the Deed. Those of Mr LE and Ms T were invested in accordance with Clauses 15, 16 and 17 of the Deed, as neither applicant made a specific investment request for the Trustees to consider.

On the loans and purchase of preference shares:-

- Most of the loans were made prior to Mr L, and the Additional Applicants, joining the Scheme and none of his, or the Additional Applicants', money was invested in the loans. Equally, this applied to the Scheme's purchase of preference shares in two companies, Learner Provider and Kirkpatrick Fiscal Limited, the latter owned by Mr Davison.

On ProphetMax:-

- All of the ProphetMax Managed FX members of the Scheme were effectively referred by ProphetMax. They simply provided a conduit to allow people to trade their pension fund through the Scheme account with IB Capital.

On Mr Davison's meetings with the Prime Brokers and Mr Kelly of Tivan

- Mr Davison attended a number of meetings during the last quarter of 2011 and first quarter of 2012, with the Prime Brokers, and Mr Kelly was present at all meetings. It was obvious that they knew Mr Kelly well and were very aware of his knowledge and long experience as a trader. There was a mutual level of experience and understanding among the parties, concerning the practicalities involved in applying trading methodology, and risk mitigation strategies within the discretionary management of the accounts. As all of the relevant technical detail, discussed during the meetings, confirmed that which was available on these regulated professional companies' websites, there was no need for Mr Davison to make copious notes, during the meetings or exchange emails about the subject matter, before or after the meetings. The Trustees were left feeling completely comfortable with the arrangements being entered into, particularly as the compliance and verification procedures, being applied by the Prime Brokers on Tivan and its personnel, appeared to be very stringent.

- The Prime Brokers are very substantial, well founded, long established and respected financial institutions. They are both regulated by the FCA in the UK and as such are compelled to follow standard due diligence procedures on all parties connected with the opening and discretionary management of the Scheme's accounts with them. The Trustees reasonably relied upon the regulatory

framework governing both institutions and therefore demonstrated due responsibility in discharging their duty of care to Mr L and the Additional Applicants.

On the AMA with Tivan:-

- Tivan earned commission on each buy and sell transaction. This was paid directly by the Prime Brokers to Tivan. Tivan was to gather the proceeds into a segregated account which Mr Kelly and senior management at Tivan would oversee. After the deduction of reasonable overheads, the commission was to be rebated back through the Prime Brokers by Tivan into the relevant Scheme accounts and applied, as a reduction of overall trading costs, within three months of the end of each calendar year.

- The amount of commission rebated to the Scheme on an annual basis would be variable, and therefore, would have led to no charges being levied by Tivan. In other words the arrangement was intended to be effectively a profit sharing arrangement between the Scheme and Tivan. For this variable arrangement to be catered for, Mr Kelly informed the Trustees that 'TBA' should be entered for the annual management fee and the performance fee in the AMA with Tivan.

- The Prime Brokers had to make sure any investments or trading activity undertaken by Tivan complied with FCA rules and that the discretionary manager, Tivan, met all regulatory requirements.

- The Trustees were entirely reliant on the professional guidance and skill of Tivan to manage the accounts in an efficient and effective manner. Clearly Tivan failed in this regard.

- At the Oral Hearing, Mr Davison submitted that, following the retrieval of members' funds from ProphetMax, he and Mrs Davison had been anxious not to allow the retrieved funds to remain uninvested for too long, hence the urgency conveyed to members in the Trustees' communications with members regarding the Tivan investment.

- At the Oral Hearing, Mr Davison informed me that members had been given the option to transfer out of the Scheme when the ProphetMax funds were retrieved, but that no Member had taken that option.

On the issuance of quarterly statements

- The Trustees strongly refute that they deliberately misled members of the Scheme by issuing statements showing incorrect fund values. Like all trustees they relied on the information supplied by their regulated professional advisor, in this case information supplied to them by Tivan.

Actions taken by the Trustees

- They discussed the recovery of the funds invested with Tivan, with a firm of UK lawyers who, having reviewed the case, informed them that a Swiss lawyer would need to be instructed to start the process, as that process was to be undertaken in Switzerland; and all their suitable Swiss associate firms had requested a minimum upfront fee. That minimum upfront fee was in excess of the cash held within the Scheme's bank account. The lawyers also expected from experience that the legal cost would rise significantly beyond the £150,000 level once the case was underway, with no guarantee of success. Therefore, they decided not to proceed with legal action against Tivan.

102. They also contacted The Pensions Regulator and HMRC, who both redirected them to Action Fraud, who in turn referred the case to a relevant Economic Crime Unit of the South Yorkshire Police. They were interviewed on a number of occasions and were later told, that the resources to pursue a complex cross border investigation into the dealings of an Irish national and a Swiss corporation would be very significant with a slim chance of a successful outcome.

General submissions

103. At the Oral Hearing, Mr Davison did not dispute anything that Mr L or Mr G said and apologised to the members for what had occurred.

Ombudsman's decision

104. Below, I set out and confirm the findings that I made in my Preliminary Decision, in addition to setting out the further conclusions that I have reached following the Oral Hearing. As I did in the Preliminary Decision, I shall consider the following:-

A. The structure of the Scheme's funds.

B. The Tivan investment.

C. Fees and commission under the AMA with Tivan.

D. Termination of accounts with the Prime Brokers.

E. Loans and investments made from the Scheme's assets.

F. Investment in Kirkpatrick Fiscal Limited.

G. Quarterly statements issued to members.

H. Consultancy and invoices.

I. Arguments raised by the Trustees:-

a. Mr and Mrs Davison's membership of the Scheme.

b. Mr L's, and the Additional Applicants', contributory negligence.

105. As stated in paragraph 28, and as I pointed out in the Preliminary Decision, the ProphetMax investment is the subject of legal proceedings in the Netherlands. It is therefore outside my jurisdiction. It is only mentioned for background history. It does not form part of my consideration of Mr L's complaint.

A. <u>The structure of the Scheme's funds</u>

106. In the Preliminary Decision, I concluded that no member had any sub-trust under which his or her beneficial rights were maintained or ringfenced in any way. That finding was made on the basis that:

- Having reviewed Clause 13 of the Deed (set out in paragraphs 36 and 37 above), which infers that all of the members' arrangements, other than any SIPP arrangement, which does not apply here, are pooled and that investments are made from those pooled funds within the Scheme.

- Mr and Mrs Davison's legal representatives had informed my office that the Scheme was a defined contribution occupational scheme, the assets of which were managed as a single pooled investment, whilst a clear and distinct record of each member's arrangement within the Scheme was held. Each member's beneficial rights were confined to that fraction of the Scheme's assets which represented the Member's arrangement.

- This explanation accorded with an email, dated 26 July 2012, from Andrew Meeson to Mr Davison (see paragraph 39). Mr Meeson, a director of T12 Administration, had operated a similar method in the schemes considered by the Court in the case of Dalriada Trustees Ltd v Woodward and others [2012] EWHC 21626 (Ch). There the Court held that members:

  "are not the sole beneficiary of a sub-trust within the overall scheme. They are one of many beneficiaries entitled to benefits from the trust assets, the rate or amount of which is ascertainable in accordance with the rules and by reference to the amount credited to his account for contributions made by or in reference to him and investment returns thereon."

107. Nothing that was said during the Oral Hearing has given me any reason to change my view in relation to the Scheme's structure. Further, I note that, in the case of Dalriada Trustees Ltd v Woodward [2012] EWHC 21626 (Ch), in which it was found that there was no sub-trust in the pension scheme in question, the relevant provisions of that pension scheme's trust deed were identical, in all material ways, to those of the Scheme. Therefore, I find that Mr L's, and the Additional Applicants', respective beneficial entitlements have been reduced by all reductions in the Scheme's overall

assets, including those that relate to the Trustees' actions that occurred before Mr L and the Additional Applicants joined the Scheme, whether that be by way of lost investments, loans made/written off, or fees due to investment managers.

B. The Tivan investment

The Trustees' Investment Duties

108. Section 33 of the Pensions Act 1995 (the "**1995 Act**") (the relevant parts of which are set out below for reference), 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".

109. The duties imposed on pension scheme trustees in relation to investments are contained in: the Deed and Rules; common law; and trust law.

110. Section 34(1) of the 1995 Act 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) of the 1995 Act; and any restrictions imposed by the Scheme.

Investment powers / duties under the Deed

111. The relevant provisions of the Deed, which govern the Scheme's trustee investment powers, are contained in Clauses 15 to 16, and are set out in paragraph 38 above.

112. Mr and Mrs Davison have stated that the Scheme assets in respect of Mr L and all Additional Applicants, other than Mr E and Ms T, were invested in accordance with Clause 16 of the Deed, taking into account the specific wishes of those members. As

Mr E and Ms T had not given any specific investment request, their notional assets were not invested in Tivan.

113. Given that the Scheme assets were not actually ringfenced (as explained in paragraphs 106 and 107 above), Mr E and Ms T's assets will have been affected by the investment with Tivan. As the Scheme's investment powers are wide-ranging, I do not consider that Mr and Mrs Davison acted outside the scope of their powers of investment, as provided for in the Scheme's Deed and Rules, in transferring the funds to Tivan, or in entering into the agreements with the Prime Brokers. Whether or not the members' specific wishes were genuinely taken into account I explore later in paragraphs 197 to 203 below.

Statutory investment duties under section 36(1) of the 1995 Act

114. With regard to section 36(1) of the 1995 Act. This provision requires trustees to exercise their powers of investment in accordance with: (i) regulations; and (ii) subsections (3) and (4) of section 36 of the 1995 Act, to the extent that the trustees have not delegated the exercise of such powers to a fund manager in accordance with section 34 of the 1995 Act (which is explained in paragraphs 134 to 142 below).

i) The Investment Regulations

115. The Occupational Pension Schemes (Investment) Regulations 2005 (SI 2005/3378) (the "**Investment Regulations**"), which set out specific requirements in relation to trustees' exercise of their investment powers under section 36(1) of the 1995 Act, are restricted in their application to the Scheme, by virtue of Regulations 6(1) and 7(1) of the Investment Regulations, on the basis that the Scheme has fewer than one hundred members.

116. 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".

117. Mr and Mrs Davison invested all of the funds which represented the contributions into the Scheme from Mr L and the Additional Applicants with Tivan, and chose the option of investing in a "VERY DYNAMIC" line of investment, meaning that the entirety of those funds would be invested in a high-risk manner. When I issued my Preliminary Decision, I had seen no evidence that Mr and Mrs Davison had considered the need to diversify the investment of Scheme assets, or that they had taken any advice in that regard. Scheme assets that had not been invested via Tivan appeared to have been largely invested in unsupported loans, in respect of which the Trustees' debtors had defaulted. I found that there was nothing to suggest that the Trustees had "regard to the need for diversification of investments", as Regulation 7(2) of the

Investment Regulations required them to do, when investing Scheme assets with Tivan.

118. For that reason I considered that Mr and Mrs Davison had acted in breach of the requirements of Regulation 7(2) of the Investment Regulations by entering into the AMA with Tivan and by transferring the Scheme funds to Tivan.

119. At the Oral Hearing, Mr Davison confirmed that the Trustees had taken no independent advice in relation to diversifying Scheme fund investments. The decision to invest in accordance with the AMA with Tivan was made hastily, as the Trustees were keen to avoid leaving themselves open to allegations of not being sufficiently proactive in respect of reinvesting the funds that had been retrieved from ProphetMax. I have seen no evidence that the Trustees considered the need for diversification of investments prior to entering into the AMA and transferring Scheme funds to the Prime Brokers' accounts. Therefore, my findings in paragraph 118 above still stand.

ii) Subsections (3) and (4) of section 36 of the 1995 Act (Choosing investments: requirement to obtain and consider proper advice)

120. The relevant parts of subsections (3) and (4) of section 36 of the 1995 Act 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 –
>
> (a) 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
> (b) obtain and consider such advice accordingly."

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

122. Under subsection (7) of section 36 of the 1995 Act, trustees will not be regarded as having complied with subsections (3) or (4) unless the advice that they have obtained is in writing. Whilst Mr and Mrs Davison claim to have conducted due diligence before

investing with Tivan, when I issued the Preliminary Decision, I had seen no evidence that they had received any written advice in relation to the investment of the Scheme funds. In the absence of any such evidence, I considered that Mr and Mrs Davison had acted in breach of the requirement to obtain written advice under subsections (3) and (4) of section 36 of the 1995 Act.

123. Mr Davison confirmed at the Oral Hearing, that he had been aware of section 36 of the 1995 Act. However, the Trustees had not taken written investment advice before investing with Tivan. Having received confirmation from Mr Davison that no written advice was taken before entering into the AMA with Tivan, my finding, that the Trustees acted in breach of the requirement of section 36(3) and (4) of the 1995 Act, still stands.

Requirements under case law

124. Case law provides further requirements for trustees to meet in exercising their power of investment, as follows:-

- 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 1).*

- A higher standard of care is expected of a person who holds himself out to have some special skill (*Bartlett v Barclays Bank [1980] Ch 515*).

- 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* (page 733)).

125. Although Mr Davison declared only five years' investment experience in relation to his chosen investments with RJ O'Brien when he completed the customer information disclosure form, referred to above in paragraph 46, he had clearly held himself out to the Scheme's members, as having had substantially more investment experience, thirty years (see paragraph 49 above). Therefore, I considered in the Preliminary Decision that, by virtue of *Bartlett v Barclays Bank*, the standard of care expected of Mr Davison, as a trustee of the Scheme, in relation to his investment of Scheme funds, was higher than the normal standard requirement imposed by the case of *Re Whiteley*.

126. The investments that were entered into were high-risk in nature and there was a complete lack of diversification of investment which showed a lack of regard for members' best financial interests and a failure to avoid hazardous investments, contrary to the requirements imposed on trustees by *Cowan v Scargill* and *Learoyd v Whiteley*.

127. Regarding the nature of the AMA with Tivan, I found some of its terms rather surprisingly onerous from a trustee's point of view. In particular, Tivan's ability to terminate the agreement with immediate effect, and with no provision as to how assets would be returned to the Trustees, or how costs would be settled other than the provision for the immediate payment of any sums due to Tivan, was, in my opinion, unreasonable and raised doubt in my mind that the Trustees had considered the AMA properly.

128. In light of the points raised in paragraphs 125 to 127, I found, in the Preliminary Decision, that Mr and Mrs Davison's actions had breached their duty of care and skill as they fell short of the higher standard of care expected as a consequence of *Bartlett v Barclays Bank* and they failed to fulfil the requirements imposed on them by *Cowan v Scargill* and *Learoyd v Whiteley*.

129. At the Oral Hearing, Mr Davison confirmed that the Trustees had not taken independent advice in respect of either: the investments; or the terms of the AMA with Tivan. In fact, Mr Davison admitted that he had not read the detail of the documents as fully as he might have done. Therefore, my Preliminary Decision finding, set out in paragraph 128 above, has not changed.

The Pensions Regulator's Code of Practice

130. I am required (further to section 90 (5) Pensions Act 2004) to have regard to the Pensions Regulator's codes of practice concerning pension scheme trustees, in considering complaints made to us.

131. Code of Practice No.13 (the **Code**), published by the Pensions Regulator in November 2013, and entitled 'Governance and administration of occupational defined contributions trust-based pension schemes', required trustees to ensure that a "clear and comprehensive" contract was drawn up, setting out the terms on which advisers or service providers were appointed (paragraph 169 of the Code). Trustees were specifically required to ensure that any notice period, and the basis for exit fees, were reasonable, with arrangements in place in respect of releasing information back to the trustees and any new adviser, within a reasonable timescale.

132. Although the AMA with Tivan was entered into before the Code came into force, Mr and Mrs Davison's duty of care and skill required them to take adequate steps to keep their knowledge and understanding of pensions and trust law up to date. At the Oral Hearing Mr Davison told me that the Trustees had kept themselves up to date

with the Pensions Regulator's Codes of Practice and other guidance published for pension scheme trustees.

133. In my opinion, Mr and Mrs Davison should have been aware of the Code's publication in November 2013, and should have taken steps to familiarise themselves with, and abide by, its guidance. However, The Trustees did not attempt to alert Tivan to the existence of the new Code, when it was published in 2013, or try to negotiate any amendment to the AMA with Tivan in light of the publication of the Code and the requirements that it contained.

Delegation of the Trustees' power of investment

134. My finding, under paragraph 119 above, of a breach by the Trustees of their duties under the Investment Regulations, is subject to consideration of the effect of section 34 of the 1995 Act:

> "(2) any discretion of the trustees of a trust scheme to make any decision about investments –
>
> (a) may be delegated by or on behalf of the trustees to a fund manager to whom subsection (3) applies to be exercised in accordance with section 36, but
>
> (b) may not otherwise be delegated except under section 25 of the Trustee Act 1925 (delegation of trusts for period not exceeding twelve months)…
>
> (3) This subsection applies to a fund manager who, in relation to the investments, may take the decisions in question without contravening the prohibition imposed by section 19 of the Financial Services and Markets Act 2000 (prohibition on carrying on regulated activities unless authorised or exempt).
>
> (4) The trustees are not responsible for the act or default of any fund manager in the exercise of any discretion delegated to him under subsection (2)(a) if they have taken all such steps as are reasonable 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 his work competently and complying with section 36."

135. I am going to consider whether or not it could be said that the Trustees delegated their discretion to Tivan, to make investment decisions.

Sections 34(2) and (3) of the 1995 Act (requirement for FCA authorisation or exemption)

136. In order for pension scheme trustees to delegate their discretion to a fund manager under section 34(2), that fund manager must be authorised by the FCA to carry on regulated activities or exempt from that authorisation requirement. Tivan has never had the necessary FCA authorisation to enable the Trustees to have delegated their investment discretion to it in accordance with section 34(2) of the 1995 Act and I have seen nothing to suggest that it is exempt from the authorisation requirement.

Section 34(4) of the 1995 Act

137. Even if Tivan had been granted the necessary FCA authorisation or any exemption from the requirement for FCA authorisation, in order for the Trustees to have been exempt from responsibility for Tivan's exercise of its discretion to make investment decisions, they would have needed not only to have conducted sufficient due diligence before appointing Tivan as fund manager, to satisfy themselves as to Tivan's knowledge and experience (section 34(4)(a)), but also to have continued to monitor Tivan's performance on an ongoing basis following Tivan's appointment as investment manager (section 34(4)(b)).

138. Mr and Mrs Davison have claimed that Mr Davison's meeting with Mr Kelly, which is documented by his handwritten note of his meeting with Mr Kelly on 14 February 2012, together with the FCA authorisation of the Prime Brokers, amounted to sufficient due diligence to enable the Trustees to enter into the AMA with Tivan. At the Oral Hearing, Mr Davison added that he had also received recommendations in respect of Tivan from individuals outside the Scheme. I do not consider that that constitutes evidence of Mr and Mrs Davison having conducted sufficient due diligence to satisfy the requirement under section 34(4)(a), for the Trustees to have satisfied themselves that Tivan had the appropriate knowledge and experience for managing the Scheme's investments. The Trustees did not investigate Tivan themselves, but simply relied upon the opinions of other people to inform their decision to enter into the AMA with Tivan.

139. I questioned Mr Davison at the Oral Hearing, to try to ascertain what steps the Trustees had taken to satisfy themselves that Tivan was continuing to carry out its work competently on an ongoing basis, as they would have been required to do by section 34(4)(b) of the 1995 Act, in order to benefit from section 34(4) of the 1995 Act, as set out in paragraph 134 above. Mr Davison informed me that he had monitored the Prime Brokers' accounts regularly and that, initially, he had considered the commission payment of £740,000 to Tivan to be a sign that trading had started well. Mr Davison also informed me that, contrary to the purported agreement (of which there is no written evidence) that commission would be rebated, that rebate did not happen as, instead, Tivan retained the money to enable the Trustees to take advantage of a "fantastic opportunity". Mr Davison relied upon the advice of two of the Scheme's members, neither of whom are Mr L or any of the Additional Applicants,

who were part of Tivan's trading team, to inform his decision not to request that the money was instead paid to the Scheme immediately.

140. The Trustees' reliance upon the opinions of other members of the Scheme concerns me as it suggests that Mr and Mrs Davison may have been relying upon those members to fulfil the requirement of section 34(4)(b) on their behalf. There is nothing in section 34 or any other legislation to permit trustees to delegate their duty under section 34(4)(b) to another party. On that basis, I was unable to find, in my Preliminary Decision, that Mr and Mrs Davison had properly delegated the exercise of their investment powers, and the liability that comes with it, to Tivan.

141. At the Oral Hearing, when given full opportunity to do so, Mr Davison provided no evidence that the Trustees had in fact delegated the exercise of their investment powers under section 34 and I have seen no evidence, such as minutes of meetings with Tivan, or other records, to suggest that he had. As is explained in paragraph 187 below, Mr Davison did not take adequate steps to verify the statements that he received from Tivan, which showed a monthly investment growth of 1% per month. Nor was there evidence that the Trustees or any other person considered paragraph 25 of the Code (see paragraph 156).So the Trustees' monitoring of Tivan's competency clearly fell below the requirement under section 34(4), to take "all such steps as are reasonable" to satisfy themselves that Tivan was carrying out its work competently. Therefore, I have to conclude that they did not do so.

142. On that basis, the Trustees will be liable for any failure to take care or exercise skill in the performance of their investment duties, by virtue of section 33(1) of the 1995 Act (see paragraph 108 above).

Personal liability for breach of investment duties

143. Clause 21 of the Deed contains an exoneration clause for the Trustees, under which:

> "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."

144. On joining the Scheme, Mr L, and the Additional Applicants, signed a form which contained the indemnity set out at paragraph 22 above.

145. As explained in paragraph 108 above, section 33 of the 1995 Act 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. On that basis, I do

not consider that the exoneration clause under the Deed is effective in preventing Mr and Mrs Davison from being held personally liable for any loss suffered by members in relation to the breach of their investment duties by entering into the AMA with Tivan, which they would otherwise be responsible for repaying.

146. The indemnity given by members on joining the Scheme is contained in the membership application form, which I consider to be a commercial agreement between the members and the Trustees. It would be for the parties to enter into separate proceedings to determine whether the Trustees could recover from Mr L, or any of the Additional Applicants, any of the funds that I direct the Trustees to pay under this Final Determination.

147. In the Preliminary Decision, I acknowledged that section 61 of the Trustee Act 1961 ("**Section 61**"), would require consideration following the Oral Hearing. Under Section 61, assuming that it is relevant to the application of section 33 of the 1995 Act, I may direct relief to the Trustees wholly or partly of any personal liability for any breach of trust that has arisen out of their actions or inactions, as trustees of a pension scheme, if it appears to me that: (1) the Trustees acted honestly and reasonably; and (2) it would be fair to excuse the Trustees from personal liability, having regard to all the circumstances of this case.

148. It is clear that the extent of the due diligence that the Trustees carried out before entering into the AMA with Tivan and the various agreements with the Prime Brokers has been shockingly inadequate. The Trustees took no independent advice in relation to either the AMA, or the powers of attorney that the Trustees entered into with Tivan. Instead, Mr Davison relied upon: the Prime Brokers' relationship with Mr Kelly; the Prime Brokers' FCA registration; and the Prime Brokers' willingness to take on Tivan as a client. The Trustees carried out no due diligence themselves into Tivan, or either of the Prime Brokers, before placing a large amount of the Scheme's funds into accounts with the Prime Brokers. Mr Davison did not conduct any of his own research into Mr Kelly's background or qualifications, relying instead upon having been introduced to him by an acquaintance.

149. As I mentioned in paragraph 46 above, the Trustees entered into an agreement with RJ O'Brien, authorising RJ O'Brien to deal on the Trustees' behalf with CFE in relation to CFD transactions. It is of concern that I have received confirmation from the FCA that RJ O'Brien did not have the necessary permission from the FCA to carry out such activities. In any event, given that the Trustees gave Tivan (which was not FCA-regulated) power of attorney to invest and trade the Scheme's assets on the Trustees' behalf, I do not see how the Trustees could reasonably have concluded that the involvement of the Prime Brokers provided sufficient mitigation of the clear risks posed to members' funds by entering into the AMA with Tivan.

150. Further, I do not consider that exposing members' funds to the extreme risks inherent in CFDs, can be regarded as reasonable behaviour on the Trustees' part in respect of performing their investment functions. In my view, entering into CFDs essentially amounts to betting. CFDs are only regulated by the FCA because the product gambled on is a financial one; the underlying principle is exactly the same as, for example, placing a bet on a horse in the Grand National.

151. For these reasons, I am unable to find that the Trustees acted reasonably in entering into the AMA with Tivan (which, as explained in Section C below, severely lacked information concerning the charges and fees to which the funds were to be exposed), or that they ought fairly to be excused, under Section 61, assuming it is relevant to the application of section 33 of the 1995 Act, for their breach of trust committed by entering into the AMA with Tivan. Therefore, I find that the Trustees are personally, jointly and severally, liable for the financial loss caused to members by the Trustees' entering into the AMA with Tivan.

C. Fees and commission under the AMA with Tivan

152. The total amount invested with Tivan had been £1,328,963, which was reduced to approximately £106,000, by a loss on investment of £1,223,000. When I made my Preliminary Decision, it was not clear to me whether that investment loss included: the £260,000 in finance costs; £100,000 Prime Broker's fees; and £740,000 in commission to Tivan. Mr Davison confirmed, at the Oral Hearing, that it did.

153. Mr L has complained that Mr and Mrs Davison did not mention the above fees or commission to members at any point before entering into the AMA with Tivan. When I issued my Preliminary Decision, I considered that Mr L's complaint was supported by the fact that no mention was made of fees or commission in the investment strategy document provided by Tivan that Mr and Mrs Davison sent to members, or in any correspondence that I had seen, with members in relation to entering into the AMA with Tivan. At the Oral Hearing, Mr Davison did not deny that the Trustees had failed to mention the fees and commission to members before entering into the AMA with Tivan.

154. Further, the AMA with Tivan contained no provisions, whatsoever, as to the fees or commission payable under it. The entry of the term "TBA" in relation to fees and commission under the AMA left Tivan with discretion to charge as much as they liked. At the very least, a prudent individual would have insisted that the method of calculating fees and commission were outlined in the agreement, in order to limit their level in some way. Not documenting any agreement about the level of fees or commission clearly amounted to a breach of trust on the Trustees' part.

155. Under the Code, once it had come into force in November 2013, trustees were required to have an understanding of the costs to which their investments were exposed and to ensure that those costs were documented (paragraph 99 of the Code).

156. Under paragraph 125 of the Code, trustees were specifically required to consider the impact of fees on the investment return and to check their level against applicable market comparators to ensure that they remained competitive.

157. Mr Davison has given a somewhat complex explanation of how the arrangement in respect of fees and commission was to have worked. However, given the extremely high proportion of the amount invested, that was made up of costs, fees and commission, I cannot accept that any ordinary, prudent person, let alone an individual claiming to have extensive investment experience, would have entered into such an agreement.

158. I therefore confirm my finding, in the Preliminary Decision, that Mr and Mrs Davison's entering into the AMA with Tivan, without documenting the fees, charges and commission structure adequately, or at all, and without informing the members concerned about the level of commission, fees and charges that would or might be payable, was in breach of: the Trustees' duty of care and skill; the Trustees' various duties under case law (outlined in paragraph 124 above); and in breach of the Trustees' fiduciary duty to Scheme members to act honestly and in good faith. I also remain of the opinion, which I expressed in the Preliminary Decision, that the Trustees' lack of attention in relation to the fees, charges and commission structure, amounted to separate maladministration. It was also contrary to the provisions of the Code that are outlined above.

159. Further, I consider negotiating the fees and commission charges under the AMA with Tivan to be an investment function of the Trustees', as referred to in section 33(1) of the 1995 Act (see paragraph 108 above). At the Oral Hearing, Mr Davison confirmed that the Trustees had not taken independent advice in relation to the fees and commission structure under the AMA with Tivan, and that the Trustees had relied upon assurance from other Scheme members about Tivan's retention of the £740,000 commission charge, rather than insisting that Tivan rebated the commission charge to the Scheme, as had been agreed.

160. I have already found, in the Preliminary Decision, that the Trustees failed to take care in their negotiation of the fees and commission structure under the AMA with Tivan. I find that section 33(1) of the 1995 Act, prevents Mr and Mrs Davison from relying upon the exoneration under Clause 21 of the Scheme's Deed and Rules, in respect of the loss caused to Mr L and the Additional Applicants. This is as a consequence of the Trustees' failure to negotiate the fees and commission charges under the AMA with Tivan.

161. That finding was subject to any relief that might be granted by virtue of Section 61 (assuming Section 61 applies in respect of section 33 of the 1995 Act). I have not seen or heard any further evidence to suggest that Mr Davison acted reasonably in entering into the AMA with Tivan, as there was no negotiation, or documentation of the fees and commission charging structure. Further, Mr Davison's decision to permit Tivan to retain commission representing such a significant proportion of the funds invested under the AMA with Tivan, without conducting any of his own due diligence in relation to the investment opportunity in question, was clearly not a reasonable one, and I do not consider that it would be fair to excuse the Trustees for the breach of trust that they have committed.

162. I am unable to find that the Trustees should benefit with any relief from their personal liability in respect of the fees and commission charges under Section 61. I find that the Trustees are personally liable to the Scheme for any loss of funds incurred in respect of fees, charges and commission, under the AMA with Tivan.

D. Termination of accounts with the Prime Brokers

163. When I issued the Preliminary Decision, I was not aware of either: Mr and Mrs Davison's reasons for terminating the Scheme's accounts with the Prime Brokers ; or the extent of any decision-making process that Mr and Mrs Davison went through before deciding to terminate those accounts.

164. Further, it was not clear where the funds that had been held by either or both of the Prime Brokers were moved to after the termination of the accounts in which those funds had been held.

165. It was, however, apparent to me that the use of the Prime Brokers, as brokers in relation to the Tivan investment, was not only considered by the Trustees in deciding whether to proceed with the Tivan investment but was also put forward to members by the Trustees, as a selling point in relation to entering into the investment.

166. As detailed in paragraph 73 above, I now understand that Mr Davison terminated the Prime Brokers' accounts in August 2014, following investigation into Tivan, and having instructed a law firm on account of the Trustees' concerns in relation to the investment losses incurred under the AMA with Tivan.

167. As detailed in section G below, the Trustees also had concerns about the authenticity of the information contained in the quarterly statements that had been issued to members.

168. Following the termination of the accounts with the Prime Brokers, any monies that had been held in those accounts was returned to the Scheme, so it was not necessary for the Trustees to appoint any broker in place of the Prime Brokers.

169. I am satisfied that the Trustees' reasons for terminating the Prime Brokers' accounts were reasonable and that the Trustees were right to have been concerned about the scale of the loss incurred under the AMA with Tivan.

E. Loans made from the Scheme's assets

170. Mr and Mrs Davison claim that the loans that were made from the Scheme's assets are not relevant to Mr L or the Additional Applicants, as those individuals had not joined the Scheme when the loans were made and none of them would have monies invested in any of the loans.

171. On the contrary, as stated in the Preliminary Decision, given that the Scheme's assets (excluding any held in a SIPP) are pooled and are not ringfenced (as explained in paragraphs 106 and 107 above), I find that the failure to recover the amounts loaned to the various debtors will have affected the assets of all Scheme members.

172. Further, it has become apparent, from what Mr Davison said during the Oral Hearing, that the Trustees failed to carry out adequate due diligence before entering into the various loans and to take adequate steps to protect the Scheme's funds in the event of a default on loan repayments (see paragraphs 75 to 79) above.

173. Whilst the Trustees engaged the services of HDA to provide consultancy services in relation to the loans, as Mr Davison was the director of HDA and provided those services himself, the clear conflict of interest and failure to manage that conflict (as explained in paragraphs 190 to 193 below) prevents any advice received from HDA from being considered to be independent advice.

174. As I explained in section B above (the Tivan investment), the Trustees were under a statutory duty, (section 36(3) of the 1995 Act), to obtain and consider proper advice, given by an FCA authorised person, before granting loans from Scheme assets. As the Trustees failed to do that, I find that they are personally liable for the investment loss suffered as a consequence of those loans having failed and, as a consequence of section 33(1) of the 1995 Act, the Trustees cannot rely upon Clause 21 of the Scheme's Deed for relief from that liability.

175. I also find that the Trustees' failure to conduct adequate due diligence before entering into the loans and to fail, in relation to all but one of the loans (the personal guarantee in respect of that loan never having materialised), to obtain security in relation to the funds loaned, amounts to a breach of trust. The Trustees failed to meet their duties of care and skill imposed on them by case law, as set out in paragraph 124 above.

176. I do not find that the Trustees can rely on Section 61 (if applicable). As Mr Davison was aware of section 36 of the 1995 Act, and therefore, of the requirement to obtain written advice before entering into an investment. I cannot see how his failure to have taken independent advice in writing, in relation to any of the loans, can be regarded

as reasonable. Further, given that the Trustees were investing funds belonging to Scheme members, as well as their own funds, I cannot see that the Trustees' decision not to insist on some form of security from any of the debtors bar one, can be regarded as a reasonable decision. The companies, to which the Trustees made loans, had all been established recently prior to the loans being made. This should have caused the Trustees to act with caution given that the companies would not have been able to show any reliable, established credit history. It would also be unreasonable for the Trustees to be excused for their breach of trust, when included with the numerous other breaches of trust that I have found the Trustees to have committed.

177. Therefore, I am unable to find that the Trustees should benefit from any protection under Section 61 in respect of the loans that they made with Scheme funds. I therefore find that the Trustees are personally liable to the Scheme for any loss incurred by the Scheme in respect of those loans.

F. Investment in Kirkpatrick Fiscal Limited

178. When I made my Preliminary Decision, I had not seen any detail in relation to the Trustees' investment in Kirkpatrick Fiscal Limited. However, given the requirement under section 36(7) of the 1995 Act, for investment advice to be obtained by pension scheme trustees in writing before entering into any investment of scheme assets (as explained in paragraph 120 to 122 above), I found, as a matter of fact, that Mr and Mrs Davison were in breach of section 36(7) of the 1995 Act, in investing Scheme assets in Kirkpatrick Fiscal Limited without having taken written investment advice.

179. In order to determine whether the Trustees' actions in investing in Kirkpatrick Fiscal Limited and setting up the SPV accorded with the Trustees' duties of care and skill under common law and statute, I questioned Mr Davison about the arrangement at the Oral Hearing, as detailed in paragraphs 81 to 85 above.

180. It seems, from Mr Davison's answers, that the Trustees simply accepted TCM's recommendation that they set up the SPV, without questioning the arrangement or even conducting their own research into the suitability of such an arrangement for the Scheme. I find this particularly surprising given that the use of SPVs by pension schemes was a new and not widely explored concept in 2009, when Kirkpatrick Fiscal Limited was established. I consider that the fact that the Trustees were willing to accept advice from TCM's lawyer, who was not only related to one of TCM's directors but not even qualified to give pensions law advice, is evidence that the Trustees' investment in Kirkpatrick Fiscal Limited fell well short of the standards and duties of care established by case law, as detailed in paragraph 124 above.

181. I therefore find that the Trustees' investment in Kirkpatrick Fiscal Limited and the setting up of the SPV failed to meet the requirement to exercise an investment function with due care and skill and amounted to a breach of trust.

182. As explained in paragraph 108 above, the Trustees are personally liable for any loss incurred as a consequence of any failure to take care or exercise skill in the performance of any investment function. I consider that the Trustees' failure to obtain written, independent investment advice before entering into the investment in Kirkpatrick Fiscal Limited, and the Trustees' lack of any independent due diligence activity or independent research into the nature of an SPV and/or its suitability in relation to the Scheme, demonstrates that the Trustees did not take due care, or exercise skill, in deciding to enter into this investment.

183. Section 33 of the 1995 Act, precludes the Trustees from relying upon any protection offered by Clause 21 of the Trust Deed. On that basis, I find that the Trustees are personally liable to the Scheme for any loss of Scheme funds, incurred as a consequence of the Trustees' investment in Kirkpatrick Fiscal Limited, and the use of the SPV to lend money to Kirkpatrick Fiscal Limited.

184. Regarding the Trustees' breach of duty, I cannot see that any reasonable trustee of a pension scheme, being responsible for the funds of the pension scheme's members, would have entered into such an unusual arrangement without conducting independent research or seeking independent advice. Therefore, I am unable to find that the Trustees acted reasonably in entering into the SPV or, consequently, that they should be excused from the personal liability detailed in paragraph 183 above by virtue of Section 61 (if applicable).

G. Quarterly statements issued to members

185. Having questioned Mr Davison at the Oral Hearing, it is clear to me that the Trustees failed to fulfil the requirement to continue to monitor Tivan's performance as investment manager, as required by section 34(4) of the 1995 Act, given that Mr Davison confirmed that he received no written confirmation of the investment growth of 1% per month, that was shown in statements issued to members. At the very least, I would have expected the Trustees to have asked for written statements, showing the investment performance, rather than relying on what they were told verbally, especially given the extremely volatile nature of the investments concerned.

186. Clearly, the Trustees did not fulfil their duties under *Re Whiteley* and Mr Davison, who had held himself out to members as having had thirty years of investment experience, did not demonstrate the higher standard of care expected of him under *Bartlett v Barclays Bank* (see paragraph 125). In issuing statements to members based only on verbal assurances, I cannot see that the Trustees acted in members' best financial interests as required under case law (*Cowan and Scargill [1985] 1 Ch 270*).

187. I therefore find that, in issuing the incorrect statements to members, the Trustees acted in breach of trust. I cannot see that any reasonable pension scheme trustee would have issued the information that the Trustees issued to the members without at least having seen written confirmation of the purported investment growth. Further,

Mr Davison admitted, at the Oral Hearing, that he had released the last statement despite having had concerns as to the authenticity of the information he had received from Mr Kelly. I do not regard that decision as reasonable. Therefore, I cannot find that the Trustees acted reasonably in issuing the incorrect statements to members, or that Section 61 (if applicable) should offer any protection to the Trustees in respect of any personal liability arising as a consequence of this breach of trust.

188. Regarding the allegations that the Trustees deliberately falsified the statements, Mr Davison assured me, under oath at the Oral Hearing, that he had not deliberately provided members with incorrect information, and that his apparent admission to South Yorkshire Police in respect of having falsified the statements, was only given on the advice of the Officer concerned.

189. Mr Davison's actions were far from reasonable and fell short of the duties imposed on him as a trustee under common law and statute. He might not have set out to falsify the statements, but he did choose to close his eyes and ears to the need to verify the information that he received from Tivan; this is not the behaviour of an honest person. I consider that issuing the final statement despite concern as to the truth of its content amounts to wilful neglect and default on the Trustees' part.

H. Consultancy and invoices

190. As detailed above in paragraphs 89 to 92, it is clear that the Trustees' engagement of HDA to provide consultancy service in respect of the loans entered into by the Trustees created a conflict of interest, as Mr Davison was acting both in the capacity as a trustee of the Scheme, and in the capacity as an advisor to the Trustees.

191. As Trustees of the Scheme, Mr and Mrs Davison were under a fiduciary duty not to profit from their position in relation to HDA at the expense of the Scheme's beneficiaries, and not to be in a position of conflict of duty or interests.

192. Mr Davison admitted, at the Oral Hearing that, despite having been aware of the fiduciary duties imposed on pension scheme trustees under common law, the Trustees had not considered the issue of conflicts of interest, and had taken no steps to mitigate the obvious conflict of interest that arose from HDA's engagement by the Trustees.

193. I find that the Trustees are personally liable to account for the money paid by the Scheme to HDA and cannot claim any exoneration from that liability under clause 21 of the Deed. Their actions in failing to take steps to mitigate the clear conflict of interest posed by engaging the services of had, despite their awareness of their fiduciary duties, amount to wilful default.

I. Arguments raised by the Trustees

a) Mr and Mrs Davison's membership of the Scheme

194. Mr and Mrs Davison have argued that I should take into account the fact that their monies were also invested in Tivan and have explained that, initially, the Scheme was established for Mr Davison's benefit only as the sole member of the Scheme, and that the Scheme's membership grew as Mr and Mrs Davison were approached by individuals who wished to invest through the Scheme.

195. As I stated in the Preliminary Decision, regardless of Mr and Mrs Davison's membership of the Scheme and its history, as Trustees of the Scheme, Mr and Mrs Davison were required to abide by the requirements of common law and trust law; to act in accordance with their duties of care and skill, and their fiduciary duties.

196. Therefore, as I previously stated in the Preliminary Decision, I do not consider Mr and Mrs Davison's membership of the Scheme, or the Scheme's history, to be relevant to my findings on the issues about which Mr L, and the Additional Applicants, have complained.

b) Contributory negligence

197. Mr and Mrs Davison have asserted that they acted in accordance with members' instructions in entering into the agreement with Tivan.

198. Looking at Mr and Mrs Davison's investment powers under the Scheme, as Trustees of the Scheme, Clauses 15 to 17 of the Deed provided them with a broad investment power. However, the Trustees were required to "*take into account any specific written wishes of a Member…as to the manner in which such Member's Fund is invested*" (Clause 16 of the Deed).

199. The facts are that, following the losses incurred through investing in ProphetMax, Mr and Mrs Davison approached members and suggested that they invest those members' assets through Tivan. Mr and Mrs Davison sent the members Tivan's slides, setting out Tivan's investment strategy. Those slides made no mention of the commission, charges, or fees, payable to Tivan. Members were not required to consent actively to their funds being transferred to Tivan but were given just two days to inform the Trustees if they did not wish their funds to be transferred.

200. The nature of the Trustees' communication with members in relation to the transfer of funds to Tivan, appears to me, to have been somewhat hurried, with the Trustees urging members to send in their questions, in relation to Tivan's slides, as soon as possible, as they were keen to progress the transaction.

201. I have seen no evidence that members took an active role in conducting any due diligence in relation to Tivan, or that they were required to do so, given that the Trustees had the power, under Clauses 15 to 17 of the Deed to invest members'

funds as they saw fit, and that active consent was not necessary in order for the investment in Tivan to proceed.

202. In the Preliminary Decision, I said that I would explore this matter further at the Oral Hearing, before making a decision as to whether contributory negligence may have occurred, on the part of Mr L, and/or any of the Additional Applicants. Also, whether this has any bearing on quantum.

203. When I questioned Mr L and Mr G at the Oral Hearing, they confirmed that, beyond reading the information that the Trustees had sent to them in respect of Tivan, they did not conduct any due diligence themselves. It became apparent that Mr L and Mr G had placed their trust in the Trustees, to invest the money that they had transferred to the Scheme in accordance with the applicable law, with the aim of achieving the best possible investment return for the Scheme's members. I have seen no evidence to suggest that any action by any one or more of Mr L, and the Additional Applicants, had any effect on the Trustees' actions. I note that there was not a range of investments offered by the Trustees for members to choose from. Further, as members' funds in the Scheme were pooled, members' investment instructions would have been irrelevant. Therefore, I do not find any contributory negligence on the part of Mr L, or any of the Additional Applicants. As I have stated in paragraph 146 above, whether or not the Trustees could rely upon any indemnity from members would be a matter of separate proceedings.

Summary decision in respect of my findings concerning the Trustees

204. I uphold Mr L's and the Additional Applicants' complaints, as set out below.

B. <u>The Tivan investment</u>

205. Mr and Mrs Davison acted in breach of the requirements of Regulation 7(2) of the Investment Regulations by entering into the AMA with Tivan and by transferring the funds involved to Tivan.

206. The Trustees acted in breach of the requirement of section 36(3) and (4) of the 1995 Act, to obtain and consider written independent advice before entering into an investment, as they did not do so before entering into the AMA with Tivan.

207. The Trustees breached their duties of care and skill as they: fell short of the higher standard of care expected, as a consequence of *Bartlett v Barclays Bank*; and failed to fulfil the requirements imposed on them by *Cowan v Scargill* and *Learoyd v Whiteley*.

208. The Trustees' entering into the AMA with Tivan did not constitute a valid delegation of their investment functions under section 34 of the 1995 Act. Therefore, each Trustee will be personally liable for any failure to take care or exercise skill in the performance of their investment duties, by virtue of section 33(1) of the 1995 Act.

209. The Trustees cannot rely upon Clause 21 of the Deed for relief from personal liability to the Scheme for the losses in Scheme funds caused by their entering into the AMA with Tivan, as section 33(1) of the 1995 Act prevents them from doing so.

210. I do not consider that the Trustees can benefit from any relief under Section 61 (assuming that it applies in relation to section 33 of the 1995 Act), as they did not act reasonably in entering into the AMA with Tivan and it would not be fair for them to be excused for their breach of trust in doing so.

211. I therefore find that the Trustees are personally liable, jointly and severally, to the Scheme for any loss on investment under the AMA with Tivan.

212. As for the indemnity given by members on joining the Scheme, it is for the parties to enter into separate proceedings to determine whether the Trustees could recover from Mr L, or any of the Additional Applicants, any of the funds that I direct the Trustees to pay under this Final Determination.

C. Fees and commission under the AMA with Tivan

213. I find that the Trustees failed to take due care, or exercise skill, in negotiating and documenting the fees, charges, and commission structure, under the AMA with Tivan. Under section 33(1) of the 1995 Act, the Trustees are personally liable to account to the Scheme for any amount paid in fees, charges, and commission, under the AMA with Tivan.

214. The Trustees' shortcomings in agreeing to the fees, charges, and commission structure, under the AMA with Tivan amount to a breach of trust, for which they are not to be excused by virtue of Section 61 (if applicable), such behaviour being clearly unreasonable. So, the Trustees are personally liable, jointly and severally, to account to the Scheme for the losses incurred.

D. Termination of accounts with the Prime Brokers

215. I am satisfied that the Trustees' reasons for terminating the Prime Brokers' accounts were reasonable and that the Trustees were right to have been concerned about the scale of the loss incurred under the AMA with Tivan.

E. Loans made from the Scheme's assets

216. The Trustees' failed to conduct adequate due diligence, or to take independent written advice, before entering into the loans, and failed to take steps for their security, in the event of any of the loans defaulting (except for that made out to Radical Supplies Limited which security did not materialise). This constitutes a failure on the Trustees' part to take care and exercise skill in the performance of an investment function, in respect of which the Trustees cannot exclude or restrict their liability, on account of Section 33(1) of the 1995 Act.

217. Therefore, Clause 21 of the Deed affords the Trustees no protection from personal liability.

218. The Trustees' shortcomings in respect of entering into the loans amount to a breach of trust, for which I do not find that they are entitled to any relief under Section 61 (if applicable), as I do not consider that the Trustees' actions or inactions in that respect were reasonable.

219. The Trustees are personally liable, jointly and severally, to account to the Scheme for the loss incurred by entering into the various loan agreements which have defaulted.

F. Investment in Kirkpatrick Fiscal Limited

220. The Trustees' failure to take independent written advice, or conduct any independent due diligence, before entering into the SPV, and investing in Kirkpatrick Fiscal Limited, amounted to a failure to take due care, or exercise skill, in the performance of an investment function, in respect of which the Trustees are personally liable.

221. The Trustees are unable to exclude or restrict their personal liability, as provided by section 33(1) of the 1995 Act, so cannot rely upon Clause 21 of the Deed.

222. The Trustees cannot benefit from any relief under Section 61 (if applicable) for their breach of trust, as their actions were not reasonable, and it would not be fair for them to be excused from the consequences of their actions and inactions, in relation to investing in Kirkpatrick Fiscal Limited, and setting up the SPV.

223. Therefore, the Trustees are personally liable, jointly and severally, to the Scheme for any loss of Scheme funds incurred by investing in Kirkpatrick Fiscal Limited and setting up the SPV.

G. Quarterly statements issued to members

224. The Trustees acted in breach of trust in failing to take appropriate steps to verify the figures contained in the statements of account that they sent to members in relation to the performance of the Tivan investment.

H. Consultancy and invoices

225. The Trustees' engagement of HDA, to provide consultancy services in respect of entering into the various loans made out of Scheme funds, and their complete failure to acknowledge or mitigate the obvious conflict of interest that arose from that engagement, amounted to a breach of the Trustees' fiduciary duty of no conflict.

226. The Trustees are personally liable, jointly and severally, to account for all payments made by the Trustees from the Scheme's funds to HDA.

I. Arguments raised by the Trustees

a) Mr and Mrs Davison's membership of the Scheme

227. I do not consider Mr and Mrs Davison's membership of the Scheme, or the Scheme's history, to be relevant to the findings made on the issues about which Mr L, and the Additional Applicants, have complained.

b) Contributory negligence

228. I do not find any contributory negligence on the part of Mr L, or any of the Additional Applicants.

229. Any attempt by the Trustees to rely upon the indemnity given by members to the Trustees on joining the Scheme would have to be the subject of separate proceedings.

Directions

230. Within 28 days of the date of this Determination, the Trustees shall pay into the Scheme the sum of:

- the £1,328,963 that the Trustees transferred into the Prime Brokers' accounts in respect of the AMA with Tivan, less any funds that were returned to the Scheme when those accounts were closed;
- £798,061, being the total amount of Scheme funds paid out by the Trustees as loans;
- £173,461, being the amount invested in Kirkpatrick Fiscal Limited; and
- £114,803.59, being the total amount of all payments made by the Trustees to HDA,

plus interest at the rate of 8% of the judgment amount.

231. The Trustees have committed multiple breaches of trust. Their actions also amount to pure maladministration. For example, there was a failure to produce statements (paragraph 55 above) and a lack of attention in respect of the fees, charges and commission structure (see paragraph 158). The Trustees acted incompetently in assessing and addressing various conflicts points. Lengthy proceedings were necessary in order to investigate and determine Mr L's and the Additional Applicants' cases. During the Oral Hearing it was apparent that the Scheme was administered almost entirely without established process or procedure. Accordingly, within 28 days of the date of this Determination, the Trustees shall pay the sum of £5,000 to each of Mr L, and the Additional Applicants, in recognition of the exceptional level of distress and inconvenience suffered by each of them over a prolonged period of time.

232. In the event that any Member makes a request to take their cash equivalent from the Scheme, in accordance with Part 4ZA of the Pension Schemes Act 1993, before the Trustees have paid the amounts set out in paragraph 230 above, the Trustees shall take legal and actuarial advice as to how they should determine the amount to transfer out of the Scheme in respect of that member.

Reporting to TPR

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

Anthony Arter

Pensions Ombudsman
29 March 2019

Appendix 1

Additional Applicants:

PO Ref	Name	DJS	TV-in	Invested with Prophet Max?	Might be said to have agreed to Invest with Tivan?	Amount Invested with Tivan
7951	Mr S	29/2/12	?	Yes	Yes	31,797
8118	Ms R	18/4/12	18,955	Yes	?	11,273
6703	Mr E	24/2/12	46,315	Yes	Yes	29,531 from PM + 25,450
12813	Mr DY	1/6/12	79,038	?	?	?
7616	Mrs RE	28/5/12	42,176	Yes	No	42,176?
8801	Ms T	14/2/12	21,875	No	No?	?
11753	Mr ES	4/5/12	23,670	Yes	Yes	?
11759	Mr LE	26/1/10	41,112	No	No	Nil
10259	Ms N	26/3/12	?	Yes	?	35,345
102802	Mrs G	19/4/12	?	Yes	Yes	?
102801	Mr G	19/4/12	?	Yes	Yes	?
10848	Mr ER	14/2/12	19,184	Yes	?	11,981
10229	Mr RY	21/3/12	c35,000	Yes	Yes	22,083