PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN

Applicant	Bridge Trustees Ltd (**Bridge Trustees**)
Scheme	Pilkington's Tiles Pension Scheme (**the Scheme**)
Respondents	Mr Dean Burrows, Mr Stephen Lloyd, Mrs Jean Hirst and Mr David Gratrix (**the previous trustees**)

Subject

Bridge Trustees Ltd complain that two of the previous trustees Mr Burrows and Mr Lloyd authorised the return of £193,010.93 to Pilkington's Tiles Limited (**the Company**) and in doing so acted in contravention of the rules of the Scheme and contrary to the interests of the members. As such they have committed a breach of trust and should not be entitled to an indemnity under rule 14.20.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint should be upheld against Mr Dean Burrows and Mr Stephen Lloyd as they did not act in accordance with the rules. They did not act prudently or reasonably in considering whether a return of money to the Company was allowed under the rules, what the tax implications would be and whether this was in the best interests of the members. Mr Burrows and Mr Lloyd's focus was on returning the money to the Company and I therefore find that they acted in deliberate disregard of the interests of the members and therefore cannot claim an indemnity under rule 14.20. I also find that they failed to inform their fellow trustees of the return of money to the Company.

DETAILED DETERMINATION

Material Facts

1. The previous trustees were all employees of the Company and members of the Scheme. Stephen Lloyd and Dean Burrows also held positions with the Company as Managing Director and Personnel Manager respectively. Mr Burrows was also the Chair of the trustees and prepared the minutes. Jean Hirst and David Gratrix were both member nominated trustees.

2. The Scheme has both a defined benefit (**DB**) section and a defined contribution (**DC)** section. The administration of both the DB and DC sections had been moved from Capita Hartshead (now Capita) to Scottish Life in 2009.

3. The complaint centres around the sequence of events and actions during the period October 2009 to March 2010, after the move to Scottish Life, during which payments were made from the Scheme to the Company of £187,191.25 on 24 December 2009 and £5,819.68 on 11 March 2010.

4. The following are extracts from the minutes of the Trustees' meeting held on 16 October 2009 when a fall in fund value was reported. All four trustees were present plus Mr Clark the Finance Director for the Company, Neil Walton, the actuary and other representatives from Scottish Life and a representative from RBIG a Scheme adviser.

    "Scheme Valuation Report 2009

    > Neil Walton presented the scheme valuation for 2009 in a preliminary report. The initial response of all Trustees was one of shock and horror
    >
    > …
    >
    > Administration Transfer from Capita
    >
    > There are some employer contributions remaining in the scheme in respect of new entrants who leave within two years and take a refund of contributions. It was agreed that any excess should be pooled with the DB section and considered an additional contribution. The amount is fairly small at between £20K and £30K."

5. On 27 November 2009 Mr Harper of Capita emailed Mr Burrows and said:

    > "I can confirm that we have completed the reconciliation of DC funds. As you are aware the funds allocated to DC members (£2,695,610.67) were transferred to Scottish Life in August. This leaves a surplus balance of £198,647.50 in the DC Trustee bank account.

> …
>
> I would be grateful if you could provide Trustee approval for us to issue an invoice for the total fee of £9,750 (exclusive of VAT) representing the fee for the work we have undertaken in connection with the transition to Scottish Life and for this to be offset against the surplus balance of £198,647.50 before this is transferred to Scottish Life."

6. On 21 December 2009 Steve Clark, Finance Director at the Company emailed Andrew Stone of KPMG, Manchester who was working with him on the refinancing of the Company's banking facilities and said:

> "On a piece of positive news we have received confirmation that in the next few days we will receive a £187k cash refund of excess company contributions which are not in the Short Term Cash Forecast."

7. Following Mr Harper's email on 27 November 2009 there were a number of email exchanges and conversations between Mr Harper and Mr Burrows which resulted in the sum of £177,233.29 being remitted to the Trustees' bank account with Bank of Scotland on 24 December 2009. The same day Mr Burrows and Mr Lloyd authorised the payment of £187,191.25 from the Trustees' bank account to the Company.

8. On 4 January 2010 Mr Burrows emailed Mr Harper and said:

> "I have spoken at length with Steve Clark and Steve Lloyd on behalf of the company as well as with my fellow Trustees and a few points have been raised.
>
> The Trustees would like formal confirmation and a summary of where this money is from and over what period of time. Then where it has been invested and at what rate, since you knew of its existence. Given the timescales involved in scheme administration and transfer to Scottish Life, we expect this may be quite some time. We are having a Trustee meeting on 12th January and we would appreciate it if you could provide the above in time for that meeting. It will enable us to make informed decisions.
>
> The company is however very disappointed that the total fund of £198.647.50 (as of your email of 27/11/2009) has not been returned. If there is a dispute of invoices then it is just that, a dispute which needs to be resolved…If in the first instance I could ask that the Trustee information be provided that would be very much appreciated".

9. On 5 January 2010 Mr Harper emailed Mr Burrows and said:

> "The unallocated account represents the employer contributions in respect of those who have left and taken a refund of their own contributions. I have no recollection of any previous call being made on the unallocated account, so assume that these funds have accrued since our appointment as administrators and possibly since the inception of the scheme. The monies have remained invested in accordance with the investment decision originally made by the member. Funds were disinvested prior to the payment last year of the allocated funds to Scottish Life and were held in the Trustee account until being paid over last month.
>
> I hope this proves useful for the Trustee meeting."

10. Between 7 January and 3 February 2010 there was further email correspondence between Mr Burrows, Mr Harper and the Finance Director Mr Clark mainly concerning the outstanding fees and the balance of the unallocated account.

11. A Trustees' meeting was held on 12 January 2010. All four trustees were present together with Mr Clark the Finance Director. The minutes of the meeting record that the meeting was called by the Company to discuss two specific areas, namely seeking additional actuarial advice for the Company's benefit and payment of the PPF levy. Under the item Actuarial advice the following is recorded:

> "The company has for some time been disappointed with the support, guidance and advice provided by Scottish Life and their actuarial team, cumulating in the receipt of the latest preliminary results of the valuation which makes reference to recovery plan contributions of £900,000 per year from 2010. This clearly does not take into account the already agreed two year payment holiday nor does it consider the covenant of the company. Should the trustees demand payment at this level the Company would be forced to close. Clearly not an option, but seemingly not one considered by the Actuary.
>
> The company has at it's (sic) own expense, requested KPMG to provide advice and guidance solely for the benefit of the company.
>
> …
>
> It is the view of the Company that the scheme may be sufficiently funded to provide a secure low risk strategy for investment, and that with accurate lifestyling of the remaining members, the liabilities can be met with current assets without the need for additional contributions."

12. Under the item PPF levy the following is recorded:

> "As stated in previous minutes the Trustees have asked for the PPF levy to be paid in full and on time. Given the economic climate of the

> past 18 -24 months, the Company has been unable to pay the levy for 2008 (£205,595.00) and is now in a position where final demands have been made.
>
> In order to meet it's (sic) obligation for payment of the PPF levy, the Company has asked that the scheme makes the payment in full as soon as possible and that the company will make 12 equal payments back to the scheme with effect from April 2010.
>
> Following discussions with Steve Clark Group FD, the Trustees unanimously agreed that this would be a sensible course of action. Steve Lloyd contributed fully to the discussion but abstained from the actual vote in order to ensure that there was no conflict of interest. An agreement will be drawn up by Steve Clark prior to any disinvestment which will set out repayment details. A standing order will be created to ensure the monthly repayments go directly to Scottish Life as soon as possible."

13. The minutes do not record that any mention is made by Mr Burrows, Mr Lloyd or Mr Clark of the £187,000 that the Company has received from the return of the excess DC contributions.

14. On 11 March 2010 Mr Burrows and Mr Lloyd authorised the payment of the balance of the unallocated account for excess contributions amounting to £5,819.68 from the trustees' bank account to the Company.

15. A meeting of the Trustees was held on 10 May 2010. All four trustees were present plus Mr Clark representing the Company, Mr Walton of Scottish Life and a representative from RBIG. The following is an extract of item 2 of the minutes of that meeting:

> "NW (Mr Walton) confirmed that the deficit figure of £3M (million) is an 'as at' figure from April 2009, although for recovery plan purposes we are allowed to use a current status figure, which on that basis would leave the scheme with a deficit of £1.5M.
>
> NW confirmed that using the current figures in the latest recovery plan this would extend the recovery plan to 2017.
>
> SL (Mr Lloyd) explained he would be speaking on behalf of the business and briefly explained the current financial status of the group, which had reported a loss on its last two years of trading albeit at a greatly reduced level for the last financial year. In addition the company was going through a refinance process following the exiting from the UK of its current funders GMAC.
>
> Because of the current financial status and the need to consolidate the business with the new funders, the company was not in the position to make any additional contributions, pay the PPF levy as

agreed or any future PPF levies. The company wish this to be the situation for the next 5 years when it would be reviewed."

There is no mention in the minutes by Mr Burrows, Mr Lloyd or Mr Clark of the return of the excess contributions to the Company.

16. On 14 June 2010 the Company went into administration.

17. Bridge Trustees Limited were appointed as the new trustees by the administrators on 18 October 2010.

18. An oral hearing was held on 16 January 2015 at the respondents' request at which the evidence of Mr Burrows, Mr Lloyd and Mr Harper was heard and cross examined.

Relevant Rules

19. Rule 5.6 General Reserve says

"Any part of a member's fund which cannot be applied to provide benefits for and in respect of him without exceeding the maximum benefits which may be provided for him in accordance with rule 10 shall be held by the trustees as a general reserve. Where a deferred pensioner does not have 2 years' qualifying service the balance of his member's fund remaining after benefits have been secured for him under paragraph 11 of appendix 2 shall also be held by the trustees in the general reserve. The general reserve from time to time will be applied by the trustees as the principal employer shall from time to time direct to pay the costs and expenses of the scheme and/or to reduce the amount of the contributions which would otherwise be required from the employers in proportions which the principal employer determines to be fair. Provided that in respect of any period after the scheme shall have been terminated in accordance with rule 16.1 and whether or not the trustees shall have determined to continue the scheme as a closed scheme, the trustees shall apply the general reserve (if any) in payment of the costs, charges and expenses of the scheme and any balance of the general reserve then remaining on the final winding–up of the scheme shall be repaid to the employers in such shares and proportions as the trustees shall decide. Where part or all of any general reserve is applied to off-set employer contributions then due to the scheme. The amount of the general reserve so applied will be deemed to be an employer contribution for the purposes of the rules."

20. Rule 14.20 Indemnity says

(a) Without prejudice to any right of indemnity given them by law the trustees shall be indemnified by the employers (and each of them) and shall be entitled to an indemnity against the assets of the fund in respect of:-

(i) all liabilities of any description incurred by them in the performance of their obligations hereunder or in the administration of the scheme so long as those liabilities shall have been incurred in good faith and without any fraudulent or wrongful intent or deliberate disregard of the interest of the beneficiaries of the fund on their part; and

(ii) all expenses properly incurred by them in the execution of the trusts of the fund including all expenses incurred in connection with any such liability as is referred to in sub paragraph (i) above or in connection with any breach of trust for which they are exonerated from liability by virtue of paragraph (b) below.

(b) The trustees shall not be liable for any breach of trust of whatever nature whether omitted or committed by any person but this paragraph shall not operate to release any liability attaching to any trustee or director or employee of the trustee in respect of that person's fraud or deliberate disregard of the interests of the beneficiaries under the fund."

21. This gives slightly more protection to the trustees than that under Section 61 of the Trustee Act 1925 so our consideration of the exoneration clause in the Scheme rules will automatically include any consideration under the Trustee Act 1925.

Summary of Bridge Trustees' position

22. Bridge Trustees say that the payments to the Company were in breach of the Scheme Rules as there is no power to return the excess DC contributions to the employer except in the case of a wind up. Rule 5.6 says that the excess DC contributions are to be held in the General Reserve and used to pay the costs and expenses of the Scheme and/or to reduce the amount of the contributions due as the principal employer may direct.

23. The excess DC contributions had been identified at the Trustees meeting of 16 October 2009 and the Company (Mr Clark also attended the meeting on behalf of the Company) had agreed that that these excess DC contributions should be pooled with the DB Fund. Mr Lloyd and Mr Burrows were at the meeting and were officers of the Company as well as trustees, Mr Lloyd was the Managing Director of the Company so two of the principal directors of the company agreed that the excess contributions should be pooled with the DB Fund.

24. Mr Burrows and Mr Lloyd's legal advisers have made a submission that they acted in, the firm belief that they must do so, having been advised by Rob Harper of Capita in December 2009 and that this is the "explanation" of their conduct. There is no evidence of any such advice or instruction and the nearest they have come to supplying any evidence is a sentence in their letter of 10 February 2012 where they say "Mr Burrows has informed us that he was advised by Mr Harper in December 2009 that the Trustees had no authority to dispose of the surplus funds". If this advice had been given one might have expected in the circumstances that Mr Burrows and Mr Lloyd would to protect themselves have asked Capita to confirm this in writing or by e-mail.

25. Mr Harper has provided a statement to say that he gave no such instruction. There is no email or other evidence to show that any instruction was given. Bridge Trustees also submit that despite the input of two firms of solicitors Mr Burrows has never made a statement containing a statement of truth. Nor has Mr Burrows or Mr Lloyd picked up on the point previously made by Bridge Trustees that they would welcome a complaint from the Respondents against Capita as that would allow Bridge Trustees to pursue a complaint against Capita. If it were subsequently found that Mr Harper had said what is alleged then Capita could be held responsible and not Mr Burrows and Mr Lloyd.

26. There is therefore no reason to believe that Capita gave such incorrect advice, let alone presume to "instruct" their client trustees as to what they "must" do with those funds.

27. Whatever Capita may or may not have advised or instructed, it does not explain why Mr Burrows and Mr Lloyd saw no need to inform their co-trustees of what was being advised, or of what they proposed to do and indeed of what they actually did.

28. Mr Burrows also made a palpably untrue statement in his email of 4 January 2010 to Mr Harper when he said he had discussed the matter at length with Mr Clark and Mr Lloyd as well as his fellow trustees. Mr Burrows also asked Mr Harper to explain where the monies had come from and said that the information was required for the Trustee meeting on 12 January 2010. Mr Harper responded on 5 January 2010, and having provided the information, concluded "I hope this proves useful for the Trustee meeting". Mr Harper would have been aware at this point

that the monies had been paid to the Trustees' bank account on 24 December 2009 but it also apparent from this exchange that Mr Harper did not know that Mr Burrows and Mr Lloyd had authorised the onward payment from the Trustees' bank account to the Company. Bridge Trustees therefore submit that this demonstrates the validity of Mr Harper's statement that he did not instruct the Trustees to pay the monies to the Company. Bridge Trustees also say that this highlights the inconsistency of the respondents' account and their statement that Mr Harper had said the payment was wholly a Company matter and nothing to do with the Trustees.

29. If Capita had given such advice there is every reason to think that a responsible trustee of a pension scheme would have questioned this, and at least referred the issue to his co-trustees. All the more, trustees in the position of Mr Lloyd and Mr Burrows, who were well aware (as described in the minutes of the meeting of 16 October 2009) that the Scheme was in deficit to the extent this had caused all trustees "shock and surprise" and as noted in the minutes of the meeting of 12 January 2010, the trustees had received a preliminary report from the Actuary asking for recovery payments of £900,000 a year from 2010.

30. Mr Burrows' legal adviser has said that a finding against the respondents would affect the rights of the principal employer in some fundamental respects and as the employer was the recipient of the money any claim for repayment should have been pursued against them. Bridge Trustees does not agree stating that before it made a complaint to the Pensions Ombudsman, it contacted the administrator of the Principal Employer to lodge a claim for the return of the £193,010.93. The administrator accepted the claim but as the Principal Employer was insolvent the claim could only be admitted as an unsecured creditor.

31. The suggestion that the Company's finances were in December 2009 in "reasonable shape despite the economic difficulties" is hard to reconcile with the concern expressed in the minutes of the meeting of 12 January 2010 that the Company was unable to pay the PPF levy, and that the Company was at this time engaged with KPMG in negotiating a refinancing, and with the collapse of the Company into insolvency a few months later.

30. Mr Burrows and Mr Lloyd maintain that they did not obtain any personal benefit from the repayment to the Company. Whilst they were not making payment direct to themselves, a total lack of personal benefit seems unlikely. As officers of the Company they no doubt had an interest in its continued survival (which would ensure their continued employment) and presumably the better it performed, the better they would be remunerated (or at least the more secure their positions would be). We have no information on this aspect, but it is also possible that they may have personally guaranteed some of the Company's borrowings, so would have a personal interest in seeing cash used to pay down debts.

31. The argument that Mr Burrows and Mr Lloyd did not deliberately disregard the interests of beneficiaries does not reconcile readily with the statement that they relied on the alleged "instruction" from Capita "and thereafter acted on it quickly, given that it was of benefit to the Company".

32. The argument that Mr Burrows and Mr Lloyd did not, "deliberately disregard a prior agreement reached with the Trustees on 16 October 2009, because no such agreement could have been reached" is unduly legalistic (and wrong). As explained above, and as Mr Burrows' minutes record, de facto there had been such an agreement. Bridge Trustees assume that Mr Burrows and Mr Lloyd are not saying that they did in December 2009 consider the agreement, reached the conclusion in their own minds that it was legally invalid, and hence that it should be disregarded. But they do not offer any other explanation as to why, as a matter of fact, the agreement was disregarded. The agreement had of course only been made in the context of an anticipated £20 - £30,000 payment for the Scheme. But why did the anticipated receipt of the much larger sum of £187,000 not prompt some consideration of why if nothing more, the original £20 - £30,000 should not still pass to the Scheme as previously agreed? Mr Burrows and Mr Lloyd cannot offer any satisfactory factual explanation for their thought processes.

33. Mr Burrows and Mr Lloyd say they did not mention the matter at the 12 January 2010 meeting "because they both believed that the subject was not a Trustee matter". If we read this correctly the suggestion is that both considered the issue and reached a positive decision not to make mention. If that is their case, Bridge Trustees submit that it is hard to credit, given that the funds had passed through the trustee bank account, and the previous (contrary) trustee decisions. If Mr Burrows and Mr Lloyd had indeed as is alleged been instructed by Capita that the

funds “must” go to the Company, what reason would there have been not to mention this to their co-trustees?

34. Mr Burrows and Mr Lloyd’s legal advisers have said that as the Scheme was substantially in deficit on 24 December 2009, there was no need to deduct tax. That is debatable, but not decisive of the case. There is no confirmation that Mr Burrows and Mr Lloyd actually considered this issue at the time. However, the fact of the substantial deficit makes all the more implausible the remainder of Mr Burrows and Mr Lloyd’s alleged justifications for paying over those trustee funds so quickly to the Company, when they knew full well that the Scheme was in deficit and needed the funds to provide benefits for members.

Summary of Mr Burrows and Mr Lloyd’s position

35. Mr Burrows and Mr Lloyd acknowledge that Rule 5.6 provides that any excess contributions are to be held by the Trustees of the Scheme as a general reserve and that this reserve is to be applied by the Trustees as the principal employer shall from time to time direct,

> “ … to pay the costs and expenses of the scheme, and/or to reduce the amount of the contributions which would otherwise be required from the employers …”

The Rule gives the principal employer a choice as to where any excess contributions are to be directed.

36. The general reserve is not held for the members in the sense of being available for the augmentation of members’ benefits. It is held in aid of the employers, that is, to meet the costs, expenses and contributions for which they are otherwise liable. It is under the Principal Employer’s control and the Trustees can only apply it “as the principal employer shall from time to time direct.” These points are material in any assessment of what was done by Mr Burrows and Mr Lloyd as lay trustees. It is one thing to misapply a fund or a winding up surplus in a DB scheme held specifically on trust to provide pension benefits to members; quite another to repay to the employer a reserve held specifically to meet employer expenses and against which the members have no direct claim.

37. The complaint proceeds on a fundamentally flawed basis that the reserve could properly have been applied to relieve the DB section by meeting the PPF levy or any other purpose relating to the DB section. This approach is at best highly questionable and actually considered to be plainly wrong. As the reserve was

derived exclusively from the DC section, clear words would have been required to have had the effect that it was available for the benefit of the DB section. A cross subsidy was unlikely to have been contemplated given that DC members bear investment risk whereas DB members do not. It is therefore submitted that the complaint is fundamentally misdirected as the reserve was not available and could not have been applied to the DB section or to pay the PPF levy.

38. Bridge Trustees have not adopted the right procedure to have this matter resolved. Equitable resolution would require an analysis of the meaning, interpretation and effect of Rule 5.6. An investigation by the Pensions Ombudsman is not the proper forum for cases entailing the construction of scheme provisions; whereas the Court is experienced in dealing with such matters: a fortiori, the Court is the right forum where there are issues about whether funds are held solely for the benefit of one section of a scheme and whether they can be applied for another.

39. There is no indication at Minute 3 of the Minutes of the Trustees' Meeting of 16 October 2009 that the principal employer had made any choice or given any such direction to the Trustees in respect of the "fairly small" return of employer contributions expected from Capita at that stage. The Trustees at the meeting held on 16 October 2009 simply anticipated what the principal employer might wish to do when the final amount of the excess contributions was known.

40. The Trustees could not have agreed, as stated at Minute 3, that "the excess should be pooled with the DB fund, and considered as an additional contribution" because the Trustees had received no direction from the principal employer to do so, and were therefore not in a position to make such an agreement.

41. It cannot be said that Mr Burrows and Mr Lloyd were, "in deliberate disregard of the prior agreement reached with the former trustees." If there was no prior agreement reached on 16 October 2009, then their actions, were not a deliberate disregard of the interests of the beneficiaries and thus they remain entitled as Trustees to an indemnity against the Scheme's assets in accordance with Rule 14.20 (a)(i).

42. The repayment of a total of £198,000 to the sponsoring employer is more easily understood if it is accepted that the payment(s) were made in the firm belief that they had no alternative having been so advised by Capita in December 2009.

43. Mr Burrows and Mr Lloyd were lay trustees; they were, and are still, quite clear that Capita's instruction to Mr Burrows was that all of the amount of the excess DC contributions notified to Mr Burrows on 27 November 2009 must be returned to the employer. Rob Harper was Capita's long standing Scheme Administration manager, his position is crucial to an understanding of why Mr Burrows and Mr Lloyd acted as they did.

44. Rob Harper had been Mr Burrows' usual day to day contact at Capita on Scheme matters for some years prior to the payment to the principal employer. Earlier in 2009 Mr Burrows and Rob Harper had worked together to finalise the transfer of the Scheme's DB section to Scottish Life, and by August 2009 they had also completed the transfer of the Scheme's DC section. Rob Harper's email of 27 November 2009 notifying Mr Burrows about the amount of the excess employer contributions was part of Capita's "tidying up" exercise following the transfer of all Scheme administration to Scottish Life in 2009.

45. It is difficult to think of a reason why Mr Burrows would have questioned Rob Harper's instruction on a technical matter such as this. Mr Burrows and Mr Lloyd relied on Capita's instruction and thereafter acted on it quickly, given that it was of benefit to the Company. If this is so, it provides to a large degree an explanation of why Mr Burrows and Mr Lloyd thereafter saw no need to inform their co trustees of the receipt of a much larger amount of excess contributions than had been originally anticipated; or to consider whether the trustees needed to seek legal or other advice before making payments to the principal employer; or whether they should inform all trustees about the amount of excess payments returned to the employer at either or both of the two Trustee meetings held after the first payment was made on 24 December 2009.

46. The email dated 21 December 2009 from Steve Clark, Finance Director of Pilkington's Tiles Limited to Andrew Stone at KPMG, Manchester gives credence to the statements of Mr Burrows and Mr Lloyd on the repayment of the excess DC contributions to the employer.

47. Without this explanation it is not difficult to see why Bridge Trustees as a professional pension scheme trustee was likely to regard, and did regard the actions of Mr Burrows and Mr Lloyd in returning all of the excess DC contributions to the Employer, as at least, a serious error of judgment and at

worst, as is alleged, a breach of trust. However, Bridge Trustees' complaints take no account of the extraordinarily difficult economic and financial background in which the principal company and Mr Burrows and Mr Lloyd were operating at this time, except to suggest that these difficulties were the reason they acted as they did, i.e. they acted in the company's interests, deliberately ignoring the interests of the Scheme's members.

48. The evidence indicated that in December 2009 the principal company's trading and financial position were in reasonable shape despite the worst economic difficulties experienced in the UK and Europe since the 1930's.

49. The explanations provided above indicate that the actions taken by Mr Burrows and Mr Lloyd, although not beyond criticism, were undertaken in good faith, without fraud or wrongful intent, or deliberate disregard of the interest of the beneficiaries of the scheme. Mr Burrows and Mr Lloyd honestly believed they were acting on the instructions of someone on whom they were entitled to rely as trustees, and on whom they did rely.

50. They did not receive any personal benefit from their actions, nor did they act at any time with the intention of benefitting themselves, or any other person, to the detriment of the Scheme members.

51. Mr Burrows has provided a statement on 12 July 2013 to say that he was acting on the specific advice of Capita who he relied on for instruction and advice throughout his involvement with the pension scheme. He has also provided a background to the events that occurred at the time and the concerns over Capita's administration of the Scheme.

52. The Scheme had started to change its administrator in October 2007. The DB fund had been transferred in full, and the DC monies had all been allocated in full to each member. The announcement from Capita regarding the remaining monies came as a surprise as they had not indicated at any time what this might be, only that there might be some excess employer contributions that had remained with Capita when employee contributions had been refunded. Mr Burrows says he spoke with Capita several times about this money but they seemed more concerned about the payment of outstanding invoices. Mr Burrows says "he was told by Rob Harper (Capita) that the Trustees did not have the authority to transfer this money and that it should be paid to the employer for them to decide

what to do with it." As all other monies had been reconciled and as this excess was company contributions that had not been returned, it made sense that these should be returned to the employer.

53. Mr Burrows has also said that as an employee and not a Director he has never received any incentive or bonus whilst at the Company.

54. Mr Lloyd has also provided a statement on 15 July 2013 to say that there has been an attempt to link several unrelated events that occurred at different times into a conspiracy by himself and Mr Burrows. In the six years from 2004 that he had been Managing Director, the Company had been profitable for 5 of those years, the only loss being in the year to March 2009, at the height of the financial crisis. It had returned to profit the following year and was set to grow significantly in the year to March 2011.

55. Mr Lloyd has also said that cash flow had been a challenge during the period but that was the same for nearly every business at the time, it was the period when the banks failed. While the transfer was a large figure, in relation to the business it represented around only 8/9 days of salaries and just over a day of sales. The ultimate failure of the Company was due to the failure of the Company's funder GMAC who had to be bailed out by the US Government and then being required to close all overseas operations.

56. The Company had secured a new £11m facility with Burdale, which would have been impossible if the company had been in the perilous state that has been alluded to especially in the economic environment that existed at that time. The DB scheme had also been very fortunate as a result of the move from Capita to Scottish Life in that when the markets crashed in 2008, the funds were held in cash, and this allowed the Trustees to invest at the bottom of the market and between November 2008 and September 2009 the scheme funds grew from £22.2m to £27.6m. A "back of the envelope calculation" by the scheme actuary estimated the liabilities as at September 2009 at £28.7million and the scheme was 96% funded.

57. As part of the strategy that returned the Company to profit, control of non-operating expenses was key. The company asked the trustees for payment holidays and for prudence for an extended period to give stability in an uncertain time. In addition the Company made a number of redundancies; the remaining workforce

including all the directors took a 5% salary sacrifice and agreed that no dividends would be paid. (Dividends had only been paid once in 2006).

58. Mr Burrows and Mr Lloyd neither deliberately disregarded the interests of the beneficiaries nor did they deliberately disregard a prior agreement reached with the Trustees on 16 October 2009, because no such agreement could have been reached. If this view is accepted then Mr Burrows and Mr Lloyd are entitled to an indemnity against the Scheme assets in respect of their actions in accordance with Rule 14.20 of the Rules of the Scheme.

59. In the event that the Pensions Ombudsman comes to the view that a technical breach of trust was committed consideration should be given to exonerating both Mr Burrows and Mr Lloyd. A finding of breach of trust cannot trigger personal liability. The exoneration provisions under 14.20(b) relieve Mr Burrows and Mr Lloyd from all personal liability in the absence of evidence, proved to a very high standard of probability that they acted fraudulently or in deliberate (i.e. conscious and intentional) disregard of the members' interests.

60. Mr Lloyd and Mr Burrows have also said in the letter from their legal adviser of 13 July 2013 that they accept the Witness Statements made by their co- trustees, Mr Gratrix and Mrs Hirst neither of whom were informed by them at any stage about the return of the excess of DC contributions to the Employer. It was of course open to either Mr Gratrix or Mrs Hirst, as trustees of the Scheme to have made their own enquiries at either of the two Trustee meetings held after the meeting on 16 October 2009 on matters which remained outstanding from that meeting.

61. The email of 4 January 2010 is one of a total of 12 emails, headed "Fees" which passed between Rob Harper and Mr Burrows; these were sent on 4 January (2 emails) 5, 7, 14, (2 emails) 22, 28, 29 January and 1, 2, 3 February 2010. This chain of emails starts with Rob Harper's email to Mr Burrows also of 4 January 2010, and clearly shows Rob Harper's concern to achieve settlement of a long running dispute with the trustees about the payment of Capita's outstanding charges before the residue of Scheme funds then in the bank account managed by Capita on the trustees' behalf, were transferred to the trustees' newly opened bank account.

62. There had been a long running dispute between the trustees and Capita over the service provided by the Scheme Administrator. It is possible that the reference in

Mr Burrows' email of 4 January to Rob Harper relates to an earlier discussion with all the trustees on a long running dispute with Capita about the payment of Capita's outstanding fees, and of which both Mr Gratrix and Mrs Hirst would have been aware.

63. Mr Burrows and Mr Lloyd believed that, given Rob Harper's instruction that the excess contributions must be repaid to the employer, the subject was not a trustee matter. There was never any intention on their part to conceal their actions in relation to the payment of the DC contributions from their co-trustees. They had both understood Rob Harper to say that the excess DC contributions belonged to the employer, and must be returned to the employer for him to dispose of.

64. They were acting on Rob Harper's instructions; as a result they did not consider whether there was a requirement to inform or consult the other Trustees, to consider the Scheme Rules, or to take legal or tax advice in relation to the payment to the employer. Had there been any such requirements, they believed Rob Harper would have advised them accordingly.

65. There was no report to the trustees at their meeting of 10 May 2010 on the final outcome of the fee dispute with Capita because the Company's view was that since it paid all of the administration expenses in relation to the Scheme this was not a trustee matter, although it was necessary for the Company to deal with the trustees to establish details of their complaints about the service provided.

66. When on 24 December 2009, Mr Lloyd and Mr Burrows made their first payment of £187,191.25 to the Company, the Scheme was substantially in deficit. Although the payment is described as the return of an excess of DC contributions to the Employer, the payment was clearly not an authorised surplus payment from which tax should have been deducted. There was no requirement for the Trustees to have deducted tax from the payment before its transfer to the Company.

67. Mr Burrows also gave evidence at the oral hearing on 16 January 2015 that he was quite certain that in one of his conversations with Mr Harper following the Trustees' meeting of 16 October 2009 they had discussed how the excess contributions had arisen. The intention was to still pay the excess contributions to the defined benefit section of the Scheme but he clearly remembered Mr Harper

informing him that the trustees did not have the authority to pass the money to the defined benefit section and the money must go to the employer first.

68. Mr Burrows says he accepted the advice he received from Mr Harper and made sure the next part of the process happened so that the money was returned to the Company. He believed what Mr Harper had told him and he acted on it. He understood that the money could not be paid by Capita direct to the defined benefit section of the Scheme, it had to go out of Capita first and then on to the Company. Capita had paid the money to the trustees' account and as he was one of the trustees authorised to make payments out of the account it made sense to pay this to the Company.

69. Mr Burrows had seen Capita's finalisation of the reconciliation of the defined contribution records and the identification of the excess contributions as a tidying up exercise. To his mind the payment of the return of the excess contributions to the Company was also a tidying up exercise and one to be achieved quickly. He had found this to be logical as the employees' contributions had been returned in the same way. He had not recorded or asked for Mr Harper's advice to be put in writing as he had relied on Mr Harper for advice on technical issues.

70. He expected the Company to make an additional contribution to the Scheme (the defined benefit section) but it was for the Company to decide.

71. Mr Burrows also said during the course of the oral hearing that he was sure that informal discussions had taken place with the other two trustees (Mrs Hirst and Mr Gratrix) over the repayment of the excess contributions and that his mindset at the meeting on 12 January 2010 was that the return of the excess contributions was a tidying up exercise and it was for the Company to decide what happened to that repayment. As regards the Company's request for a loan of £205,000 to pay the PPF then he thought that if this would help the Company then it would also be of benefit to the members of the Scheme.

72. Mr Lloyd has also said during the course of the oral hearing that he was sure informal discussions had taken place with the other two trustees. He did not however wish to challenge the evidence of Mr Gratrix or particularly Mrs Hirst as he did not want to put her through the ordeal of providing oral evidence.

Statement from Robert Harper of Capita Hartshead

73. Mr Harper made the following statement on 10 June 2013:

I am a Client Partner, Employee Benefits with Capita, formerly Capita Hartshead. I have no formal pensions qualifications but have worked in the pensions industry for 25 years and for Capita/Capita Hartshead for the last nine years. I was involved with Capita Hartshead's administration of the Pilkington's Tiles Pension Scheme (the Scheme) until our appointment was terminated in late 2009 when the trustees chose to transfer the administration of the Scheme to Scottish Life.

One issue that arose in the course of the transfer was a refund due to the trustees of the Scheme from the previous fund manager of the defined contribution section. As a result of members having left and taken short service refunds there was a balance due to be refunded to the trustees once the last units were realised. I recall that in the period up to the final payment being made there was some debate over the payment of fees outstanding to Capita Hartshead. Eventually however Capita Hartshead sent a payment of these funds by direct credit transfer to the trustees' bank account in late 2009.

I am now given to understand that these funds were subsequently paid on by the trustees (or some of them) to the Scheme employer. I was not aware of that at the time.

I am also given to understand that it is now being alleged that in or about December 2009 I advised, authorised or instructed one of the trustees of the Scheme, probably Mr Dean Burrows, that these funds should be refunded to the employer. This is not true.

I am well aware that refunds of pension fund money to employers are not readily permitted. Had the possibility of such a refund been raised with me then I am sure firstly that I would remember such a discussion (which I do not) and secondly that I would not have stated that such a payment could be made, let alone give any sort of instruction that it should.

I can accordingly state categorically that I had no knowledge of this payment being refunded to the employer and that this refund was in no way discussed or advised by me."

74. Mr Harper also attended the oral hearing on 16 January 2015 and explained that Capita had only acted as administrators to the Scheme. During the period in question (October 2009 to March 2010) Capita were engaged in reconciling and transferring the defined contribution records to Scottish Life. Mr Harper also confirmed that he had had a good working relationship with Mr Burrows and had discussed with him the transfer of the excess contributions or unallocated fund to Scottish Life. He had also been involved in trying to get Capita's unpaid invoices resolved and was aware that these could be paid from the unallocated fund.

75. Mr Harper recalled that Capita did have a copy of the Scheme's Trust Deed and Rules and thought that he would have looked at these to establish if the invoices could be paid from the unallocated fund. Mr Harper also explained that from his previous pension experience he had a clear understanding and was very aware that

there were only limited circumstances in which a return of money could be made from a pension scheme to an employer. He was therefore certain that he would not have given any advice or direction to Mr Burrows that the unallocated fund had to be repaid to the employer.

Conclusions

76. I will deal firstly with Mr Burrows' legal adviser's view that this Office is not the right place to consider the interpretation of Rule 5.6 and that this would be better dealt with by the Court. The Ombudsman's central role is to investigate and determine disputes of fact or law or complaints of maladministration by those responsible for managing occupational or personal pension schemes. Section 146 of the Pensions Schemes Act 1993 says the Pensions Ombudsman may investigate:

"(d) any dispute of fact or law between the trustees or managers of an occupational pension scheme and-

(i) another person responsible for the management of the scheme, or

(ii) any trustee or manager of another such scheme,

and in a case falling within sub-paragraph (ii) references in this Part to the scheme to which the reference relates are references to each of the schemes,

any dispute not falling within paragraph (f) between different trustees of the same occupational pension scheme,"

77. The legislation does not impose any restrictions as to the type of dispute of fact or law that the Pensions Ombudsman can investigate and it has already been agreed that this complaint falls with this office's jurisdiction.

78. Mr Burrows' legal adviser has argued that the wording of Rule 5.6 requires analysis and interpretation as to whether the reserve could be properly applied to the DB section. They say that as the reserve was derived purely from the DC section then clear words would be required to have had the effect that it was available for use within the DB section or to pay the PPF levy. I do not agree. The wording in my view is unambiguous allowing the employer freedom to decide how the reserve

should be used 'to meet the costs and expenses of the scheme and/or to reduce the contributions which would otherwise be required.' The employer would be aware that costs and expenses would arise across the whole scheme e.g. audit costs and it would be an unnecessary restriction to limit the way in which the reserve could be used to just that part from which it derived and in this instance, for example, only allowing the DC audit costs to be met from the reserve.

79. Similarly I find that it would also be an unnecessary restriction to limit the reserve to being used only to meet the contributions from the section from which it derived and the construction of the Rules gives no indication that this was the intention. In any event the wording of Rule 5.6 does not permit payment of funds in the general reserve back to the employer. Such a payment is in breach of Rule 5.6 and trustees have a duty to comply with scheme documentation (Target Holdings v Redfern [1995] UKHL 10).

80. Mr Burrows and Mr Lloyd admit that they authorised the return of the excess DC contributions to the Company and without the involvement or agreement of their fellow trustees Mrs Hirst and Mr Gratrix. They also acknowledge that they acted without taking any legal or tax advice regarding the consequences of their action. They did however have a duty to take advice on technical matters or matters of uncertainty (re Whiteley (1886) 33Ch D 347).

81. Bridge Trustees have suggested that Mr Burrows and Mr Lloyd may have had a personal benefit in paying the excess contributions to the Company. Mr Burrows and Mr Lloyd have denied this and say they have received no personal benefit from the repayment of the excess contributions to the Company. There is no evidence that Mr Burrows and Mr Lloyd gained personally from the repayment but the repayment was certainly of help to the Company at the time and may have extended its life in the short term. But there is no way of knowing whether this may have helped with the salary they were receiving.

82. Mr Lloyd has also provided information on the financial position of the Company and the fact that the amount returned of £187,000 was small in terms of the Company's sales and salary requirements. Nevertheless he has also said that cash flow was a challenge during this period and I expect that the sudden news of the excess contributions in the Scheme was welcomed and moves were made to pay it back to the Company as quickly as possible.

83. Mr Burrows and Mr Lloyd say they acted on the instructions of Rob Harper of Capita who said that they must repay the excess DC contributions to the Company. Mr Harper has provided a statement to say that he gave no such instruction. He has also provided oral evidence that from his knowledge of pensions he is aware that it is only possible in limited circumstances to make a payment from the Scheme to the Company. He says he would not therefore have told Mr Burrows that a return of the excess contributions to the Company had to be made.

84. Mr Burrows has said in the course of the oral hearing that Mr Harper had informed him in one of their conversations after the trustees meeting of 16 October 2009 that the trustees did not have authority to pay the excess contributions to the defined benefit section as it was for the employer to decide how these excess contributions should be used. It was therefore logical that these should be returned to the employer. Mr Burrows did not ask Mr Harper to confirm this point in writing as he accepted what he had been told and he had always relied on Mr Harper for advice on technical issues.

85. Mr Burrows had therefore advised the Company that the excess contributions had to be returned to it and it was a decision for the Company to make as to how this money should be used. He did however expect the Company to make an additional contribution to the defined benefit section of the Scheme.

86. Mr Burrows and Mr Lloyd have also said that they were certain that the return of the excess contributions had been informally discussed with the other two trustees Mrs Hirst and Mr Gratrix and by inference that there was no need to record this at the Trustees' meeting on 12 January 2010. Both Mrs Hirst and Mrs Gratrix have said both in their witness statements and also in response to their being named as respondents to this complaint that they had no prior knowledge of the return of the excess contributions to the Company before they were advised of the fact by Bridge Trustees. I therefore find on the balance of probabilities that it is more likely than not that Mrs Hirst and Mr Gratrix were not informed of the return of the excess contributions either before or after the meeting of 12 January 2010.

87. There is no email or other evidence to show that any instruction was given by Mr Harper. The transfer of the initial payment of £187,000 was made by Capita to the

trustees' bank account with Scottish Life and it was from here that Mr Burrows and Mr Lloyd transferred the money to the Company. There has been no satisfactory answer to the question of why Mr Harper would pay the money to the Trustees account if he had been insistent that the money had to be returned to the Company. Mr Harper could equally have paid the money to the Company's account and avoided the rush to get the transfer completed from the trustees' bank account on Christmas Eve.

88. Mr Harper has confirmed that Capita have only ever provided administration services to the Scheme and they did not provide consultancy advice to the trustees. Mr Harper was a credible witness at the oral hearing and he was certain that he had not given any instruction or direction to Mr Burrows that the excess contributions had to be returned to the Company. Indeed I would find it surprising that someone in an administration capacity would give instructions or advice to a trustee despite the admitted close working relationship and particularly surprising if that advice or instruction was to return money from a pension scheme to an employer. I accept the oral evidence of Mr Harper that he would not have advised the return of scheme monies to the employer. I therefore find that on the balance of probabilities Mr Harper did not give any such advice or instruction that the excess contributions had to be returned to the Company.

89. Bridge Trustees have also said that neither Mr Burrows or Mr Lloyd have picked up on the point made in its' submission that they would welcome a complaint from the Respondents against Capita as that would allow Bridge Trustees to pursue a complaint against Capita. If it were subsequently found that Mr Harper had said what is alleged then Capita could be held responsible and not Mr Burrows and Mr Lloyd.

90. Even if reliance on Capita's advice were established, such reliance is not always a defence to the trustees' behaviour. In this instance Mr Burrows and Mr Lloyd should have considered the reasonableness of any advice given and challenged that advice where appropriate (such as where it appears to challenge the provisions of the Scheme). The Pensions Regulator's Code of Practice 07: 'Trustee Knowledge and Understanding' anticipates that pension trustees should have sufficient knowledge and understanding of trust affairs to question professional advice where necessary.

91. Both Mr Burrows and Mr Lloyd have made reference to the fact that they were lay trustees and were carrying out this role in conjunction with their roles at the Company. They were not professional trustees and were carrying out their roles as trustees to the best of their ability and knew that had a duty to act on behalf of the members. Although it is commonly recognised that a professional trustee may have a greater level of pension knowledge than a lay trustee the basic duty of all trustees is to act in the best interests of the members and to consider whether any action or decision is following that basic duty.

92. Even if I accept that Mr Burrows may have gained the impression from the conversations he had with Mr Harper that it was for the Company to decide how these excess contributions were to be used and from this he made a connection that these excess contributions had to be returned, it does not explain why the payment had to be made immediately or if it did, why Capita could not transfer it to the employer or why he did not think it necessary to inform his fellow trustees. Also if he expected the Company to make an additional contribution to the defined benefit section of the Scheme why the money could not be left in the Scheme until a decision was made.

93. The point to establish, therefore, is whether the Trustees have committed a breach of trust and whether they are entitled to an indemnity under the Rules that govern the Scheme.

94. It is clear from the information that has been provided that the Company was experiencing difficulties in the latter part of 2009 due to the financial crisis and the fact that its funders GMAC were pulling out of the UK. The Company was seeking new financing and had engaged KPMG to help with this. There was a clear need to reduce outgoings and maximise the assets of the Company. Thus any outgoings such as PPF payments and the recovery payments to the Scheme were to be avoided and any additional funds were welcome. The potential availability of a further £187,000 was seen as positive news as evidenced by the email from Mr Clark to KPMG on 21 December 2009. The fact that this sum was mentioned specifically shows that it was considered meaningful and not as immaterial as has been suggested.

95. The email also shows that the decision to pay this £187,000 into the Scheme had already been taken by Mr Burrows and Mr Lloyd and discussed with Mr Clark. But

as trustees, Mr Burrows and Mr Lloyd should have checked whether it was possible under the rules of the Scheme to return this amount to the Company. It is a legal requirement for trustees to fully understand their own Scheme's Trust Deed and Rules. They should also have considered whether they needed to take legal or tax advice regarding the refund and whether this was in the best interests of the members.

96. Mr Burrows and Mr Lloyd were asked during the course of the oral hearing whether they had considered if a payment from the Scheme was allowed under the rules or if they had considered any tax implications. Both Mr Burrows and Mr Lloyd admitted that they had not considered any tax implications or referred to the rules as they had relied on Mr Harper's advice and direction.

97. The minutes of the Trustees meeting held on 16 October 2009 record that a decision was taken to pass these excess DC contributions to the DB section when the sum involved was expected to be only £30,000. The actual sum was some £198,000, before deduction of Capita's fees, which was a material difference and it would have been reasonable for all the trustees and Company to meet and reconsider the position. I have therefore considered what the possible conclusions of such a meeting may have been and looked at the following scenarios:

    (a) The trustees could have sought agreement from the Company to apply all of the excess contributions to the DB section.

    (b) Alternatively the trustees could have agreed for the original expected amount of £30,000 to be retained in the Scheme with the balance being returned to the Company. However if the trustees had taken tax and legal advice they would have discovered that a rule amendment would be required and any return of the money to the Company would attract a tax charge of at least 40% which would have to be deducted by the trustees before payment (i.e. some £75,000 on the amount returned of £187,000 leaving a net amount payable of £112,000).

    (c) But the Company would still have been facing a demand to pay the PPF levy of £205,000. Therefore a more reasonable conclusion may have been to leave the excess DC contributions money in the Scheme and for the Company to direct the Trustees to pay the PPF levy.

98. There is no evidence to show that either Mr Burrows or Mr Lloyd considered any of these alternatives and without any recourse to their fellow trustees or taking any legal or tax advice decided to pay the excess contributions to the Company. I do not find that reasonable behaviour and in my opinion they were influenced by the financial position at the Company and did not consider the interests of the members. I therefore find that Mr Burrows and Mr Lloyd did commit a breach of trust as they authorised a return of money from the Scheme to the Company which was in contravention of the rules of the Scheme.

99. A further Trustee meeting was held on 12 January 2010 just 17 days after the payment of £187,000 on 24 December 2009, but even when the Company asked for a loan to pay the PPF levy of £205,000 neither Mr Burrows, Mr Lloyd or Mr Clark who was also at the meeting considered it necessary to inform the other two trustees that a refund had been made. The minutes of the meeting also record that Mr Lloyd refrained from voting on the decision to lend the Company the money to pay the PPF levy as he had a conflict of interest. But neither Mr Burrows or Mr Lloyd considered whether they had a conflict of interest at the time they authorised the return of £187,000 to the Company in December 2009.

100. Mr Burrows and Mr Lloyd have said in the course of the oral hearing that they thought their fellow trustees were aware that the excess contributions had been repaid to the Company as some informal conversations had occurred with them. There was therefore no reason to mention this during the course of the trustee meeting. But they could not be certain that this was discussed, between whom and when, and any such discussion was not recorded in any way.

101. Mrs Hirst and Mr Gratrix have said in their witness statements (which have not been challenged by Mr Burrows and Mr Lloyd) that they had no prior knowledge of the repayment of the excess contributions to the Company and the first they knew of this was when they were approached by Bridge Trustees. Mr Lloyd has also said in the oral hearing that due to her age he would not want to put Mrs Hirst through the ordeal of challenging her memory of events.

102. There is a difference here in the recollections of the previous trustees but I conclude that on the balance of probabilities it is more likely than not that Mrs Gratrix and Mrs Hirst were not aware of the repayment at the time of the trustee meeting in January 2010.

103. I do not find it reasonable that Mr Burrows and Mr Lloyd remained silent on the fact that the Company had received the refund of the excess contributions of £187,000 at the meeting even if they believed, as they claim, that they had been advised that they had to return these contributions. The trustees were being asked to lend the Company £205,000. The trustees have a fiduciary duty to act in the best interests of the members and this means they must show undivided loyalty to them. A consequence of the duty of undivided loyalty is that they must make available to their fellow trustees all the information that is relevant to the members' affairs.

104. As Mr Burrows and Mr Lloyd did not provide any information on the refund of £187,000 then they did not show undivided loyalty to their fellow trustees or act in the best interests of the members. If the other trustees had been aware that a refund had been made they may not have readily agreed to the loan of £205,000 to the Company to pay the PPF levy.

105. Although it is not a breach of trust for pension trustees to want to assist an employer (Edge v Pensions Ombudsman [2000] Ch 602), the trustees should still consider whether an advancement or loan to the Company is reasonable or prudent. Advancing money to an employer from an underfunded scheme is "high risk" and unlikely to be prudent (Lawrence Graham Trust Corporation PO determination Q00623).

106. Although I find Mr Burrows and Mr Lloyd guilty of a breach of trust I must also consider whether they are entitled to an indemnity under the Rules of the Scheme. Rule 14.20(b) says the trustees are entitled to an indemnity against the assets of the fund in respect of "any breach of trust of whatever nature whether omitted or committed by any person but this paragraph shall not operate to release any liability attaching to any trustee or director or employee of the trustee in respect of that person's fraud or deliberate disregard of the interests of the beneficiaries under the fund." The question is therefore whether Mr Burrows and Mr Lloyd deliberately disregarded the interest of the beneficiaries.

107. Mr Burrows' legal advisers have said that the exoneration provisions exclude liability for conduct including gross negligence except for anything falling short of fraud or conscious wrongdoing. It is possible that Mr Burrows and Mr Lloyd were under the impression that the excess DC contributions belonged to the employer

and that there was no alternative other than to return these to the employer. However that is contrary to the provisions of Rule 5.6 which as Trustees Mr Burrows and Mr Lloyd are expected to understand and comply with. Furthermore it does not explain why they did not advise their fellow trustees of the proposed return of these excess DC contributions either prior to their return or at the next available opportunity at the next trustee meeting.

108. Mr Burrows and Mr Lloyd have said at the oral hearing that they were surprised that the amount of the excess contributions in the defined contribution section of the Scheme had grown to almost £200,000 and that this had not been picked up by the auditors or mentioned by the administrators. It would have been better if this money had been identified sooner. Whether or not the excess should have been identified earlier, the evidence I have heard and seen, particularly accounts of the company's financial position at the time, email exchanges and Trustee meeting records, persuade me that that when the amount of the excess contributions was identified it was viewed as fortuitous and a welcome addition to the Company's cash in hand at a difficult time.

109. A decision to transfer the money to the Company seems to have been made sometime around the 21 December 2009 as witnessed by the email from Mr Clark to KPMG on 21 December 2009 where he said "on a positive note we have received confirmation that we will receive a £187K cash refund of excess company contributions which are not in the Short Term Cash forecast." The expected amount was some £187,000 but Capita only transferred some £177,000 into the trustees' bank account as they had held some money back in respect of their fees. Nevertheless Mr Burrows and Mr Lloyd decided to transfer £187,000 to the Company which demonstrates to me that they were more interested in meeting the commitment to KPMG and returning the money to the Company than protecting the interests of the beneficiaries. I therefore find that this action of returning the £187,000 to the Company was a conscious wrongdoing on the part of Mr Burrows and Mr Lloyd and a deliberate disregard of the interest of the members. I therefore conclude that Mr Burrows and Mr Lloyd are in breach of trust and not entitled to an indemnity under Rule 14.20.

110. The next trustee meeting was held within three weeks of the return of the £187,000 and at which the Company asked the trustees to pay the PPF levy. Both Mr Burrows and Mr Lloyd should have recognised at that point, that by asking the

trustees to pay the PPF levy they were reducing the assets available to meet the Scheme's liabilities and that the Company had already received £187,000 in excess DC contributions which could have been used to meet the majority of the PPF levy.

111. The trustees did approve a loan to the Company of £205,000 to pay the PPF loan. I conclude that on the balance of probabilities it is probable that if Mr Burrows' and Mr Lloyd's fellow trustees had been advised of the return of the £187,000 to the Company and obtained appropriate advice then they may have agreed to use the £187,000 to pay the PPF levy direct from the Scheme with the Company topping up the balance. The net result of Mr Burrows and Mr Lloyd's actions however was that the Scheme's assets were diminished by not only the £187,000 but also the £205,000 passed across to the Company to pay the PPF levy.

112. In the course of this investigation it is has also become clear that the Scheme may have a tax liability in respect of the monies refunded to the Company. As that money cannot be recovered from the Company and if as seems likely the Scheme will have to pay the tax on the refund plus a Scheme Sanction Charge and possibly a late payment charge, I consider that as Mr Burrows and Mr Lloyd are responsible for the tax charge arising then they should also be responsible for reimbursing the Scheme for the tax charge when the amount is known.

113. It is a generally accepted principle of trust law that all parties to a breach of trust are jointly and severally liable. In this case the breach of trust was actioned by Mr Burrows and Mr Lloyd without the knowledge of the other two trustees Mrs Hirst and Mr Gratrix. The refund of the £193,000 did not come to light until after Bridge Trustees had taken over as trustee to the Scheme and there was little that either Mrs Hirst or Mr Gratrix could do to put matters right. In my judgement neither Mrs Hirst or Mr Gratrix were party to the breach of trust.

114. I do not therefore find Mrs Hirst or Mr Gratrix party to any breach of trust and entitled to the protection of the indemnity under Rule 14.20 of the Scheme's rules.

115. I do find Mr Burrows and Mr Lloyd jointly and severally liable for any loss suffered by the Scheme and not entitled to any indemnity under Rule 14.20. The directions below are made accordingly.

Directions

116. I direct that within 28 days of this determination Mr Burrows and Mr Lloyd are to reimburse the Scheme for the amounts of

    - £187,191.25 plus simple interest at the rates applicable by the reference banks between 24 December 2009 and date of payment
    - £5,819.68 plus simple interest at the rates applicable by the reference banks between 11 March 2010 and date of payment.

117. I further direct that Mr Burrows and Mr Lloyd are responsible for meeting any tax charges that might arise in respect of the return of the excess DC contributions levied by HMRC including any late payment charge when this is known.

Jane Irvine
Deputy Pensions Ombudsman

31 March 2015