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Case No: PE-2019-000016

IN THE HIGH COURT OF JUSTICE
IN THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
PROPERTY, TRUSTS AND PROBATE LIST

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 06/11/2020

Before :

MR JUSTICE TROWER

- -

Between :

THE BOARD OF THE PENSION PROTECTION FUND	**Claimant**
- and -	
DALRIADA TRUSTEES LIMITED	**Defendant**
-and-	
SECRETARY OF STATE FOR WORK AND PENSIONS	**Interested Party**

- -
- -

EDWARD SAWYER AND DANIEL SCOTT (instructed by **Herbert Smith Freehills LLP**) for the **Claimant**
FENNER MOERAN QC (instructed by **Pinsent Masons LLP**) for the **Defendant**
JASON COPPEL QC AND KATHERINE APPS (instructed by the Government Legal Department)

Hearing dates: 14,15 and 16 July 2020
Further written submissions filed on 21 and 28 July 2020

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the representatives of the parties by email. The date and time for hand-down is deemed to be Friday 6 November 2020 at 10:00.

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE TROWER

Mr Justice Trower :

Introduction

1. In these proceedings, the Board of the Pension Protection Fund (the "Board") seeks the court's determination of a number of legal issues concerning the operation of the Fraud Compensation Fund (the "FCF"). The FCF is a statutory fund established by section 188 of the Pensions Act 2004 ("PA 2004") for the purpose of providing compensation to occupational pension schemes where the value of the scheme's assets has suffered a reduction attributable to an act or omission constituting an offence of dishonesty.

2. The defendant, Dalriada Trustees Limited ("Dalriada"), is an independent professional trustee who is regularly appointed by the Pensions Regulator ("TPR") and the court as trustee of occupational pension schemes whose affairs are a cause for concern. Many of these schemes have a potential call on the FCF. It is joined to these proceedings in its capacity as trustee of a purported occupational pension scheme, the Turnberry Wealth Management Pension Trust (the "Scheme").

3. On 20 April 2020, the Secretary of State for Work and Pensions (the "Secretary of State") was joined to the proceedings as an Interested Party. She was permitted by the order to make written and oral submissions at the trial which she did through her counsel Jason Coppel QC.

4. The Board was established under section 107 of PA 2004 and is responsible for the management and operation of both the FCF and the Pension Protection Fund ("PPF"). The FCF provides compensation to occupational pension schemes where there has been a reduction in the value of scheme assets attributable to an offence of dishonesty. The PPF is a fund designed to protect members of defined benefit and hybrid occupational pension schemes by paying compensation in the event that the employer is insolvent, and the scheme is underfunded.

5. The Board is the successor to the Pensions Compensation Board ("PCB") which was established under section 78 of the Pensions Act 1995 ("PA 1995") in response to the Goode Report (Pension Law Reform: the Report of the Pension Law Review Committee (HMSO, September 1993)). As with its predecessor administered by the PCB, only occupational pension schemes are eligible for compensation from the FCF. The fraud compensation provisions cover both defined benefit and defined contribution occupational pension schemes.

6. The FCF is funded by contributions levied by the Board through a fraud compensation levy on occupational pension schemes. Trustees or managers of eligible schemes are liable to pay this levy for the purpose of meeting expenditure payable out of the FCF: section 189(3) of PA 2004 and regulation 3(3) of the Occupational Pension Schemes (Fraud Compensation Levy) Regulations 2006 (SI 2006/558). The obligation to contribute does not extend to schemes which are not themselves eligible for fraud compensation by reason of section 182(1)(a) of PA 2004 (i.e. those prescribed by regulation 2 of the Occupational Pension Schemes (Fraud Compensation Payments and Miscellaneous Amendments) Regulations 2005 (SI 2005/2184)) (the "Fraud Compensation Regulations"): see section 189(2) of PA 2004. It follows that there is a legislative link between the occupational schemes that are

liable to contribute to the funding of the FCF and those in respect of which a fraud compensation payment may be made.

7. The context in which the issues in these proceedings arise for determination is that since at least 2015 the Board has been notified of increasing numbers of occupational pension schemes which have been used as a vehicle for pension scams consisting of what is described in the papers as pension liberation activity (cf. section 18 of PA 2004). In broad terms, these are activities designed to enable members of pension schemes to gain access to their pension savings prior to the date permitted by the relevant tax legislation. They tend to be structured in a manner whereby the liberation payment does not amount to a direct payment by the scheme back to the member.

8. A common form of liberation activity is (or at least was) that members of a *bona fide* pension scheme were persuaded to transfer their accrued benefits to a scam scheme in return for a promise to return cash to them prior to the normal minimum retirement age of 55. The cash return was to be achieved through what were variously called "pension loans", "savings advances", "pension unlocking", "cash incentives" and other similar forms of words. It was often the case that the liberation activity gave rise to tax liabilities being imposed on both the member and the scheme. In many instances, all or part of the transferred but unreturned funds were then misapplied or misappropriated through improper investments and the overcharging of administration expenses.

9. The establishment and operation of these liberation schemes may well have involved the commission of an offence of dishonesty by the perpetrators. These offences are likely to have included conspiracy to defraud or cheating the public revenue, theft and offences under the Fraud Act 2006 and the Proceeds of Crime Act 2002.

10. The scale of the problem is apparent from evidence adduced by the Board from its general counsel, Mr David Taylor, who explained that as at 9 December 2019, the Board had received eight applications for compensation and was on notice of a further 150 applications yet to be made with an estimated total compensation claimed across all applications in the region of £240 million. I was told at the trial that since those figures were prepared two further applications have been made and many more are pending with a total anticipated quantum exceeding £350 million. The affected schemes have several thousand members. Four of the applications so far received (including the one in relation to the Scheme) have been made by Dalriada.

11. The Board stresses that it does not have a duty to minimise calls on the FCF and has no preference as to whether the questions with which these proceedings are concerned are answered in the positive or negative sense. It simply wishes to ensure that it administers the FCF properly and by reference to the relevant statutory criteria. The proceedings have, however, been formulated in such a way that it will argue for answers that are most likely to minimise calls on the FCF while Dalriada will argue for answers to the opposite effect. In my view this is a sensible and pragmatic way in which to proceed.

Dalriada and the Scheme

12. On 13 June 2013, Dalriada was appointed as independent trustee of the Scheme by TPR pursuant to its powers under sections 7 and 9 of PA 1995 (an appointment that was

confirmed by the court on 19 June 2013). In that capacity, it made an application for compensation from the FCF under section 182 of PA 2004 on 4 December 2017. The estimated value of the loss was said to be £3,194,668. The Board has not accepted the application in the light of what Mr Taylor describes as its doubts about the issues raised in these proceedings.

13. An outline explanation of what appear to have been the circumstances in which Dalriada came to make a claim for compensation from the FCF is necessary in order to put in context the issues that I am asked to determine and the extent to which Dalriada has a legitimate interest in advancing arguments contrary to those advanced by the Board. The Board has not yet satisfied itself that all of the matters which I now summarise have been established for the purposes of enabling it to comply with its statutory functions.

14. The Scheme appears to have been established pursuant to a trust deed dated 20 January 2013. Ten days later it was registered with HMRC as an occupational pension scheme. The original trustees of the Scheme were Margaret Brown and Martin Brown. The sponsoring employer, described in the trust deed as the provider, was Turnberry Wealth Management Limited ("Turnberry"), a company of which Mr and Mrs Brown were the sole directors and (together with an entity called the M Brown Trust) its sole shareholders.

15. Clause 3.2 of the deed by which the Scheme was established provides that:

> *The scheme has been established by an employer as an occupational pension scheme. Automatic eligibility for membership of the scheme is therefore limited to officers and employees of the employer provider and associated companies, and to family members of such officers and employees. Others who outside the above definition [sic] may only join the scheme with the consent of the trustees.*

16. Initially the evidence was that Turnberry had no employees, although its liquidators' most recent progress report states that it had 6 employees at the date of its liquidation (March 2015). It appears that Mr and Mrs Brown were eligible to join the Scheme as directors of Turnberry on the date of its establishment. The Scheme now has 31 members. A summary of what happened next is given in Mr Taylor's witness statement:

> *Following the establishment (or purported establishment) of the Scheme in January 2013, it appears that in the early part of 2013 members were induced to transfer their benefits from other schemes to the Scheme on the promise of receiving "loans". I understand that the total amount transferred to the Scheme was £3,319,668.14. Although it seems some money was liberated to members who received purported "loans", the majority of the benefits appear to have been lost ... in May 2013 a payment of £2,684,000 was made by the Original Trustees for a purported investment for the Scheme which appears to be worthless.*

17. The value was lost because, on 16 May 2013, the Scheme paid away £2,684,000 for the purchase from a BVI company called Exceptional Management Limited ("Exceptional"), of 2,683,655 £1 preference shares in Elysian Fuels No 27 Plc ("Elysian"), a company whose business was the construction and eventual operation of a large bio-ethanol plant in Grimsby. These shares were part of a holding of 8,000,000 shares that Exceptional had acquired one month earlier through a company controlled by the same individual who controlled Elysian at what was in practice a price of 18.675p per share.

18. The evidence indicates that the shares in Elysian are now worthless and Dalriada contends that the investment was used as a means to facilitate dishonest pension liberation. It seems that some of the £2,684,000 that was originally paid to Exceptional has found its way back to members in the form of cash payments, purporting to be loans from a connected company, Ream Estate Ltd. There was evidence that at least two members received cash payments representing identified percentages of the par value of the Elysian shares purchased on their behalf.

19. In the Board's view there is at least a realistic possibility that the Scheme was a sham when established. Furthermore, as Mr Taylor put it in his witness statement when summarising the Board's assessment of what occurred in May and June 2013, "*it is clearly a live possibility that a prescribed offence was committed and that there has been a reduction in scheme assets that is attributable to that offence*". The reference to a prescribed offence was to "*any offence involving dishonesty, and for these purposes dishonesty shall include an intent to defraud*" (Regulation 3 of the Fraud Compensation Regulations).

20. Turnberry went into liquidation on 27 March 2015 by order of the sheriff court of Ayr, Scotland. Its winding up was on the grounds of inability to pay its debts and followed its loss of a series of complaint cases before the Financial Ombudsman Service ("FOS"), as a result of which it was ordered to pay compensation to clients. Clients had complained that investment advice did not reflect their needs and involved the encouragement of large investments in unregulated collective investment schemes and failures to carry out proper due diligence. By the end of 2015 Turnberry had been declared in default by the Financial Services Compensation Scheme ("FSCS").

21. On 25 January 2018, the liquidator submitted a scheme failure notice in respect of the Scheme expressed to be made under section 122 of PA 2004. As will appear, the question of whether or not the statutory requirements for the issue of a scheme failure notice were satisfied will be affected by the answer to some of the questions that I am asked to determine.

22. As I have already mentioned, the Scheme is one of many in respect of which Dalriada has been appointed independent trustee. Of those appointments, at least 102 have been made in respect of schemes where Dalriada considers there might be scope for a fraud compensation application to be made to the FCF. It has identified 79 companies that are or could be described as sponsoring employers, 'providers' or equivalents for such schemes. Of those 79, the accounts of only 16 revealed the existence of either employees or remunerated directors. For reasons explained in Dalriada's evidence, it has limited visibility as to the way in which many of these potential employers operated, but there is no reason to think that a summary of the position described in the third witness statement of Mr Sean Browes is not accurate:

> *Dalriada cannot be certain that the remaining employer companies that have not been positively identified as having or having had employees or remunerated directors definitely do / did not have them but the factual matters set out here, together with the absence of any evidence to the contrary found in any of the documents filed on Companies House, point very strongly towards that being the case*.

23. It appears to be the case that Turnberry had employees at the date of its liquidation. That is not, however, the case in relation to the other three schemes in respect of which Dalriada,

as independent trustee, has already made an application to the FCF. The evidence is consistent with a conclusion that, in respect of two of those three schemes, there was an "employer" company (Tallton Place Limited and Woodcroft House Limited respectively) which had an un-remunerated director but no remunerated employees or officers.

The Fraud Compensation Provisions

24. Part 2 of PA 2004 is concerned with the Board and its functions which include the duty to hold, manage and apply the PPF and the FCF.

25. Chapter 3 of Part 2 of PA 2004 is concerned with entry into the PPF, which normally occurs under section 127 of PA 2004 when a qualifying insolvency event occurs in relation to an employer, but can also occur under section 128 of PA 2004 on the application of the trustees or managers of a scheme when an employer is unlikely to continue as a going concern. Both routes require what is called a scheme failure notice to be issued, confirming that a scheme rescue is not possible:

i) In the case of PPF entry under section 127, the scheme failure notice is issued by the relevant insolvency practitioner and is a notice to the effect that a scheme rescue is not possible. Section 122(5)(b) of PA 2004 requires a scheme failure notice issued by an insolvency practitioner to confirm the matters prescribed by regulation 9(2) of the Pensions Protection Fund (Entry Rules) Regulations 2005 (SI 2005/590) (the "PPF Entry Rules"). They are that the employer is not continuing as a going concern and that no other person has assumed responsibility for meeting the employer's pension liabilities under the scheme, or in the opinion of the insolvency practitioner will do so.

ii) In the case of PPF entry under section 128, the scheme failure notice is issued by the Board itself under section 130(2) of PA 2004. Section 130(5)(b) of PA 2004 requires a scheme failure notice issued by the Board to confirm the matters prescribed by regulation 10(3) of the PPF Entry Rules, which are in substance the same as those for which provision is made by regulation 9(2) in the case of an insolvency practitioner.

26. The Board's obligation to make fraud compensation payments in respect of an occupational scheme arises under Chapter 4 of Part 2 of PA 2004. As with Chapter 3 of Part 2, the provisions of Chapter 4 contemplate that there is an employer in relation to the occupational pension scheme in respect of which the application for compensation is made. The provisions which impose a duty on the Board to make fraud compensation payments are contained in section 182 of PA 2004 and the relevant parts are as follows:

182 Cases where fraud compensation payments can be made

(1) The Board shall, in accordance with this section, make one or more payments (in this Part referred to as "fraud compensation payments") in respect of an occupational pension scheme if–

(a) the scheme is not a prescribed scheme or a scheme of a prescribed description,

(b) the value of the assets of the scheme has been reduced since the relevant date and the Board considers that there are reasonable grounds for believing

that the reduction was attributable to an act or omission constituting a prescribed offence,

(c) subsection (2), (3) or (4) applies,

(d) an application is made which meets the requirements of subsection (5), and

(e) the application is made within the authorised period.

(2) This subsection applies where–

(a) a qualifying insolvency event has occurred in relation to the employer in relation to the scheme,

(b) after that event, a scheme failure notice has been issued under section 122(2)(a) in relation to the scheme and that notice has become binding,

...

(3) This subsection applies where–

(a) in relation to the scheme, an application has been made under subsection (1) ... and

(b) in response to that application ... the Board has issued a scheme failure notice under section 130(2) in relation to the scheme and that notice has become binding.

(4) This subsection applies where–

(a) the scheme is not an eligible scheme,

(b) the employer in relation to the scheme is unlikely to continue as a going concern,

(c) the prescribed requirements are met in relation to the employer,

(d) the application under this section states that the case is one in relation to which paragraphs (b) and (c) apply, and

(e) in response to that application the Board has issued a notice under section 183(2) confirming that a scheme rescue is not possible in relation to the scheme and that notice has become binding.

(5) An application meets the requirements of this subsection if–

(a) it is made by a prescribed person, and

(b) it is made in the prescribed manner and contains the prescribed information.

(6) Subject to subsection (7), an application is made within the authorised period if it is made within the period of 12 months beginning with the later of–

(a) the time of the relevant event

...

(8) For the purposes of this section, an insolvency event ("the current event") in relation to the employer is a qualifying insolvency event if–

(a) it occurs on or after the day appointed under section 126(2), and

(b) ...

(i) it is the first insolvency event to occur in relation to the employer on or after that day

...

(10) In this section–

...

"the relevant event" means–

(a) in a case where subsection (2) applies in relation to an eligible scheme, the event within paragraph (a) of that subsection,

(b) in any other case where subsection (2) applies, the issue of the scheme failure notice under section 122(2)(a) mentioned in paragraph (b) of that subsection,

(c) in a case where subsection (3) applies, the event within paragraph (a) of that subsection, and
(d) in a case where subsection (4) applies, the trustees or managers becoming aware that paragraphs (b) and (c) of that subsection apply in relation to the scheme;

27. There are, therefore, a number of conditions which must be satisfied before the Board is required to make a fraud compensation payment under section 182(1) of PA 2004. Where that is the case, the duty to pay compensation is mandatory.

28. The first condition (section 182(1) of PA 2004) is that a scheme must be an occupational pension scheme, a phrase which has the meaning given by section 1 of the Pension Schemes Act 1993 ("PSA 1993"): see section 318(1) of PA 2004. The relevant definition of what is an occupational pension scheme is now as follows:

(1) In this Act, unless the context otherwise requires -

"occupational pension scheme" means a pension scheme –

a) that –

i) for the purpose of providing benefits to, or in respect of, people with service in employments of a description, or

ii) for that purpose and also for the purpose of providing benefits to, or in respect of, other people,

is established by, or by persons who include, a person to whom subsection (2) applies when the scheme is established or (as the case may be) to whom that subsection would have applied when the scheme was established had that subsection then been in force, and

(b) that has its main administration in the United Kingdom or outside the EEA states, or a pension scheme that is prescribed or is of a prescribed description;

(2) This subsection applies—

(a) where people in employments of the description concerned are employed by someone, to a person who employs such people,

(b) to a person in an employment of that description, and

(c) to a person representing interests of a description framed so as to include –

(i) interests of persons who employ people in employments of the description mentioned in paragraph (a), or

(ii) interests of people in employments of that description.

(3) For the purposes of subsection (2), if a person is in an employment of the description concerned by reason of holding an office (including an elective office) and

is entitled to remuneration for holding it, the person responsible for paying the remuneration shall be taken to employ the office-holder.

(4) In the definition in subsection (1) of "occupational pension scheme", the reference to a description includes a description framed by reference to an employment being of any of two or more kinds.

29. The second condition (section 182(1)(a) of PA 2004) is that the scheme must not be a prescribed scheme or a scheme of a prescribed description. These exclusions, which are described in regulation 2 of the Fraud Compensation Regulations, do not seem to have any bearing on the questions that I have to consider.

30. The third condition (section 182(1)(b) of PA 2004) is that the value of the assets of the scheme has been reduced since the relevant date and the Board considers that there are reasonable grounds for believing that the reduction was attributable to an act or omission constituting a prescribed offence, being the offences of dishonesty that I have already mentioned. This condition is most relevant to the fourth question I am asked to decide.

31. The fourth condition (section 182(1)(c) of PA 2004) is that one of three circumstances relating to the financial condition or status of the employer has occurred:

    i) The first circumstance (section 182(2) of PA 2004) is that a qualifying insolvency event has occurred in relation to the employer and the relevant insolvency practitioner has issued a scheme failure notice under section 122(2) of PA 2004, the form of which I have already explained.

    ii) The second circumstance (section 182(3) of PA 2004) is where the Board itself has issued a scheme failure notice under section 130(2) of PA 2004 after receipt of an application by the trustees or managers of a scheme that is eligible for PPF entry.

    iii) The third circumstance (section 182(4) of PA 2004) applies where the employer in relation to a scheme that is ineligible for PPF entry is unlikely to continue as a going concern and the Board has issued a notice under section 183(2) of PA 2004 that scheme rescue is not possible. For these purposes section 130(5)(b) of PA 2004 applies to the question of whether or not the Board is able to confirm that scheme rescue is possible, and therefore whether or not a scheme failure notice can be issued: section 183(7) of PA 2004.

32. The fifth condition (sections 182(1)(d) and 182(5) of PA 2004) is that the application has been made by a prescribed person (trustees, managers, administrators or beneficiaries) and in the prescribed manner and containing the prescribed information. This must include information about the employer in relation to the scheme, including the date of its qualifying insolvency event or when it was unlikely to continue as a going concern: regulation 5 of the Fraud Compensation Regulations.

33. The sixth condition (section 182(1)(e) of PA 2004) is that the application must be made within the authorised period. For present purposes, the relevant authorised period is within the 12-month period beginning with a qualifying insolvency event in relation to the employer and the other circumstances I have referred to in describing the fourth condition above.

34. It follows from the drafting of section 182(1) of PA 2004 that the conditions for making a fraud compensation payment out of the FCF contemplate that there is an employer. If there is no employer, a number of these conditions cannot be satisfied. The only way in which putative employers are identified on the face of section 182 itself is by reference to the fact that they are described as being "*the employer in relation to the scheme*" (i.e. an occupational pension scheme). It is in that context that the first question arises.

35. Section 184 of PA 2004 then imposes a duty on the trustees or managers of an occupational pension scheme who have made an application under section 182 of PA 2004 to obtain any recoveries of value "*to the extent that they may do so without disproportionate cost and within a reasonable time*". The board is not permitted to make any fraud compensation payment until the date (called the settlement date) after which further recoveries of value are unlikely to be obtained (section 184(2) of PA 2004). This provision is designed to ensure that appropriate steps are taken by trustees to effect recoveries from elsewhere before they make a recovery from the FCF.

36. For these purposes, the phrase "*recovery of value*" means (see section 184(3) of PA 2004):

> *any increase in the value of the assets of the scheme, being an increase attributable to any payment received (otherwise than from the Board) by the trustees or managers of the scheme in respect of any act or omission –*
>
> *a) which there are reasonable grounds for believing constituted an offence prescribed for the purposes of paragraph (b) of section 182(1), and*
>
> *b) to which any reduction in value falling within that paragraph was attributable.*

37. The amount of any fraud compensation payment is then to be quantified in accordance with section 185 of PA 2004. Where any recovery of value is made before the settlement date, it will lead to an equivalent reduction in the amount of any fraud compensation payment that might otherwise have been made. This is achieved by section 185(3) of PA 2004, which provides that the fraud compensation payment must not exceed the difference between the reduction in the value of the assets of the scheme considered by the Board to be attributable to the act or omission constituting a prescribed offence (section 182(1)(b)) and the amount of any recoveries of value obtained before the settlement date.

38. Subject to section 185(3) of PA 2004, further detail of the calculation is given in regulation 7 of the Fraud Compensation Regulations (see section 185(4)). This provides for Q, which is the value of the assets immediately before the application for compensation was made under section 182 of PA 2004 to be deducted from P, which is the adjusted value of the assets on an identified date which immediately preceded the loss, i.e. the reduction falling within section 182(1)(b). The adjustment is to take account of any alteration in the value of the scheme assets (in the form of investment gains and losses, but not of course the loss itself) between the date of the loss and the application date: regulation 7(4)(a). The figure which results from this calculation is the amount of the fraud compensation payment to which the applicant is entitled.

39. The questions which I am asked to decide arise out of those parts of the fraud compensation provisions of PA 2004 which require the Board to satisfy itself as to:

i) the relationship that a company must have with one or more individuals in order to qualify as an employer in relation to the relevant scheme (Questions 1 and 3);

ii) the nature of any liabilities that are capable of constituting the employer's pension liabilities under that scheme (Questions 2 and 3);

iii) the expenses and other liabilities borne by the assets of the scheme which are capable of contributing to a reduction in value attributable to an act or omission constituting a prescribed offence (Question 4);

iv) the extent to which a purported occupational pension scheme that was a sham when established is capable of becoming an occupational pension scheme within the meaning of section 182 of PA 2004 at some time thereafter and the impact that would have on any compensation payable (Questions 5 and 6).

Question 1

40. The requirement for an employer gives rise to the first question, which seeks to identify when a company is an employer for the purposes of section 182 of PA 2004:

> *Is a company a statutory "employer" for the purposes of section 182(2)-(4) PA 2004 and the Fraud Compensation Regulations if at the times material for section 182(2)-(4) and those Regulations:*
> *(a) the company did not actually have a contract of employment with anyone in the description of employment to which the scheme relates; or*
> *(b) the position was as in (a) but the company had remunerated directors/officers who held an office with emoluments or earnings and who were eligible for scheme membership; or*
> *(c) the position was as in (a) but the company had unremunerated directors/officers eligible for scheme membership?*

41. For each of (a) to (c), the Board argued that the answer was no, and Dalriada argued that it was yes. The primary position of the Secretary of State was that the question is academic and should not be answered for that reason. However, she contended that, if I were to decide that it is appropriate to answer the question, I should answer it in the affirmative.

42. I should deal first with the Secretary of State's submission that the first question is academic, because there is no live issue between the Board and Dalriada. The reason this was said to be the case is that Turnberry's two directors were both remunerated, and both received redundancy payments when Turnberry became insolvent. It also now appears that Turnberry had six employees at the date of its liquidation (although this was less clear at the time these proceedings were started). She submitted that it follows from this that there were no live issues between the parties and that in those circumstances it would be wrong for the court to grant declaratory relief.

43. In support of this submission, Mr Coppel QC cited *A Local Authority v AG (No 2)* [2020] EWHC 1346 (Farm) at [6] to [16] and *Rolls Royce Ltd v Unite the Union* [2010] EWCA Civ 387. In *Rolls Royce* at [38] and [39], Wall LJ referred to the following passage from

the speech of Lord Bridge of Harwich in *Ainsbury v Millington* [1987] 1 WLR 379, 381B-C:

> *It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.*

But Wall LJ then went on to recognise that Lord Bridge immediately added:

> *Different considerations may arise in relation to what are called "friendly actions" and conceivably in relation to proceedings instituted specifically as a test case.*

44. Aikens LJ summarised the applicable principles in a passage in his judgment in *Rolls Royce* at [120] which also reflected the approach that had been adopted by Wall LJ:

> *For the purposes of the present case, I think that the principles in the cases can be summarised as follows.*
>
> *(1) The power of the court to grant declaratory relief is discretionary.*
>
> *(2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant.*
>
> *(3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.*
>
> *(4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue; (in this respect the cases have undoubtedly moved on from Meadows).*
>
> *(5) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish, even on "private law" issues. This may particularly be so if it is a "test case", or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned.*
>
> *(6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court.*
>
> *(7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question it must consider the other options of resolving this issue.*

45. I accept the Secretary of State's submission that the court should proceed with caution where there is no dispute to be decided which will directly affect the rights and obligations of the parties inter se, anyway in the capacity in which they appear. So much is evident both from Aikens LJ's summary of the applicable principles and from the approach that was taken in *Rolls Royce* both by Wall LJ at [60] and by Aikens LJ at [122-128].

46. However, in my judgment, the present case is one in which the principles summarised by Aikens LJ are satisfied. There are a number of factors which point against a conclusion that I should decline to grant declaratory relief.

47. The first is that the nature of the relief sought makes it particularly suitable for the grant of a declaration in proceedings against a defendant with both a sufficient interest and a sufficient expertise to make all of the arguments required to enable the court to reach a full and considered answer. It raises a narrow point of construction of an Act of Parliament in the context of an easily defined fact pattern. It is the equivalent of what Aikens LJ in *Rolls Royce* at [128] called the two very narrow issues of statutory construction that arose and that all members of the Court of Appeal accepted could be decided.

48. Secondly, it seems to me that the Board is affected by the relief that is sought. It is faced with a large number of applications. Although Mr Coppel QC said that we do not know enough about those cases to reach a view on whether or not the point will arise, the Board believes that it will. The evidence indicates that it is highly likely that a number of those applications relate to schemes in respect of which the putative employer has no employees and only unremunerated office-holders.

49. To that extent I am satisfied that Dalriada will be affected by the outcome of these proceedings in its capacity as independent trustee of other schemes where the putative employer had no employees and only an unremunerated office-holder. In that capacity, the interest it has in arguing as it does on the first question does not cut across its duties as trustee of the Scheme and it has both the experience and expertise to make the arguments required. In that sense there is a real and present dispute as to the existence or extent of a legal right between claimant and defendant in relation to the question asked. I appreciate that questions of capacity are important in this context, but in my view it is only in a very limited sense that it can be said that Dalriada is unaffected by the decision which the court is asked to make and that there is no dispute between the legal entities that are parties to the proceedings.

50. Thirdly, although it now transpires that it is probable that Dalriada will not be affected in its capacity as trustee of the Scheme (because it seems likely that Turnberry had six employees and remunerated directors), the Board has not yet reached a conclusion as to the facts on which it must proceed. Mr Sawyer, who appeared for the Board, told me that the Board has not yet accepted that there were what he called valid employment relationships.

51. Fourthly, as I consider that the point is likely to arise and will have to be determined at some stage, I think that this is one of those cases in which the sooner it is decided the better. There are good reasons in the public interest for the uncertainty identified by the Board to be resolved as soon as practicable, enabling it to take the correct approach to applications for compensation from the FCF where the relevant company has no employees or remunerated office-holders.

52. Fifthly, the question raised is a point of importance which a body carrying out public functions wishes to have decided, and its outcome will affect a large number of people. Mr Coppel QC explained that part of the Secretary of State's concern was that those other people, being individual members of other schemes, might be affected even though they are not before the court. Of course that is right in the sense that the court's determination of a point of law in any proceedings is capable of having an impact on the extent to which claims by parties not before the court can be pursued. However, that will also be the case

where there is unarguably a dispute between claimant and defendant and a point of law is determined as part of the process of deciding that dispute.

53. I should also add that the Secretary of State had what Mr Coppel QC described as a slightly broader concern which was that the court was being asked to make findings about the meaning of what the Board called a "statutory employer" that could affect directly or indirectly a number of other features of the pensions regulatory regime. In particular, she was concerned about the impact which anything the court said casting doubt on the decision of Morgan J in *Pi Consulting Trustee Services Limited v The Pensions Regulator* [2013] Pens LR 433 ("*Pi Consulting*") might have on the way in which the statutory regime operates.

54. As will become apparent from what I shall say in relation to the first question, I do not cast any doubt on *Pi Consulting*. My task was made easier by the fact that no party sought to challenge it, and the Board's arguments were limited to explaining why in their submission it was distinguishable. More generally, I have in mind the Secretary of State's submission that care is required in reaching a conclusion that could affect directly or indirectly other features of the pensions regulatory regime. As will appear I have accepted the submission of the Secretary of State and Dalriada that the Board is wrong to give the words "*employer*" and "*employment*" where they appear in section 182 of PA 2004 a meaning that is different from the concepts established in other parts of the pension legislation. To that extent her concerns may be assuaged.

55. Before I turn to the substance of Question 1, I should say that I myself had some concerns about the suitability of the component parts of Question 5 for determination in the form in which they have been asked. I raised the question at the outset of the trial as to whether or not it was appropriate for the court to address the issues raised having regard to the principles that I have just considered in the context of Question 1, namely the extent to which they too are questions which are directed at addressing hypothetical or academic issues, insufficiently connected to a surrounding factual matrix. Unlike in relation to Question 1, no party contended that this was the case and each party made submissions as to the correct answers. That does not, of course, relieve me from considering whether or not Question 5 raised issues with which it is appropriate for me to grapple, but I have decided that for similar reasons to those which I addressed in relation to Question 1, it is possible for the court to give some limited guidance and it is appropriate that I should do so.

56. Turning to the substance of Question 1, I start with some of the basic characteristics which a person must have in order to be an employer in relation to an occupational pension scheme. The first simple point is that there is no issue that, for the purposes of Part 2 of PA 2004, an employer can be a company, an individual or a partnership. This is apparent from the drafting of section 121 of PA 2004, which is concerned with defining what constitutes an insolvency event in relation to an employer.

57. Secondly, section 318(1) of PA 2004 contains the following definition of employer which applies to section 182 of PA 2004:

> *In this Act, unless the context otherwise requires – …*

> *"employer"- (a) in relation to an occupational pension scheme, means the employer of persons in the description of employment to which the scheme in question relates (but see subsection (4))*

58. Self-evidently this is not a comprehensive definition of "*employer*" because it contains the defined word "*employer*" within it, and so to that extent begs the very question I have to determine. The focus of the definition is on the identification of an employer "*in relation to"* an occupational pension scheme, i.e. on the characteristics of the employment relationship which it (or he or she) as employer has with a particular category of other persons ("*persons in the description of employment to which the scheme in question relates*"). Those characteristics tie the employment to the scheme, but they do not otherwise describe the legal nature of what is capable of constituting employment or the characteristics required of the persons whom the "*employer*" employs (i.e. must they be an employee or is office-holding sufficient?). In short, the definition does not further explain the meaning of the word "*employer*" where it appears in the body of the definition, nor therefore the full nature of the relationship of employment that the person capable of being characterised as an "*employer*" must have with the other "*persons*" referred to on the face of the definition.

59. Section 318(4) does not assist very much on the point either. It provides that regulations may, in relation to occupational pension schemes, extend the meaning of "*employer*" to include (a) persons who have been the employer in relation to the scheme and (b) such other persons as may be prescribed. This power contemplates that it may be appropriate for the definition to be extended to persons who have been, but no longer are, employers as defined, as well as to other persons who are not within the contemplation of the general definition provided for by section 318(1). Although on one view, the existence of section 318(4) of PA 2004 is an indication that the draftsman intended the basic definition to be narrow, which was why an ability to extend it by Regulations was enacted, it is equally possible that the legislature was signalling an intent that the definition should from the outset have a wide meaning. In any event, as the focus of the power to extend appears to be on timing issues I do not consider that either of these possibilities helps very much on the questions that I have to decide.

60. Section 318(1) of PA 2004 contains no definition of "*employment*" where it appears in the definition of "*employer*" either. It therefore follows that the nature of what is meant by "*employment*", being the relationship between the "*employer*" described on the face of the definition and the other *"persons in the description of employment to which the scheme in question relates*", is not defined in PA 2004 in a manner which determines whether or not office-holding is sufficient.

61. Likewise, the Fraud Compensation Regulations contain no comprehensive general definition of "*employer*" or "*employment*". As they were made by the Secretary of State under various powers granted by PA 2004, the expressions used in PA 2004 have, unless the contrary intention appears, the meaning which they bear in that Act: section 11 Interpretation Act 1978. In my view no such contrary intention appears. For the purposes of the Regulations themselves the word "*employer*" is extended in certain circumstances to those who are no longer an employer ("*the person who was the employer of persons in the description of employment to which the scheme… relates*" (Regulations 1(4) and 1(5) of Fraud Compensation Regulations), but this does not affect the underlying question of who is capable of being an employer (or what is capable of being employment) in the first place.

62. Some of the defined terms in section 318(1) of PA 2004 refer back to section 181(1) of PSA 1993. This is the case with the word "*employee*". Thus, section 181(1) now defines the word "*employee*" to mean "*a person gainfully employed in Great Britain either under a contract of service or in an office (including an elective office) with earnings*". (The phrase "*with earnings*" replaced the phrase "*with emoluments chargeable to income tax under schedule E*" which was included in the definition at the time of the enactment of PA 2004.) It follows that an unremunerated office-holder is not an "*employee*" for the purposes of section 181 of PSA 1993 and therefore for the purposes of section 318(1) of PA 2004 either. It also follows that if the word "*employees*" had been used in place of the word "*persons*" in the definition of "*employer*" in section 318(1) of PA 2004, it would have been necessary to refer back to PSA 1993 with the likely result that the person with whom an employer (as defined) must have a relationship is limited to those employed under a contract of service and those employed as a remunerated officer.

63. However, unlike in relation to its definition of "*employee*", section 318(1) of PA 2004 does not specifically refer back to section 181(1) of PSA 1993 for all or any part of its definition of "*employer*" or "*employment*". If it had done so, the following definitions from section 181(1) would have applied:

> *"employer" means-*
>
> *(a) in the case of an employed earner employed under a contract of service, his employer;*
>
> *(b) in the case of an employed earner employed in an office with emoluments-*
>
> *(i) such person as may be prescribed in relation to that office; or*
>
> *(ii) if no person is prescribed, the government department, public authority or body of persons responsible for paying the emoluments of the office;"*
>
> "*employment" includes any trade, business, profession, office or vocation and "employed" shall be construed accordingly except in the expression "employed earner"*

64. Mr Sawyer submitted that this was an exclusive definition of the word "*employer*" and meant that an unremunerated officer holder could not have an employer as that word is defined in section 181 of PSA 1993. He also relied on what Warren J said in *PNPF v. Taylor* [2010] Pens LR 261 ("PNPF") (at [344]) for a submission that, unlike a remunerated office-holder, an unremunerated office-holder would not as a matter of ordinary language be regarded as in employment. I shall come back to this point.

65. The fact that the draftsman of section 318(1) of PA 2004 did not refer back to PSA 1993 for the purposes of defining the word "*employer*" leaves open the theoretical possibility that the person with whom it (or he or she) has the requisite relationship must be a remunerated employee under a contract of service. However, it also leaves open the possibility that the word "*employer*" extends to anyone who has a relationship of "*employment*" with an office-holder, that relationship of employment extending to any office-holding whether remunerated or unremunerated by reason of the extended definition of employment contained in section 181(1) of PSA 1993.

66. Mr Sawyer also submitted that, in the absence of extended definitions of "*employer*" and "*employment*" having the explicit effect of (a) deeming a person to be an employer in relation to a remunerated or unremunerated office-holder and/or (b) deeming the relationship of employment to extend to the holding of a remunerated or unremunerated office, the words "*employer*" and "*employment*" where they appear in PA 2004 bear their ordinary meaning. By this the Board meant an employer under a contract of service, but not the company of which a director is an office-holder.

67. He said that what this means in practice was explained by Lord Hoffmann in *Percy v Board of National Mission of the Church of Scotland* 2006 2 AC 28 at [54] (as recently cited in *Gilham v. Ministry of Justice* [2019] UKSC 44 at [12]):

> *The distinction in law between an employee, who enters into a contract with an employer, and an office holder, who has no employer but holds his position subject to rules dealing with such matters as his duties, the term of his office, the circumstances in which he may be removed and his entitlement to remuneration, is well established and understood.*

68. It follows, so Mr Sawyer submitted that, in order to qualify as a statutory employer for fraud compensation purposes under PA 2004, it is necessary for the putative employer to be party to a contract of service with a person who, pursuant to that contract, is in a description of employment which makes him eligible to join the scheme. A putative employer which merely has officers, whether remunerated or unremunerated, eligible to join the scheme is not a statutory employer, because there is no employment in the sense described by Lord Hoffmann - there is only an office-holding.

69. In support of this submission, the Board relied on the fact that the definition of employer in section 318(1) of PA 2004 refers to a relationship that the employer has with persons ("*the employer of persons*") who have a defined characteristic ("*in the description of employment to which the scheme in question relates*"). It could have referred to a relationship that the employer has with "*employees*" who have that defined characteristic but does not do so. It also said that, because onerous funding obligations are imposed by the pensions legislation on those whom Mr Sawyer called the statutory employer, it is to be expected that the identification of an employer would be clear, and in the absence of clarity on that point, the normal meaning of employer, as being on the other side of a contract of service with an employee, should apply.

70. The Board also relied on other provisions in PA 2004, which gave further pointers as to the meaning of the word "*employer*" where it appears in the definition of employer in section 318(1) of PA 2004.

71. It submitted that I should compare and contrast the different drafting approach that was adopted in relation to the use of the word "*employer*" in Part 3 of PA 2004 (as opposed to Part 2 in which section 182 appears). For the purposes of Part 3 of PA 2004, section 233 provides that "*This Part shall be construed as one with Part 1 of the Pensions Act 1995"*. This therefore requires consideration of the relevant definition contained in section 124(1) of PA 1995 when construing Part 3 of PA 2004. Section 124(1) defines employer in a manner which picks up the language which had originally been used to define the phrase "*the employer"* in section 144 of PSA 1993 for the purpose of identifying the person liable for a statutory debt when there is a deficiency in the assets of an occupational pension scheme (now section 75 of PA 1995):

> "*employer", in relation to an occupational pension scheme, means the employer of persons in the description or category of employment to which the scheme in question relates (but see section 125(3))*".

72. At first blush this definition is very similar to the definition contained in section 318 of PA 2004 and to that extent does not take matters very much further. However, unlike section 318 of PA 2004, section 124(5) of PA 1995 provides that "*Subject to the provisions of this Act, expressions used in this Act and in [PSA 1993] have the same meaning in this Act as in that*." This expressly requires reference to be made to PSA 1993 for the meaning of the word "*employer*" where it is used in Part 3 of PA 2004. There is no such express requirement where it is used in Part 2 of PA 2004.

73. It follows that, if section 182 of PA 2004 were to be in Part 3 of that Act, it would be necessary to give consideration to the meaning of the word "*employer*" as defined in PSA 1993, and it seems likely that that defined term in section 181(1) of PSA 1993 which I have set out above would apply (as to which see: *PNPF* per Warren J at [584]). This would confirm that an employer could at least extend to the person responsible for paying the emoluments of an office. However, section 182 of PA 2004 is in Part 2 and not Part 3. It follows that section 233 of PA 2004 does not of itself require consideration of the definition of the word "*employer*" where it appears either in PA 1995 or in PSA 1993. The Board contended that the consequence of this was that it is necessary to fall back on the normal meaning of employer and employment as being different from and excluding the holding of an office.

74. Mr Sawyer also cited the decision of Warren J in *PNPF* in support of a submission that, for the purposes of section 124 of PA 1995, and therefore for the purposes of Part 3 of PA 2004, no type of employment other than employment of an employed earner under a contract of service and an employed earner employed in an office with emoluments has an employer. This was because Warren J concluded (at [421]) that self-employed members of a pension scheme were in employment for the purposes of PSA 1993 but did not have an employer. This demonstrated he said that the concept of employment and being employed were distinct from the concept of having an employer. In other words, the mere fact that a person was treated as being in employment for the purposes of the legislation did not mean that he had an employer.

75. The Board also drew attention to section 308 of PA 2004 (not yet in force), which permits Regulations to be made to modify any provision of pensions legislation for the purpose of ensuring that it does not purport to refer to the employer of a self-employed person and excludes persons who do not participate in the scheme as regards people employed by him, or only do so to a limited extent. Section 308(4) defines a person as being self-employed if he is in employment but is not employed in it by someone else and it defines employment as including any trade business, profession, office or vocation. In that context, it is provided by section 308(3)(c) that "*a person who holds an office (including an elected office), and is entitled to remuneration for holding it, shall be taken to be employed by the person responsible for paying the remuneration*."

76. The Board pointed to section 308 as an example of a provision in which PA 2004 extends employment to office-holding and identifies the person responsible for paying his remuneration as the person taken to employ the officer. It says that the same could have been, but was not, done in relation to the definition of "*employer*" in section 318 of PA

2004. This as well was said to indicate that the normal meaning of employer, employee and employment as excluding the holding of an office should apply.

77. In the alternative the Board said that if it was necessary to construe PA 2004 consistently with PSA 1993, the word employer can extend to the person who employs a remunerated office-holder but not to one who is unremunerated (see the definition in section 181 of PSA 1993 cited above). It made detailed submissions on the genesis of the definitions of employee, employer and employment which it said demonstrated that:

i) the meaning of employment as extending to any trade, business, profession office or vocation (whether or not remunerated) can be traced back to the Social Security Act 1975 and the National Insurance Act 1946;

ii) the pre-PSA 1993 legislation did not include employer as a defined term, but it deemed an employer of a person earning remuneration from employment as an office-holder to be the person responsible for paying the emoluments of the office; and

iii) the pre-PSA 1993 legislation included no deeming provision in relation to unremunerated office-holders, a factor which was said to point to a conclusion that there was no employer in relation to those office-holders.

78. At the core of the Board's case was a submission that, both in relation to the pre-1993 legislation and thereafter, the draftsman used express wording when he wished to include office-holding within employment and when he wished to identify somebody as the employer of an office-holder (whether remunerated or unremunerated). It then argued that, in the absence of any special definition in relation to section 182 of PA 2004, there was no employer of an office-holder.

79. It was at the forefront of Dalriada's case that the first question has been answered by *Pi Consulting,* which the Board did not challenge and in respect of which it said that it was happy to accept the conclusions reached by Morgan J. *Pi Consulting* was concerned with the question of whether a number of schemes were occupational schemes within section 1 of PSA 1993, the relevant parts of which I have set out above.

80. There were two main reasons why it was contended that the schemes in *Pi Consulting* were not occupational pension schemes. First, it was said that the purpose referred to in section 1(1)(a) of PSA 1993 was not the purpose for which the schemes were established. Secondly, it was said that the schemes were not established by, or by persons who include, a person to whom section 1(2) of PSA 1993 applied when the schemes were established. This person was described in Morgan J's judgment as the founder.

81. The purpose issue is of limited relevance to the questions I am asked to decide, but Morgan J's answer to the founder issue is central to the submissions made by Dalriada and the Secretary of State. The founder issue required the judge to consider whether the provisions of section 1(2)(a) of PSA 1993 applied to a founder who had an officer in the form of an unremunerated director but no employees.

82. It was not in issue that, in this context, the unremunerated directors, were both "*employed*" and in "*employment*" as those words are used in section 1 of PSA 1993. The reason for this is that "*employment*" is defined in section 181(1) of PSA 1993 to include an office whether

or not the holder of the office is remunerated. It also followed (per Morgan J at paragraph [66]) that unremunerated directors were "*employed*" as that word was used in section 1 of PSA 1993 and defined in section 181(1). (It is to be noted, however, that this did not of itself mean that an unremunerated director was an "*employee*" within the meaning of section 181(1) of PSA 1993 - they were not because of the definition of "*employee*" that I have already referred to above.)

83. The question which then arose was whether the relevant unremunerated officers were employed by someone or whether they were just in employment without any person employing them. In other words, were they in a position similar to the self-employed pilots considered by Warren J in *PNPF*? On this issue, Morgan J considered the significance of section 1(3) of PSA 1993. This makes clear that, where a person is in an employment of the description concerned by reason of holding a remunerated office, the person responsible for paying the remuneration is to be taken to employ the office-holder. The argument advanced by TPR was that this led to a conclusion that nobody could be taken to employ an unremunerated office-holder because nobody is identified as the person to be taken to have that status.

84. Morgan J rejected that argument (see *Pi Consulting* at [71]) and I think that he was correct to do so. The purpose of section 1(3) is simply to identify who is to be treated as the employing person in the particular situation in which the office-holder is remunerated, which may or may not lead to the same result as would have been reached if the deeming provision had not been included. He said that section 1(3) of PSA 1993 was not to be read on the basis that, absent a deeming provision of that sort it was not possible to identify a person who employs an office-holder (whether or not remunerated). He concluded (at [71]) that:

> *In the case of a company director, it seems relatively straightforward to hold that if the company director is for the purposes of the legislation to be regarded as "employed" then it is the company who employs him*.

85. There is no inconsistency between this conclusion and the conclusions of Warren J in *PNPF* that it was unclear whether as a matter of ordinary language an office-holder has an employer (at [344]) and that the self-employed pilots with which he was concerned were in employment but had no employer (at [421]). In *PNPF* Warren J was concerned with the position of self-employed persons, not office-holders and more importantly he did not express the view that it is not in fact possible to identify the person who is to be treated as the employer of an office-holder: he simply said that the position was unclear. I agree with the view of Morgan J that it is relatively straightforward to hold that, whether a director is remunerated or unremunerated, the company of which he is a director will be his employer. In the case of a remunerated director, it will normally be the case that the company will also be the person "*responsible for paying the emoluments of the office*" as that phrase is used in the definition of employer in section 181 of PSA 1993. Where that is not the case, and the section 181 definition applies, the effect of the deeming provision is that the person responsible for paying the emoluments of the office is the employer rather than the company.

86. There is, however, some inconsistency with the view expressed by Warren J in *PNPF* (at [362]) that the wording of section 1(3) of PSA 1993 suggests "*that the draftsman of this provision did not regard an office-holder as 'employed' and that the provision is needed because without it an office-holder would not be employed at all*." Mr Moeran QC, who

appeared for Dalriada, submitted that this could not be correct because the definition of '*employed*' contained in section 181 of PSA 1993 extended to any office. With respect to Warren J, I agree with Mr Moeran QC's submission on this point. I do not think that this was a necessary part of his decision, but the fact that there may be contexts in which it is necessary or desirable to identify a deemed employer by reference to the question of who is responsible for the office-holder's remuneration, does not mean to say that without that deeming provision an office-holder is not to be treated as being employed at all.

87. Strictly speaking the conclusion that Morgan J reached was that the company of which the director concerned was an officer was someone who employed "*people in employments of the description concerned*" within the meaning of section 1(2)(a) of PSA 1993. It was not part of the *ratio* of his decision that the company of which the director concerned was an officer was itself an "*employer*" as defined by section 181(1) of PSA 1993 because the word "*employer*" is not used in section 1. Mr Sawyer submitted that this meant that *Pi Consulting* was dealing with a different question to the one with which I am concerned in these proceedings. But I do not accept the argument that it therefore does not assist on the meaning of the word "*employer*" where it appears in section 182 of PA 2004 for a number of reasons.

88. First, the fraud compensation payments to be made under section 182 of PA 2004 are to be made in respect of occupational pension schemes. For the purposes of PA 2004, "*occupational pension scheme*" has the meaning given by section 1 of PSA 1993 and extends to a scheme that is established for the purpose of providing benefits to or in respect of people with service in *employments* of a description. As *Pi Consulting* held, this extends to schemes established by companies with only unremunerated office-holders. If the Board's construction were to be correct, the consequence would be that fraud compensation payments are only payable in respect of some categories of occupational pension scheme and not others.

89. That would be a particularly surprising result given the legislative link between the occupational pension schemes the trustees of which are liable to contribute to the funding of the FCF and those in respect of which a fraud compensation payment may be made that I mentioned at the beginning of this judgment. Section 189 of PA 2004 imposes a fraud compensation levy in respect of occupational pension schemes without regard to the question of whether it has an "*employer*". If the Board's submissions on Question 1 were to be correct, an occupational pension scheme in respect of which no compensation was payable out of the FCF (because the company that otherwise would have been the employer only had unremunerated officers), would be liable to a fraud compensation levy under section 189(3) of PA 2004, but would not qualify for a fraud compensation payment under section 182 of PA 2004. In my view this lack of symmetry between the class of scheme obliged to contribute to the FCF and the class of scheme entitled to recover from the FCF when the relevant conditions are satisfied, would be a result that is unlikely to reflect the legislative intent unless clearly signalled which it is not.

90. Mr Sawyer said that this was the case in relation to the self-employed pension schemes with which Warren J was concerned in *PNPF*. That may be the case, but is not in itself a reason to extend what on the face of it would be anomalous without good reason to do so.

91. Secondly, it seems to me that, where somebody falls within the description of a person who employs people in employments of the description concerned (as that phrase is used section 1(2)(a) of PSA 1993), it is an obvious use of language to describe them as an employer,

because that is what a person who employs other people is. The mere fact that, in a self-employed context (e.g. *PNPF*), self-employed pilots are in employment but have no employer does not affect the question of whether or not other forms of employment such as office-holding do have an employer where (as Morgan J held in *Pi Consulting*) it is relatively straightforward to identify whom that employer should be.

92. Thirdly, I agree with the submission made by both Dalriada and the Secretary of State that it would be very surprising if the essence of being an employer meant one thing in PSA 1993, but something different in PA 1995 and PA 2004. While it is certainly true that a person is identified as an employer in different parts of the pensions legislation for different purposes, it would a very strange starting point to think that the word "*employer*" where it appears in the phrase "*the employer of persons in the description of employment to which the scheme relates*" contained in the body of the definition in section 318(1) of PA 2004 meant something different from "*a person who employs people in employments of the description concerned"* (to adapt without changing the meaning the wording of section 1(2)(a) of PSA 1993).

93. I also agree with the submission made by Mr Moeran QC that there is every indication that the legislature did not choose to narrow the definition of "*employer*" from that which applied in relation to the predecessor scheme to the FCF, i.e. the Pension Compensation Scheme which was operated by the PCB under PA 1995. I was shown passages from Hansard in both the House of Commons and the House of Lords in which the Ministers guiding the bill through Parliament in 2004 made clear that the only change of significance intended in relation to the substance of the fraud compensation provisions as between PA 1995 and PA 2004 was an increase in the compensation from 90% to 100%.

94. If the Board's submissions on Question 1 were to be correct, it appears to me that there would have been a change in the meaning of the word "*employer*", which could not be described as anything other than a change of significance. The reason for this is that section 81 of PA 1995, which was the statutory predecessor to section 182 of PA 2004, provided like its statutory successor that one of the conditions to be met where fraud compensation was applied for was that the employer is insolvent (section 81(1)(b) of PA 1995). In that context it is clear that the definition of "*employer*" contained in section 181 of PSA 1993 (as applied to PA 1995 by section 124(5) of PA 1995) extends on any view to remunerated office-holders. I think that the reasoning of Morgan J in *Pi Consulting* also means that it would have extended to unremunerated office holders as well, not least because it would be very surprising if the person by whom an unremunerated officer was treated as being employed for the purposes of section 1(2) of PSA 1993 was not also to be regarded as their employer for the purposes of section 181 in the same Act.

95. Fourthly, to draw any distinction between (a) the person identified as an employer in both section 182 of PA 2004 and the body of the definition in section 318 of PA 2004 and (b) the person who employs other people as described in section 1(2)(a) of PSA 1993 would be to ignore the fact that both are described as employing others in identified forms of employment, including any office-holding. Because the definition of "*employment*" is the same in both Acts, it makes no sense for the person involved in that relationship not to be capable of having the same characteristics (i.e. company and unremunerated director).

96. I was also pressed with two unsatisfactory operational and practical consequences that would result from a conclusion that a company with only office-holders could not be an

employer. In my view, while these operational and practical consequences do not of themselves determine Questions 1(a), 1(b) and 1(c), they point to positive answers to them.

97. The first is the impact on legitimate occupational pension schemes where the 'employer' only has directors and there is no principled reason why the fact that a company chooses to structure itself in that way should cause it to be treated differently for fraud compensation purposes.

98. TPR expressed concern on this issue. It said that that the court should be aware that it knew of several legitimate schemes where the company in the position of the 'employer' only had unremunerated officers and no employees and that such schemes would find themselves ineligible for compensation from both the PPF and the FCF if the Board's construction were held to be correct. I was provided with a copy of a letter from TPR which explained that it had considered applying to intervene in these proceedings but considered that the more appropriate course was to write explaining its position.

99. The second relates to certain practical consequences on transfers under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") which are described in the Secretary of State's position paper as follows:

> *There are occasions where an occupational pension scheme is set up by an "employer" which has no remunerated employees or office holders. This is not uncommon in circumstances where it is envisaged that employees will transfer under [TUPE]. When TUPE applies, the employer of the transferring employees changes by operation of law at the instant when the transfer occurs. TUPE does not govern the transfer of pensions. It is therefore common for the occupational pension scheme to which the transferring employees' accrued rights will transfer into be created in advance of the moment of the TUPE transfer so that there is no possibility of the employees' entitlement being treated as a withdrawal rather than a transfer. It is not uncommon for the formation of such a "shelfco" scheme to be a requirement of a business sale. This is of particular importance where employees may transfer under Regulation 8(6) of TUPE from a company in administration. Were the definition of "employer" to be interpreted consistently across pensions legislation and to require remuneration of employees or office holders, it is possible that employees transferred under TUPE, could unexpectedly lose their occupational pension entitlements or have unexpectedly triggered a tax charge under section 208 of the Finance Act 2004.*

100. For the reasons which I have explained in my judgment, a company is an "*employer*" for the purposes of section 182 of PA 2004 and the Fraud Compensation Regulations if it had one or more directors eligible for scheme membership, whether or not such directors received any remuneration for the holding of that office, but no contract of employment with anyone in the description of employment to which the scheme relates. It follows that, so far as this issue is concerned, there is no reason why the fraud compensation application by Dalriada in respect of the Scheme does not qualify for consideration by the Board.

Question 2

101. The second question seeks to identify the characteristics of the "*employer's pension liabilities under the scheme*" for the purposes of determining whether or not a scheme

failure notice can be issued, without which the Board has no duty to make any payments out of the FCF:

> *Assuming the company (Turnberry Wealth Management Limited) is a statutory "employer", then for the purposes of ss 122(2)(a), 130(2) and 183(2)(a) PA 2004 and regulations 9(2) and 10(3) of the PPF Entry Rules:*
>
> *(a) does the phrase the "employer's pension liabilities under the scheme" mean:*
>
> *(i) a legally enforceable obligation under the scheme rules or statute requiring the employer to pay monetary contributions towards members' benefits;*
>
> *(ii) any legally enforceable obligation upon the employer in relation to the scheme (including, for example, (1) any obligation the employer has under the scheme rules, even one not requiring the payment of money and (2) any liabilities the employer may have to the trustee or members for unlawfully participating in pension liberation activity);*
>
> *(iii) something else and if so what;*
>
> *(b) if the employer's only liability in relation to the scheme is one imposed by the Pensions Regulator under sections 8(1)-(2) or 25(6)-(7) PA 1995, can such liability qualify as the "employer's pension liabilities under the scheme";*
>
> *(c) if the employer has no "employer's pension liabilities under the scheme", does that mean that no notice could validly be issued under sections 122(2)(a), 130(2) or 183(2)(a) PA 2004 or approved under section 123 PA 2004?*

102. The arguments advanced by the Board were that:

i) the phrase "*employer's pension liabilities under the scheme*" should be given its most restrictive interpretation, namely a legally enforceable obligation under the scheme rules requiring the employer to pay monetary contributions towards members' benefits;

ii) a statutory liability for costs imposed on the employer by TPR does not fall within the scope of "*employer's pension liabilities under the scheme*"; and

iii) if there are no "*employer's pension liabilities under the scheme*", a scheme failure notice may not be issued or approved.

103. Dalriada argued in favour of the widest interpretation of "*employer's pension liabilities under the scheme*" so that they included any statutory obligation requiring the employer to pay monetary contributions towards members' benefits and any legally enforceable obligation upon the employer in relation to the scheme, including each of the categories referred to in Questions 2(a)(ii) and 2(b). It also argued that there is no requirement for there to be any "*employer's pension liabilities under the scheme*" as a prerequisite for the issue of a scheme failure notice.

104. The Secretary of State's position on Questions 2(a) and 2(b) was that a liability under the scheme must be a legal rather than a moral obligation, but that it is not limited to obligations expressed in scheme rules. It includes liabilities to TPR, it is not limited to obligations under section 75 of PA 1995 but also includes obligations under sections 8 and 25 of PA 1995, it includes obligations under regulation 10 of the Occupational Pension Schemes (Employer Debt) Regulations 2005 (SI 2005/678) (the "Employer Debt Regulations") and it includes obligations in tort and equity, for example in respect of deceit, conversion and dishonest assistance. She contends that the situation contemplated by Question 2(c) cannot

occur, but if that is wrong, she agrees with Dalriada that there is no requirement for there to be any "*employer's pension liabilities under the scheme*" as a prerequisite for the issue of a scheme failure notice.

105. As I have already explained when describing the effects of sections 182(1)(c), 182(2), 182(3) and 182(4) of PA 2004, identification of the *"employer's pension liabilities under the scheme"* is relevant to the issue of a scheme failure notice, whether by an insolvency practitioner under section 122(2)(a) of PA 2004 or in the less usual circumstance by the Board under section 130(2) of PA 2004. In each instance the prescribed matters which are to be included in the scheme failure notice include confirmation that no other person has assumed responsibility for "*the employer's pension liabilities under the scheme*" and in the opinion of the issuer of the notice will not do so: regulations 9(2) and 10(3) of the PPF Entry Rules. It is also relevant to the issue by the Board of a notice under section 183(2) of PA 2004.

106. In the context of a legitimate defined benefit occupational pension scheme, the employer will have liabilities under the scheme rules to make contributions towards the scheme to provide members' benefits. This will also be the situation in those cases in which an employer has obligations to contribute to the pension pots of members of a money purchase occupational pension scheme and more specifically where such a scheme is used to fulfil an employer's automatic enrolment obligations under the Pensions Act 2008. It is not in issue that these will be *"employer's pension liabilities under the scheme"*.

107. That is not the case, however, in relation to many of the types of illegitimate liberation scheme with which these proceedings are concerned, where the employer may well have no obligations to contribute to the scheme to fund members' benefits under the terms of the scheme rules. The question which then arises is whether a scheme failure notice can be issued.

108. It is also important to note, as is stressed by the Secretary of State, that, if liabilities arising under section 75 of PA 1995 and regulation 10 of the Employer Debt Regulations are not included within the category of "*employer's pension liabilities under the scheme*", and if the consequence were to be that no scheme failure notice could then be issued, this would mean that the FCF regime would have failed to achieve its purpose in relation to money purchase schemes. This is because employers under perfectly legitimate money purchase schemes may have no liability to contribute to pension pots under the relevant scheme rules.

109. There is no issue between the parties that, in order to qualify as an employer's pension liability under the scheme, the liability must be a legal liability. A moral obligation is not sufficient. It is also clear that the legal liability must be a liability of the employer as legal obligor. What is less straightforward is when the legal liability of the employer is a liability under the scheme and when it is a pension liability.

110. Mr Sawyer submitted that a liability "*under the scheme*" means a liability under the scheme rules. He gave some examples of instances in which the draftsman of PA 2004 used the language of a liability arising under an identified statutory provision where he intended to refer to a liability that derived from an obligation imposed by statute (e.g. section 173 of PA 2004). He submitted that this illustrated that, where a statute was the source of the cause of action which established the relevant liability, this was the form of language which was used.

111. He also drew attention to the fact that, where PA 2004 is concerned with liabilities relating to the scheme but not arising under the terms of the scheme rules themselves, a different form of words is used. Thus, by section 45 of PA 2004, TPR can require companies in the employer's corporate group to provide financial support to an underfunded scheme. This may take the form of group companies becoming liable for "*the whole or part of the employer's pension liabilities in relation to the scheme*". Where this phrase is used, it is defined to mean any amounts payable under a schedule of contributions under section 227 of PA 2004 and any liability for any debt due from the employer to the trustees of the scheme under section 75 of PA 1995 or otherwise. Accordingly, it was submitted that, where a reference to an employer's liability is intended to extend to a statutory obligation of this sort, the phrase "*in relation to*" is used to connect the relevant liability to the scheme not the word "*under*".

112. The Board also said that the draftsman used another technique when he wished to include or refer to liabilities which arise externally to the scheme: this was to employ an extended definition of the phrase "scheme rules". Thus, by section 318(2) of PA 2004, it is provided that (unless the context otherwise requires), scheme rules in relation to a pension scheme are references to:

> *(a) the rules of the scheme, except so far as overridden by a relevant legislative provision,*
>
> *(b) the relevant legislative provisions, to the extent that they have effect in relation to the scheme and are not reflected in the rules of the scheme, and*
>
> *(c) any provision which the rules of the scheme do not contain but which the scheme must contain if it is to conform with the requirements of Chapter 1 of Part 4 of the Pension Schemes Act 1993 (preservation of benefit under occupational pension schemes).*

113. It was then submitted that if the phrase "*under the scheme rules*" had been used, it would have had the effect of expanding a liability arising under the rules themselves to any liability arising under the legislation listed in paragraphs (b) and (c). However, it was said that for this approach to construction to apply in the present case, the wording in the provisions dealing with the issue of a scheme failure notice, (regulations 9(2) and 10(3) of the PPF Entry Rules) would have had to be *"employer's pension liabilities under the scheme rules"*. Section 318(2) does not have that effect where the PPF Entry Rules simply provide for the liability to arises "*under the scheme*".

114. The effect of these submissions is that the phrase "*under the scheme*" has a narrower meaning than the phrase "*under the scheme rules*". The submissions also have the somewhat counterintuitive effect of giving the phrase "*under the scheme*" the same meaning that the phrase "*under the scheme rules*" would have had in the absence of the extended meaning given by section 318(2) of PA 2004. On any view that would be a tortuous approach to drafting, although I quite accept that such results can sometimes occur.

115. The Board also argued that the phrase "*under the scheme*" must mean and be restricted to "*under the rules of the scheme*" because the PPF Entry Rules were only concerned with occupational pension schemes, which is one category of "pension scheme" as defined by s.1(5) of PSA 1993. This definition refers to a pension scheme as being a scheme or arrangement "*comprised in one or more instruments or agreements*", from which it follows

that a reference to the scheme under which the liability must arise is also a reference to the instruments or agreements in which it is comprised.

116. In light of these considerations, it was submitted by Mr Sawyer that any liability arising out of the terms of a statute is an external statutory liability that is not a liability that arises under the scheme. The statutory liabilities which it is said fell into that category were the liability imposed on an employer by section 75 of PA 1995 and the liability imposed on employers under Part 3 of PA 2004 to pay periodic contributions to fund an ongoing defined benefit occupational pension scheme.

117. As to section 75 of PA 1995, this requires the employer to make good any shortfall in the scheme's assets in circumstances in which the employer is insolvent or the scheme is wound up and "*the value of the assets of the scheme is less than the amount of the liabilities of the scheme*". The reference to the liabilities of the scheme is a reference to the scheme's liabilities to pay benefits to members (regulation 5(8) of the Employer Debt Regulations). Section 75 is also applied to money purchase occupational pension schemes by regulation 10 of the Employer Debt Regulations so as to give rise to a statutory debt where the scheme's unallocated assets are insufficient to cover a reduction in asset value attributable to an offence of dishonesty.

118. As to the liability imposed on employers under Part 3 of PA 2004 to pay periodic contributions to fund an ongoing defined benefit occupational pension scheme, this relates to the situation in which an employer does not comply with his obligations under a schedule of contributions prepared in accordance with section 227 of PA 2004. The amount unpaid is then treated as a statutory debt (section 228(3) of PA 2004). While this debt was one that was said by the Board to fall outside the concept of a liability under the scheme, it recognised that the employer will also have obligations to fund under the scheme rules that will fall within the relevant definition.

119. I do not accept these submissions in relation to those statutory liabilities that arise by reason of the employer's status as an employer under the relevant scheme. It seems to me that they give inadequate weight to the context in which the phrase "*under the scheme*" is used. The purpose of identifying the extent of the employer's pension liabilities under the scheme is to establish whether, for the purposes of issuing a scheme failure notice, those liabilities have or might have been assumed by another person. In that context, there is no logical reason why a contractual liability to enable member benefits to be funded by an employer's contributions should be taken into account when considering whether or not to issue a scheme failure notice, but a statutory liability imposed on the employer for exactly the same purpose should not.

120. I agree with Mr Moeran QC's submission that the phrase "*under the scheme*" is designed to tie the liabilities that are capable of being pension liabilities to the specific scheme in respect of which the liability is imposed. The language could have been but is not "*under the scheme rules*" (making clear that the context otherwise required for the purposes of disapplying the extended meaning given by section 318(2) of PA 2004). It seems to me that if the draftsman had intended the liability to be limited to one which had as its source the scheme rules it would have been easy for him to say so.

121. A further category of liability on which the Board made submissions were liabilities at law, including in tort and dishonest assistance in a breach of trust. Mr Sawyer submitted that these liabilities did not as a matter of language arise under the scheme either. It was also

said that it was wholly impracticable for insolvency practitioners or the Board itself to be obliged to take them into account when deciding whether or not to issue a scheme failure notice.

122. I do not accept this submission for similar reasons to those that relate to liabilities that arise under a statute. As Mr Moeran QC submitted, the rationale behind the scheme failure notice is to determine whether a scheme rescue (whereby the assets of the scheme will equal or exceed PPF benefit levels) is possible. The reason why regulations 9 and 10 of the PPF Entry Rules are concerned with the question of whether "*the employer's pension liabilities under the scheme*" have been assumed by somebody else where the employer is insolvent (or not continuing as a going concern) is simply to determine whether the assets of the scheme are going to be increased in a manner that is relevant for PPF entry purposes. I agree with Mr Moeran QC's submission that the cause of action under which those liabilities arose has no logical relevance. What matters is whether or not the employer has a liability to the scheme which constitutes a pension liability.

123. I appreciate that this gives a broad meaning to the phrase "*under the scheme*", but it seems to me that it is an available one and is the one which best achieves the statutory purpose. The scheme that is referred to is an occupational pension scheme which is itself defined by section 1 of PSA 1993 and contemplates a scheme or arrangement comprised in one or more instruments or agreements. Because of what they are, those instruments or agreements give rise to a bundle of rights and obligations, including the rules but including also the obligations to which the employer is subject by reason of its status as such. In my view those obligations are capable of being regarded as part of the scheme or arrangement itself, anyway for the purposes of what is required for the issue of a scheme failure notice. To that extent the concept of a liability arising "*under the scheme*" is satisfied.

124. In any event, the scheme itself, and the employer's relationship with the scheme is essential to the existence of the liability. Even though a statutory provision, or a cause of action other than in contract, might regulate the relevant claim, there is no reason why as a matter of language the liability cannot properly be said to arise under the scheme itself, to the same extent that it might also be said to arise under the statutory provision or (e.g.) in tort. The additional factor which identifies and limits the circumstances in which the relevant liability can arise is that it must also be an "*employer's pension liability*".

125. As to what is an *"employer's pension liability*", the Board accepted that, because no employer has any direct obligation to pay pensions, the context means that the liability is one to make contributions that will be used to fund members' benefits under the relevant scheme. They are so closely linked to the payment of pensions that they can fairly be described as "*pension liabilities*". I agree that this is the correct approach. It seems to me that it follows from this that in circumstances in which it should not matter whether the source of the liability is the scheme rules, statute or a cause of action in tort or for breach of duty, the factor which is more important for identifying the relevant liability is whether it is a *pension* liability, even though it remains relevant to know whether that liability can be said to be a liability *under* the scheme.

126. There is little textual guidance as to what the phrase "*employer's pension liability*" is capable of encapsulating, but I think that a legal liability to make payment of a debt, damages or equitable compensation in vindication of the employer's obligation to fund the scheme for the purposes of paying members' benefits is an "*employer's pension liability*" for these purposes. In practical terms this means that, where the quantum of the employer's

liability to contribute takes into account the entitlement of the trustees or managers of the scheme to be paid their costs of administration of the scheme before payment of members' benefits, that liability as well is a pension liability. It is no more than a reflection of the total amount which the employer is under a liability to pay in order to ensure that member's benefit entitlements are satisfied.

127. Mr Moeran QC also submitted that the use of the phrase "*employer's pension liabilities*" in section 45 of PA 2004 supports its case on the width of what is capable of being a pension liability within the meaning of regulations 9 and 10 of the PPF Entry Rules. As I have already mentioned section 45 is relied on by the Board as an illustration of the distinction between liabilities *under* the scheme and liabilities *in relation to* the scheme. But section 45(4) provides that:

> *In subsection (2), "the employer's pension liabilities" in relation to a scheme means-*
>
> *a) the liabilities for any amounts payable by or on behalf of the employer towards the scheme (whether on his own account or otherwise) in accordance with a schedule of contributions under section 227, and*
>
> *b) the liabilities for any debt which is or may become due to the trustees or managers of the scheme from the employer whether by virtue of section 75 of the Pensions Act 1995 (deficiencies in the scheme assets) or otherwise.*

128. I accept the submission that this is indicative of the fact that the draftsman of PA 2004 does not appear to have thought that the phrase "*employer's pension liabilities*" was inapposite as a description of an employer's liabilities for amounts due or payable under a statute. I also think that it illustrates the essence of what is capable of constituting an employer's pension liabilities: ultimately the question is whether the obligation gives rise to the payment of an amount from which the payment of pension benefits is to be funded.

129. I recognise that there are dangers in construing the phrase in two separate parts without then reconsidering it as a single cohesive whole. Carrying out that exercise, it seems to me that any legal liability of an employer to make payments to a scheme which contribute towards the ability of the trustees to fund members' scheme benefits, whether directly or indirectly through the payment of expenses which would otherwise be paid out of the assets of the scheme, will satisfy the necessary test.

130. This then brings me to Question 2(b). TPR has power under section 8 of PA 1995 to provide that any fees and expenses of trustees of an occupational pension scheme appointed by it under section 7 of PA 1995 shall be paid by the employer and/or out of the resources of the scheme. There is a similar power given to TPR under section 25(6) of PA 1995 where an order is made appointing an independent trustee under section 23 of PA 1995. The question which arises is whether that liability amounts to "*the employer's pension liabilities under the scheme*".

131. The Board said that the short answer to Question 2(b) is no, because these are liabilities in respect of fees and expenses imposed on the employer either under section 8 or section 25 of PA 1995 which are external statutory liabilities not arising under the rules of the scheme. It also submitted that they are not liabilities to provide funds to pay pension benefits under the scheme. I disagree with this submission. In my view, the discharge of these liabilities has the indirect effect of preserving the assets of the scheme out of which members' pension

benefits are to be paid. If these fees and expenses are not to be paid by the employer, they would have to be paid out of the assets of the scheme in accordance with normal principles. This would have the ultimate effect of reducing the funds from which members' benefits could be paid. It follows that, applying the same principles that I have already applied in answering Question 2(a), I think that the answer to Question 2(b) is yes.

132. The final part of Question 2 is whether a notice can be issued if the employer has no "*employer's pension liabilities under the scheme*". In short summary this raises the question of whether, in the absence of any employer's pension liabilities under the scheme, it is possible for the confirmation required by regulation 9(2) and 10(3) of the PPF Entry Rules to be given by the insolvency practitioner or the Board as the case may be. In light of the conclusion that I have reached on Questions 2(a) and 2(b), this question does not arise, but I should express my view on it anyway.

133. The Board argued that the PPF Rules require the insolvency practitioner (or indeed itself) to reach a definitive conclusion about the status of "*employer's pension liabilities under the scheme*" and what will happen to them. In order to reach such a conclusion, it is said that it is necessary for the relevant liabilities to exist. It is conceptually impossible for the confirming person to satisfy themselves as to the current status of a liability (by which I understood it to mean whether or not the liability has been or would be assumed by a third party) in circumstances in which the liability does not exist. It said that the premise of regulations 9(2) and 10(3) is that "*employer's pension liabilities under the scheme*" do actually exist. Where that premise is missing, the provisions have nothing to bite on and the insolvency practitioner (or indeed itself) is unable to give the confirmations that the provisions seek.

134. While I agree that regulations 9 and 10 of the PPF Entry Rules both contemplate that the insolvency practitioner or the Board has reached a definitive conclusion, I do not accept the remainder of this submission. The draftsman may have had in mind that, in the circumstances with which he was concerned, there would always be "*employer's pension liabilities under the scheme*". That does not however mean that, if there were in fact no such liabilities, a scheme failure notice could not be issued. The context in which this requirement is imposed is that there should be no other no other person who is willing to take over the employer's pension liabilities under the scheme. In my view, that requirement can be satisfied both in circumstances in which such liabilities do exist and in circumstances in which they do not.

135. It follows that if the insolvency practitioner is satisfied that nobody has assumed any liabilities to which the employer may be subject, and he reaches a clear conclusion to that effect, I can see no reason why the requirements for the issue of a scheme failure notice are not satisfied as well. In the context in which the relevant words appear, it is my view that the phrase "*the employer's pension liabilities under the scheme*" is qualified by the phrase "*if any*".

Question 3

136. The third question seeks confirmation of the entitlement of the Company to receive fraud compensation payments from the FCF in light of the answers to the first two:

If the answer to each part of Question 1 is no or the answer to Question 2(c) is yes, does this mean that no fraud compensation payments or interim payments could be made in respect of the Scheme under Part 2 Chapter 4 PA 2004?

137. For the reasons I have given, it is not the case that the answer to each part of Question 1 is no, nor is it the case that the answer to Question 2(c) is yes. It follows that Question 3 does not arise. If that were not to have been the case, all parties agreed that the answer to Question 3 would be yes. If there is no employer, or if no scheme failure notice can be issued in relation to the Scheme, there is no route to access the FCF under PA 2004.

Question 4

138. The fourth question is concerned with the matters which are capable of contributing to a reduction in value of the scheme assets attributable to an act or omission constituting a prescribed offence for the purposes of section 182(1)(b) of PA 2004 and therefore the loss for the purposes of the Fraud Compensation Regulations:

Assuming that the [Scheme] otherwise meets the qualifying conditions for fraud compensation in section 182 PA 2004, could the Board properly determine that the following matters amount to a reduction in value attributable to an act or omission constituting a prescribed offence for the purposes of section 182(1)(b) PA 2004 (and thus qualify as the or a "loss" for the purposes of the Fraud Compensation Regulations):

(a) costs and expenses paid from the Scheme by the new trustees or managers in order to investigate the prescribed offence and the history of the Scheme's administration and to make recoveries of value in respect of the prescribed offence;
(b) administration costs incurred by the new trustees and managers over and above ordinary administration expenses, as a result of irregular scheme administration at the time the prescribed offence was committed;
(c) the costs and expenses in (a) and (b), even if they are the only matter in respect of which compensation is sought (the other losses having been made good through recoveries of value);
(d) any tax liabilities imposed on the Scheme by reason of unauthorised payments made in connection with the prescribed offence;
(e) costs and expenses paid from the Scheme by the trustees or managers in order to investigate or challenge the tax liabilities in (d);

or could the Board only properly determine that the above matters do not amount to such a reduction in value or "loss"?

139. The Board argued that it could only properly be determined that none of such matters amounted to a reduction in value or loss, while Dalriada argued that each of them could.

140. The position of the Secretary of State was that the Board is required to identify the conduct said to have constituted the *actus reus* of the offence, and then trace the impact of that act or omission on the value of the scheme assets. Regulation 7 of the Fraud Compensation Regulations requires the valuation snapshot to be taken immediately before the relevant act or omission and no later than the date of the application itself.

141. There was no dispute between the parties that whether or not there are reasonable grounds for believing that a reduction in the value of the assets of the Scheme was attributable to an act or omission constituting a prescribed offence is a matter for the Board. This question does not therefore seek a determination that any particular reduction in the value of the assets of the Scheme was in fact attributable to any such act. It is concerned with the parameters or limits of the evaluative exercise which the Board is required to carry out. In other words, to what extent are particular categories of cost, expense or liability capable of contributing to a reduction in value which was attributable to such an act or omission?

142. Mr Sawyer submitted that the focus of Question 4 was on the consequential effects of the commission of a prescribed offence, over and above the principal loss suffered by the Scheme as a result of the fraudulent act that constituted the prescribed offence. Thus, it is plain that to the extent that the paying away of assets of the Scheme in the commission of a dishonest act constituting the actus reus of a prescribed offence caused a reduction in the value of the assets of the Scheme, that reduction will be attributable to the prescribed offence. What is less obvious is the extent to which other costs, expenses or liabilities incurred thereafter are capable of being treated as attributable to the prescribed offence. Question 4 is therefore all about attributability.

143. There are a number of other legislative provisions which bear on this question. The first is section 184 of PA 2004, which I have described earlier in this judgment and which imposes a duty on the trustees or managers of a scheme seeking a fraud compensation payment to obtain recoveries of value where it is possible to do so without disproportionate cost and within a reasonable time. In that context, the meaning of recovery of value set out in section 184(3) uses the concept of attributability to describe the characteristics of an increase in value in the assets of the scheme where that increase is attributable to the payments received from others in respect of a prescribed offence. It is also used to reiterate that the receipt from others is only to be taken into account in reducing the amount of the fraud compensation payment that would otherwise be made where it is made in respect of a prescribed offence to which any reduction in value was attributable.

144. The categories of cost and expense described in Questions 4(a), 4(b), 4(c) and 4(e) are self-explanatory. The tax liability referred to in Question 4(d) requires a little more explanation. Section 164(1) of the Finance Act 2004 ("FA 2004") describes the only payments that a registered pension scheme is authorised to make to or in respect of a member of the scheme. Apart from specific payments such as lump sum death benefits and recognised transfers, pension payments in respect of members are limited by section 164(1)(a) of FA 2004 to "*pensions permitted by the pensions rules or the pension death benefit rules to be paid to or in respect of a member (see sections 165 and 167)*". Where a registered pension scheme makes a payment in respect of a member which is not authorised by section 164 it is called an "*unauthorised member payment*" (section 160(2) of FA 2004), and is one of the two categories of payment which are together called an "*unauthorised payment*": section 160(5) of FA 2004.

145. One of the categories of member payment permitted by section 164(1) of FA 2004 is a recognised transfer for which further provision is made by section 169 of FA 2004. A recognised transfer is a transfer of assets of a registered pension scheme so that they become held for the purposes of another registered pension scheme. As I have already explained the Scheme was registered as an occupational pension scheme on 30 January 2013. It follows that, unless the Scheme is a sham, any payment made into the Scheme from another registered occupational pension scheme, which on the face of it is what happened when

each member of the Scheme transferred in at the outset, will have been an authorised payment for the purposes of section 164(1) of FA 2004 so far as concerns the schemes from which those payments were made.

146. The pension rule most relevant for present purposes is Pension rule 1 in section 165(1) of FA 2004: "*No payment of pension may be made before the day on which the member reaches normal minimum pension age, unless the ill-health condition was met immediately before the member became entitled to a pension under the pension scheme*". The minimum pension age is 55, and the structure of the pension liberation activity with which these proceedings are concerned purported to enable members to access their pension savings before they had reached that age. It follows that, when liberation payments in respect of members were made out of the Scheme before the relevant members reached the age of 55, they are likely to have been unauthorised member payments within the meaning of section 160(2) of FA 2004. Where an unauthorised member payment is made, a charge to income tax at 40% arises under section 208 of FA 2004, and in certain circumstances a surcharge of a further 15% arises under section 209 of FA 2004. Liability for both charge and surcharge falls on the member or other recipient (where the unauthorised payment is made after the member's death).

147. The category of liability with which Questions 4(d) and 4(e) is concerned is slightly different; it is a scheme sanction charge. The person liable for payment of any scheme sanction charge is the scheme administrator (section 239(2) of FA 2004), which in the present case may be Dalriada, although I understand that may be disputed. A scheme sanction charge is a charge to income tax arising under section 239 of FA 2004 where a "*scheme chargeable payment*" is made by a registered pension scheme. Save for some exemptions which are not relevant for present purposes, an unauthorised payment by the pension scheme is one of the categories of scheme chargeable payment for these purposes (section 241(1) of FA 2004). This therefore will include payments made as part of pension liberation activity. The amount of a scheme sanction charge is 40% of the scheme chargeable payment but there is provision in section 240 of FA 2004 for there to be a deduction from the amount of tax that would otherwise be chargeable to take account of amounts of tax charged under section 208 of FA 2004 and paid in respect of that unauthorised member payment.

148. The policy behind the charges to income tax on the making of unauthorised payments out of a registered pension scheme was recently explained by Henderson LJ in *Clark v HMRC* [2020] EWCA Civ 204 ("*Clark*") at [25] in the following way:

> *In very general terms, the underlying policy of the legislation, in common with much predecessor legislation in the same field, was to provide fiscal incentives for the establishment and investment of occupational pension schemes, so as to provide retirement pensions and associated benefits for employees and their dependants, but coupled with strict provisions designed to ensure that the schemes would be properly administered, and that payments made out of them to beneficiaries or sponsoring employers would be confined to certain authorised categories of payment. If unauthorised payments were made, they would be taxed at high rates intended to have a deterrent effect and to compensate the State, in a rough and ready way, for the fiscal benefits previously enjoyed by the relevant funds.*

149. Turning to the point of construction itself, there can be little doubt that the policy and object of the relevant legislation, i.e. the legislative context, is the most important consideration

when seeking to identify whether, as a matter of law, an event can be attributed back to the relevant cause. A series of passages from Lord Hoffmann's speech in *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 between 29F and 31H help to elucidate the point:

> *The first point to emphasise is that common sense answers to questions of causation will differ according to the purpose for which the question is asked. Questions of causation often arise for the purpose of attributing responsibility to someone, for example, so as to blame him for something which has happened or to make him guilty of an offence or liable in damages. In such cases, the answer will depend upon the rule by which responsibility is being attributed*
>
> *…*
>
> *Not only may there be different answers to questions about causation when attributing responsibility to different people under different rules … but there may be different answers when attributing responsibility to different people under the same rule.*
>
> *…*
>
> *one cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule*"
>
> …
>
> *Before answering questions about causation, it is therefore first necessary to identify the scope of the relevant rule. This is not a question of common sense fact; it is a question of law.*

150. For that reason, there are a number of instances in which the phrase "*attributed to*" has been given a wide meaning, where that is consistent with the legislative context in which it had been used. Thus, in *Minister of Pensions v Chennell* [1947] KB 250, 252, a case on war injury compensation schemes, it was held that the phrase "*attributable to*" (a) is capable of meaning the same thing as "*caused by*" and (b) having regard to the examples given by Denning J in that case, is sufficiently wide to enable what the Board called in its submissions "remarkably remote but causally linked events" to be attributed back to the relevant causal factor.

151. Sometimes, the phrase "*attributable to*" is qualified by a word such as "*directly*" as it was in *R v Criminal Injuries Compensation Board, ex p Ince* [1973] 1 WLR 1334. In that case Lord Denning MR held (at 1341G) that the Criminal Injuries Compensation Board was entitled to conclude that the death of a police officer was directly attributable to the attempted prevention of an offence and arrest of offenders, even though there was an intervening cause which was also a cause of his death, namely his negligent driving:

> *Just as in pension cases, so in these compensation cases, "even if the intervening cause is the negligence or wrongful act of the injured person or a third party," the injury may still be attributable to the original event and give rise to a claim for compensation. It only ceases to be so when the intervening event is so powerful a cause as to reduce the*

> *original event to a piece of the history: see Minister of Pensions v. Chennell [1947] K.B. 250, 255.*

152. Another example of a case in which a wide meaning was given to the phrase "*attributable to*" is *Walsh v Rother DC* [1978] ICR 1216 in which the question was whether a loss of employment was "*attributable to*" the reorganisation of local authorities under the Local Government Act 1972. On appeal from Donaldson J there was no challenge to his conclusion on the meaning of the phrase. Both the judge (at 1221G-H) and the Court of Appeal (per Megaw LJ at 1225G) held as follows:

> *… these are plain English words involving some causal connection between the loss of employment and that to which the loss is said to be attributable. However, this connection need not be that of a sole, dominant, direct or proximate cause and effect. A contributory causal connection is quite sufficient.*

153. More recently, in *Beaton v PPF* [2017] EWHC 2623 (Ch), Nugee J had to consider whether a pension was "*attributable to pensionable service*" under a pension scheme. He was required to do so for the purpose of deciding whether the PPF compensation cap provided for by paragraph 26 of Schedule 7 of PA 2004 should have been applied to the aggregate of two separate pensions or separately to each of them. The answer depended on whether a particular benefit was attributable to the member's pensionable service for the purposes of paragraph 26(2)(b)(i). Against that background, Nugee J said as follows (at [29]):

> *The starting point is not, I think, in the end helped by a debate about the meaning of the words "attributable to". I was referred to a number of dictionaries and none of them provided a definition of "attributable to" which seemed to me to resolve the question of statutory construction or interpretation which I am faced with. It is true that the Ombudsman relied on a dictionary definition of "caused by" or "able to be ascribed to" and, as a general synonym for "attributable to" I see no particular problem with that. In the dictionaries I was referred to, some refer to causation and some refer to ascribing something to something else, but I do not regard "attributable" as in itself a difficult or ambiguous word – it means what the dictionaries say it means: something is attributable to something else if it can properly or reasonably or sensibly be ascribed to something else – and I am content to proceed on the basis that that is the normal meaning of the phrase "attributable to". What, however, the dictionary cannot shed any light on is the normal meaning of the phrase "attributable to pensionable service" and that is the phrase which is to be interpreted in para.26(2)(b) and that is, I think, a phrase that has a conventional or normal meaning in the practice of those who practise in the field of occupational pensions.*

154. This passage reflects a recognition that the common sense referred to by Lord Hoffmann in the *Empress Car* case will be affected by the context in which the phrase appears: what is proper, reasonable or sensible will always depend on that legislative context. It also reflects the need to give appropriate weight to the whole of the sentence in which the phrase "*attributable to*" appears. Thus, in the particular context of Schedule 7 of PA 2004, the dictionary meaning of "*attributable to*" did not shed light on the meaning of the phrase "*attributable to pensionable service*". This larger phrase had a conventional meaning to pensions practitioners that did not include as a causal factor the fact that a member had joined the pension scheme in question by transferring in his benefits. Nugee J concluded that, although that was "a cause" of Mr Beaton having the pension (but for the transfer in he would not have had it), it did not mean that the relevant benefits were attributable to his

service under the scheme because they had not built up as a result of service while an active member of a scheme ([2017] EWHC 2623 (Ch) at [40]).

155. I therefore accept that the legislative context is central to a determination on the extent of the link required between the originating causal factor (in the present case the act or omission constituting a prescribed offence) and the event which must be attributable to it (in the present case the reduction in the value of the assets of the scheme).

156. The Board accepted that the reduction caused by the costs, expenses and liabilities referred to in the component parts of Question 4 would be attributable to an act or omission constituting a prescribed offence if a 'but for' test were to be applied, which was the test that Dalriada said was appropriate. It said, however, that a narrower test was required, and submitted that the correct approach was to ask whether the reduction had been directly and predominantly caused by the criminal act or omission. It gave a number of reasons for this by reference to other parts of the statutory scheme.

157. First it said that the structure of the legislation showed that Parliament did not intend fraud compensation to be payable for all scheme expenditure that is in some way causally linked to the prescribed offence. This is because no compensation is payable in respect of the period after the application when expenses are most likely to be incurred in seeking to make "*recoveries of value*" as required by section 184(1) of PA 2004. Thus, section 182(1) of PA 2004 envisages that the value of the assets of the scheme has already been reduced to the relevant extent by the time an application is made and regulation 5(3)(f) of the Fraud Compensation Regulations assumes that the reduction (described as the loss) has already been discovered by the time of the application. It is also of some note that the compensation formula prescribed by regulation 7 of the Fraud Compensation Regulations limits compensation to losses incurred up to the FCF application date.

158. I do not agree that this factor has the significance for which the Board contends. While it is true that there is a cut-off date beyond which costs incurred cannot be included in the quantification of the loss because of the way in which regulation 7 of the Fraud Compensation Regulations is drafted, that does not mean to say that expenses of the type described by Questions 4(a) to 4(c) are outside the contemplation of section 182(1)(b) for that reason alone. Indeed, quite the contrary, the provisions of section 184(1) of PA 2004 explicitly require the trustees to obtain any recoveries of value to the extent that they can do so without disproportionate cost and within a reasonable time. I agree with Mr Moeran QC's submission that it follows from this provision that costs incurred by the trustees in seeking to obtain recoveries of value ought to be recoverable up to the point at which it becomes disproportionate for them to continue to incur those costs.

159. Secondly, the Board submitted that there would be significant practical problems for the operation of regulation 10 of the Employer Debt Regulations, which provides for a debt to arise under section 75 of PA 1995 in relation to a money purchase occupational pension scheme when the criminal reduction conditions are met. These conditions are contained in regulation 10(3) and are drafted in a manner which echoes the language of section 182 of PA 2004:

> *The criminal reduction conditions are:*
>
> *(a) a reduction in the aggregate value of the allocated assets of the scheme occurs;*

(b) the reduction is attributable to an act or omission which —

(i) constitutes an offence prescribed for the purposes of section 182(1)(b) of the 2004 Act; … and

(c) immediately after the act or omission or, if that time cannot be determined, at the earliest time when the auditor of the scheme knows that the reduction has occurred, the amount of that reduction exceeds the value of the unallocated assets of the scheme.

The amount of the excess mentioned in regulation 10(3)(c) of the Employer Debt Regulations is defined as "*the criminal deficit*" (regulation 10(4)) and is the amount to be treated as a debt for the purposes of the version of section 75 of PA 1995 that is applied by regulation 10.

160. It was part of the Board's case that those provisions required quite an elaborate process to be gone though in order to calculate the statutory debt. This would be unworkable if the process had to be gone through every time there is scheme expenditure that is in some way causally linked to the act or omission constituting the prescribed offence. It was submitted that this pointed to the concept of attributability being given a narrow meaning for these purposes, limited only to the primary losses rather than what Mr Sawyer called the knock-on consequences further down the line. It was submitted that this was a strong pointer to adopting a narrow construction of the phrase "*attributable to*" in regulation 10(2)(b) and therefore to section 182 of PA 2004 as well where similar language is used.

161. I am not convinced that this will give rise to the practical problems identified by the Board. The mere fact that a new liability arises under the Employer Debt Regulations every time an expense is paid out of the resources of the scheme does not seem to me to give rise to a principled objection to the construction of section 182(1)(b) of PA 2004 for which Dalriada contends. As Dalriada submitted, the consequence will simply be that a bill is presented periodically.

162. Thirdly, the Board said that Parliament must be taken to have recognised that fraud compensation levy payers have an interest in fraud compensation being kept within reasonable bounds, particularly in the context of offences of dishonesty where a wide variety of unforeseeable economic losses could follow the offence. It was said that a claim for compensation from the FCF is not equivalent to a claim for damages against the fraudulent wrongdoer himself, where public policy and moral considerations are in favour of the fraudster paying compensation for all the actual damages flowing from the fraud and consequential expenses regardless of foreseeability.

163. Fourthly, it was submitted that the calculation of the fraud compensation payment under regulation 7 of the Fraud Compensation Regulations contemplates that payments made to the trustee for expenses incurred in putting the fraud right are to be treated differently from the primary loss. This is because the amount of the payment is computed by deducting Q, which is the value of the assets immediately before the application for compensation was made under section 182 of PA 2004 from P, which is the adjusted value of the assets on an identified date which immediately preceded the loss. The adjustment is to take account of any alteration in the value of the assets between the date immediately preceding the loss and the application date, not including alterations in the value of the assets resulting from the loss (regulations 7(2) and 7(4) of the Fraud Compensation Regulations). The adjustment does however take account of payments made and received by the scheme in

accordance with its rules, which would include amounts properly payable to the trustee, and it is said that the drafting of regulation 7(4)(a) contemplates that any such payment and any alteration resulting from the loss are mutually exclusive.

164. Turning to the specific parts of Question 4, the Board submitted that a reduction arising from expenditure incurred by the trustees in the lawful expenditure of scheme funds for the purposes of investigating the fraud and making recoveries of value will result from the subsequent actions of incoming trustees seeking to counteract the effect of the offence and is not attributable to the criminal act for that reason. It said that would be the case even if the trustees had duties in their capacity as such to take those steps to investigate and recover, and the same answer should be given to Questions 4(b) and 4(c) for essentially the same reasons.

165. As to the reduction in value caused by the levying of the scheme sanction charge, the Board submitted that this was attributable to the decision by HMRC to demand payment of tax properly due. It said that the payment of tax so as to reduce the value of scheme assets is only an indirect consequence of the criminal act or omission, and therefore not attributable to it in the sense contemplated by section 182(1)(b) of PA 2004. It accepted, however, that if the criteria for payment of the scheme sanction charge were to be satisfied, HMRC did not have a discretion properly so called as to whether or not to take steps to effect a recovery.

166. In making these submissions Mr Sawyer accepted that generally speaking an effect can be attributed to more than one cause. He submitted, however, that the correct construction of the word "*attributable*" in the present context meant that if there was any other cause of a reduction, (such as the exercise of a discretion by the trustee or the making of a demand by HMRC), only that other cause, and not the underlying reason for the exercise of the discretion or the making of the demand, could have a sufficient nexus to satisfy the criteria for sufficient attributability.

167. In my judgment the Board is wrong to submit that either the exercise of a discretion by the trustees or the making of a decision by HMRC is of itself sufficient to break the link of attribution contemplated by section 182(1)(b) of PA 2004. Both the discretion and the decision are required to be exercised in accordance with settled principles. It seems to me that there is no reason why the requirement for the intervention of these necessary steps should lead to the conclusion that the expenditure by the trustees or the payment of the liability to HMRC cannot properly or reasonably or sensibly be ascribed to the underlying act or omission constituting the prescribed offence.

168. Part of the reason for this is that the attribution of an effect to a cause requires the decision maker to stand back and look at the necessary link in a common-sense manner. 'But for' causation may not be sufficient in this context because a remote cause may satisfy the test where the effect no longer seems to have very much to do with the cause even though it would not have happened without it. But where the intervening steps that are said to break the chain of causation are ones which were likely or even certain to be taken as a direct result of that event, it will not be difficult to ascribe the effect to the cause in the manner contemplated by Nugee J in *Beaton*.

169. In my view, the costs and expenses incurred by the trustees in order to investigate the prescribed offence and the history of the Scheme's administration and the making of recoveries of value in respect the prescribed offence are all properly, reasonably and

sensibly to be ascribed to that prescribed offence. It is not just that they would not have been incurred if the offence occurred. They continue to be linked to it in a manner sufficient to be treated as attributable to it, because they directly relate to and are indeed part of the effects of the acts or omissions constituting the prescribed offence. The same can also be said about any other administrative costs which result from irregular scheme administration at the time of the prescribed offence. The link will in my view be sufficiently established if the irregular administration was itself part of the process by which the prescribed offence was able to be committed.

170. In neither instance does it seem to me that it should make any difference that they are the only matters in respect of which compensation is sought (other losses having been made good by recoveries of value). To differentiate between these elements of an aggregate reduction of value in this way seems to me to be wrong in principle.

171. As to the tax liabilities and the costs that relate to any challenge, I think that they too are attributable to the original prescribed offence. The link is much closer than a simple 'but for' test. The types of tax liability contemplated by Questions 4(d) and 4(e) are imposed in circumstances in which some or more of the acts or omissions which comprise the actus reus of the prescribed offence are also a material part of the facts required to establish that liability. In my view those considerations point strongly towards the liability and any costs reasonably incurred in challenging it being attributable to the prescribed offence.

172. It follows that none of the categories of cost, expense or liability referred to in Question 4 are incapable of contributing to a reduction in value attributable to an act or omission constituting a prescribed offence. Whether that is in fact the case in relation to any cost, expense or liability incurred in relation to the Scheme is (anyway in the first instance) a matter for the Board and not the court.

Question 5

173. The fifth question seeks the court's guidance as to whether, as a matter of principle, a purported occupational pension scheme that was, when established, a sham can later become genuine where members transfer into the purported scheme or an independent trustee is appointed:

> *Making the assumptions that (1) the [Scheme] purported to be an occupational pension scheme when established, but (2) was in fact a sham when established, would it have become an "occupational pension scheme" or "scheme" within the meaning of section 182 PA 2004:*
>
> > *(a) when an individual member's benefits were subsequently transferred into the [Scheme] and that member and/or the transferring trustees*
> > *(i) believed the Trust was a genuine occupational pension scheme;*
> > *(ii) gave no thought to whether the [Scheme] was a genuine occupational pension scheme or not;*
> > *(iii) were reckless as to the same; or*
> > *(iv) believed the [Scheme] was not a genuine occupational pension scheme;*
> > *and if so, did it become an "occupational pension scheme" within section 182 for all members or just in relation to that particular member;*

> *(b) when an independent trustee was appointed in relation to the [Scheme], in circumstances where the independent trustee*
>
> *(i) believed the [Scheme] was a genuine occupational pension scheme (even if it also suspected that it was being used for pension liberation activity or that its administration was subject to significant irregularities);*
>
> *(ii) suspected the [Scheme] might not be a genuine occupational pension scheme; or*
>
> *(iii) believed the [Scheme] was a not genuine occupational pension scheme;*
>
> *and if so, did it become an "occupational pension scheme" within section 182 for all members*

174. The Board argued that none of the situations described caused the Scheme to become a genuine occupational pension scheme for any member, and, if that is wrong, in relation to any transfer in, it only became a genuine occupational pension scheme for that member. Dalriada argued that in each of the circumstances identified in Question 5, the Scheme would have become an occupational pension scheme and would have become so for all members.

175. The Secretary of State argued that the scenarios posited in Question 5 were inconsistent with the policy intention underlying the statutory definition of an occupational pension scheme. In particular, she submitted that a member attempting to transfer into a sham scheme or the appointment of an independent trustee to a sham scheme will not convert it into a genuine one. To that extent her position was aligned with that of the Board.

176. The issue raised by these questions is whether, in principle, a purported occupational pension scheme that was, when established, a sham can later become genuine, either when members transfer into the purported scheme or when an independent trustee is appointed and if so what the state of mind of the transferring trustees and members must be.

177. This point was argued:

i) without challenge to the conclusion in *Pi Consulting* that the question of whether a scheme can qualify as an "occupational pension scheme" is a matter to be determined by the ostensible effect and purpose (objectively ascertained) of its governing documents; and

ii) having regard to the possibility, left open in *Pi Consulting*, that a scheme which on the face of its governing documents is an occupational pension scheme, is in truth a sham.

178. When I refer to the Scheme in this part of my judgment, I am assuming that it was on its establishment a sham. That has not of course been shown to be the case and as will appear Dalriada contends that it is most unlikely that any purported occupational pension scheme which has engaged in any form of pension liberation activity will in fact be a sham. The Board has not identified any reported case in which a finding of sham has been made in relation to an occupational pension scheme. It is concerned, however, that there is a possibility (given further substance by TPR's allegations in *Pi Consulting*) that liberation schemes which apply to the FCF for fraud compensation might be shams.

179. The Board made clear that by using the word sham, Question 5 is referring to "*acts done or documents executed by the parties to the sham which are intended by them to give third parties or to the court the appearance of creating between the parties legal rights and*

obligations different from the actual legal rights and obligations (if any) which the parties intend to create." Per Diplock LJ in *Snook v London and Western Riding Investments* [1967] 2 QB 786, 802.

180. For there to be a sham in a standard trust context, it is necessary for both the settlor and the trustee to share a common shamming intention from the outset: per Munby J in *A v A* [2007] EWHC 99 (Fam) ("*A v A*") at [34]. This test may be satisfied where one party is recklessly indifferent to the shamming intention of another but if (e.g.) only the settlor has a shamming intention, the trust is validly constituted and, once validly constituted, cannot become a sham. As is explained in Lewin on Trusts (20th edition) at paragraph 5-025:

> *For a trust to be a sham, the original trustees must share the settlor's shamming intent at the time of the constitution of the trust. If they receive assets intending to hold them subject to the terms of the trust instrument, any later arrangement with the settlor or one or more discretionary beneficiary to treat the trust as a sham will constitute a breach of trust and will not convert the valid trust into a sham.*

181. The extent and effect of this principle has been examined in a number of cases, including *Hitch v Stone* [2001] EWCA Civ 63 at [87], *National Westminster Bank plc v Jones* [2001] 1 BCLC 98 at [60] and *Carmen v Yates* [2004] EWHC 3448 at [219(f)] in which Charles J held:

> *a conclusion that a document, agreement or provision is a sham or pretence does not make it void, or of no effect for all purposes. Rather if there is a sham or pretence: (i) the parties will not be able to rely on it as representing the true position as to the rights and obligations they have created and the court can ignore it in determining what those rights are, and (ii) as against an innocent third party it cannot lie in the mouths of the pretenders to assert to the disadvantage of that innocent third party that the transaction is a sham, or pretence, and thus of no effect*.

182. Question 5 is posed on the basis that, as a matter of principle, a purported occupational pension scheme is capable of being a sham in the sense described by Diplock LJ in *Snook*, as applied by the cases I have cited. If the parties to the original establishment of the Scheme (i.e. Turnberry as employer / provider and Mr and Mrs Brown as trustees) executed the trust deed intending it to give to third parties, such as transferring-in members, the appearance of creating legal rights and obligations different from the actual legal rights and obligations that they intended to create, it may be a sham.

183. Dalriada does not contend to the contrary, although it submitted that it is "incredibly unlikely" for this to have been the case in relation to any pension liberation scam. The reason for this is that the intention of the persons setting up any such scheme will have been to act under the terms of the trust deed and rules in a way which gives rise to pension liberation. It submitted that the moment there is an intention to use the powers under the occupational pension scheme, or to hold some of the assets pursuant to its terms, the scheme in question cannot be a sham. It also pointed to the fact that, in a case of the type contemplated, there will have been a clear intention to create a genuine trust.

184. I can see that Dalriada may well be right in what it says about the likelihood of a sham, although it is not a question that I can consider in these proceedings even if I had been asked to do so. This gave me yet further pause for thought as to whether Question 5 was too hypothetical to be answered for the types of reason that I have already considered in

relation to Question 1. However, no party said that I should not seek to give an answer and I have decided to attempt to do so, although as will appear I do not consider that all of the questions asked under Question 5 are suitable for declaratory relief. It follows that the likelihood of a sham being established is not a matter on which I need comment any further for the purposes of this judgment.

185. Both the Board and Dalriada accepted that there is no reason in principle why a trust which is initially a sham might not become genuine if a new trustee is appointed who is innocent of the shamming intent and who accepts the trust obligations on the terms of the ostensible trust documents. In those circumstances there is no reason why the trust cannot become properly constituted. As Munby J explained in *A v A* at [45]:

> *[45] … But what if [the new trustee] does not know that the "trust" is a sham, and accepts appointment believing the "trust" to be entirely genuine and intending to perform his fiduciary duties conscientiously and strictly in accordance with what he believes to be a genuine trust deed? I cannot see any reason why in that situation what was previously a sham should not become, a genuine trust.*
>
> *[46] On the contrary, principle argues compellingly that in such circumstances there is indeed, for the future, a valid and enforceable trust. After all, in the circumstances I have postulated, the trust property has been vested in someone who accepts that he holds the property as trustee on the trusts of a document which he believes to be a genuine instrument. He has no intention that the arrangement should be a sham*.

186. *A v A* is cited in Lewin on Trusts (20th edn) at paragraph 5-026 as authority for a general proposition that, if the original trustees were parties to a sham, then the appointment of new trustees who do not share the shamming intent may convert the sham into a valid trust. Whether this is what has happened will be sensitive to the facts of every case, but where an independent trustee has been appointed with no notice of the shamming intent and every intention to administer the trusts in accordance with their terms, I agree that a conversion of the type identified by the editors of Lewin is likely to have occurred.

187. The consequence of these principles for occupational pension schemes is that, if the Scheme was when established a sham in the *Snook* sense, it cannot be an occupational pension scheme within the statutory definition and there could be no employer in relation to it. I did not understand any party to disagree with those propositions. What however are the circumstances in which an occupational pension scheme which started as a sham might become a genuine occupational pension scheme as contemplated in a conventional trust context by *A v A*? On the face of it, something must occur which causes the assets to be required to be applied in accordance with the terms of the Scheme, when hitherto those terms were of no effect because they were a sham.

188. The Board's argument proceeded on the basis that, as the Scheme is a sham, it will not (at the time of transfer-in by the member) be an occupational pension scheme. The consequence of this is that the transferring trustees will have had no power to effect the transfer-in whatever the states of mind of the member transferring into the Scheme or the transferring trustees. It submitted that, for that reason, the beneficial interests in the assets being transferred by the transferring member continued to be held on the trusts of the transferring scheme. They never came to be held on the trusts of the Scheme itself, with

the consequence that the Scheme itself will not have become an occupational pension scheme within section 182 of PA 2004 at the time of the transfer-in.

189. The reason that the Board submitted that the transferring trustees will have had no power to make the transfer is that the rules of the transferring scheme ought to limit member transfers to those to be made to another occupational pension scheme that is registered under the FA 2004. It said that a transfer to a scheme that is not in fact an occupational pension scheme (whether because it is a sham or for any other reason), will for that reason be beyond the powers of the transferring trustees and also a breach of trust. This will be the case irrespective of the state of mind of the transferring trustees.

190. In support of this submission Mr Sawyer cited Lloyd LJ in *Pitt v Holt* [2012] Ch 132, at [96] (approved by the Supreme Court [2013] 2 AC 108 at [60]), to the effect that an excessive execution of a power by trustees (i.e. one beyond the scope of the power, that is in breach of trust) is void in equity. On this point, he also cited *Clark* in which the relevant transfer was made into a scheme which had been set up "*as a means of freeing the assets held for [the taxpayer in the transferring scheme] from the investment and fiscal constraints to which they were subject and enabling him to control and invest them as he wished*". Having reached the conclusion that the transfer gave rise to a resulting trust in favour of the transferring scheme because the trusts of the transferee scheme were void for uncertainty, Henderson LJ said as follows ([2020] EWCA Civ 204 at [45]):

> *Such an unauthorised transfer will often, although not necessarily, be made in breach of trust. In the present case it seems likely that the [transfer] was made in breach of trust, albeit innocently so far as [the transferring trustee] was concerned. The effect of a transfer made in breach of trust is that beneficial title to the property does not pass to the transferee, but if the property reaches a bona fide purchaser for value without notice the effect is then in substance the same as if the trustee in breach had been authorised to transfer the beneficial interest of the purchaser.*

191. I was also referred to the judgments of Robert Walker LJ in *Allan v Rea Brothers* [2002] Pens LR 169, at [43]-[52], Lloyd LJ *in Independent Trustee Services Limited v GP Noble Trustees Limited (Morris intervening)* [2012] EWCA Civ 195, [2013] Ch 91, at [106] and Lord Mance JSC in *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424, at [51] to [52] as authority for the submission that, if there has been a transfer out of the transferring scheme in breach of trust or excess of the power, the assets are never vested on the trusts of the receiving arrangement but remain subject to the trusts of the transferring arrangement. As *Clark* made clear this would be the case whatever the state of mind of the transferring trustee.

192. *Allan v Rea Brothers* is an important case on this point. In very short summary the facts were that Mr Allan, who was the relevant transferring member, procured the transfer by the trustees of his existing occupational pension scheme (the EW scheme) to the trustees of something called the Basdring scheme. The purpose of the transfer was to facilitate Mr Allan's access to pension funds in breach of the rules of the scheme. As part of the arrangements under which this was done, there was a dishonest pretence to which Mr Allan was party, that he was in pensionable employment with Basdring (at that stage it was necessary to be an employee of the scheme employer to be a member of an occupational pension scheme). It is also apparent from Robert Walker LJ's judgment (at [21]) that there were issues as to whether or not the receiving scheme in that case ever had any genuine existence or whether it was a complete sham from its inception.

193. The court in *Allan v Rea Brothers* was not provided with all of the transferring scheme documentation, but it proceeded on the basis that the trustees of the EW scheme would have had no power to effect a direct transfer to Mr Allan. The only power can have been to make a transfer to another pension scheme. Against that background. Robert Walker LJ then said as follows ([2002] Pens LR 169, at [48] and [49]):

> *48. The power must have been a fiduciary power which the trustees of the EW scheme could exercise only if acting in good faith and for the purposes for which the power was intended – that is, on a transfer from one genuine employment to another. This court has no findings or evidence of the state of mind of the other two trustees … but there are clear findings that Mr Allan himself knew that [the] plan was improper and deceitful. Had his co-trustees known the true facts, they could not properly have joined, and would not have joined, in the exercise of the power. Although the legal interest in the AXA policies passed under the assignments, the beneficial interest remained in the EW scheme. As Cross J put it in Re Abrahams [1969] 1 Ch 463, 485, the beneficial interests:*
>
> > *go back to – or, more properly I think, never left – the [original settlement].*
>
> *49. Since the court does not know the precise terms of the transfer payments power in the EW scheme it is impossible to say whether the invalidity of its exercise should be classified as an excessive (ie ultra vires) exercise of the power, or as a fraud on the power (which makes the exercise void, not voidable: Cloutte v Storey [1911] 1 Ch 18) or as an example of the operation of the principle in Re Hastings-Bass [1975] Ch 25: see Mettoy Pension Trustees v Evans [1990] 1 WLR 1587 at 1621–24, where Warner J stated at 1624:*
>
> > *For the principle to apply however, it is not enough that it should be shown that the trustees did not have a proper understanding of the effect of their act. It must also be clear that, had they had a proper understanding of it, they would not have acted as they did.*
>
> *This court formulated the test in less demanding terms in Stannard v Fisons Pensions Trust Ltd [1992] IRLR 27, but in this case even the most demanding test would lead to invalidity*.

194. Mr Sawyer submitted that the clear consequence of this was that any transfer by the trustees of an occupational pension scheme to the purported trustees of a scheme which was in fact a sham (such as the Scheme is assumed to be for the purposes of Question 5) would be an excessive execution of the power, a breach of trust and consequently ineffective to transfer the beneficial interest in the assets. It therefore follows that the Scheme could not have satisfied the requirements to be an occupational pension scheme. He also submitted that, in the circumstances with which the questions I am asked to consider are concerned, the transferee will not take as a bona fide purchaser for value without notice, not least because they will be aware of the sham.

195. Mr Sawyer also made an alternative submission that, because the transfer from the transferring trustees was not intended to be at the free disposal of the receiving scheme trustees, but was for the purpose of paying the money to a (genuine) occupational pension scheme a *Quistclose* or purpose trust would arise at the moment of receipt. The reason for this is that the purpose is not achieved because the purported receiving scheme is a sham.

Until the purpose is fulfilled, the receiving scheme trustees hold the transferred assets on trust for the transferring trustees, who themselves hold subject to the terms of the transferring scheme. In support of this submission Mr Sawyer cited *The Pensions Regulator v Payae* [2018] EWHC 36 (Ch) at [40]:

> *… the Ceding Schemes were without doubt occupational or personal pension schemes, the pension pots were intended to be transferred only to a Receiving Scheme that was a valid occupational pension scheme and if the Receiving Scheme was not such a scheme then the funds received would have been held either on resulting or a Quistclose trust and therefore remained occupational pension scheme assets held on trust for the Ceding Scheme trustees unless and until transferred to a valid Receiving Scheme*.

196. Mr Moeran QC adopted a different analysis. He submitted that both *Clark* and *Payae* were different types of case. They were not cases about the excessive exercise of a power. The reason that a resulting or *Quistclose* trust arose was because the trust to which the transfer purported to be made was void for uncertainty.

197. He accepted, however, that *Allan v Rea Brothers* was a case about excessive exercise of a power, but said that it did not affect the position in the present case because there will always be a power in transferring trustees to transfer assets to a scheme which has the capacity to exist as an occupational pension scheme, even though it does not do so at the moment in time immediately before the transfer. This would be the case in relation to the Scheme even if it were to be a sham at the time of its purported establishment. He illustrated this submission by explaining that it is not uncommon for a new transferee pension scheme to have no assets at the time that a transfer-in is made. He also submitted that it can still be a pension scheme at this stage in its life, because the definition contained in section 1(5) of PSA 1993 (*a scheme or arrangement comprised in one or more instruments or agreements*) will still be satisfied even before there are any assets of the scheme held in accordance with its terms.

198. Building on this, Mr Moeran QC then submitted that there is no reason in principle why (using the principles explained by Munby J in *A v A*), the effect of the transfer to the Scheme should not be to validate it as an occupational pension scheme. The right analysis would be that the trustees of the schemes from which the members were transferring their existing asset pool were acting as settlors, and in so doing were able to establish a valid occupational pension scheme where hitherto there had been nothing more than a sham.

199. In answer to this, the Board argued in the alternative that if, in principle, it is possible for a sham transferee scheme to be converted into a genuine scheme, that can only happen if both transferring trustee and transferring member had what Mr Sawyer described as an innocent state of mind. The reason for this is that if the transferring trustee has a guilty state of mind and goes along with the sham, the sham is perpetuated, while if the transferring member has a guilty state of mind, he will not satisfy the requirement for being entitled to treat the transaction as genuine as against the shammers which was identified by Neuberger J in *National Westminster Bank Plc v. Jones* [2001] BCLC 98 at [60].

200. In that case, Neuberger J was concerned with a tenancy agreement which was a sham as between landlord and tenant but indicated that it should be treated as genuine as against an innocent mortgagee. Based on that principle, it was submitted that, if the transferring member were subsequently to attempt to enforce the purported trusts of the receiving

scheme, there would be nothing to stop the trustee from setting up the sham against the member if he had been reckless as to the sham nature of the arrangement that he was joining.

201. Mr Moeran QC said that this was not the right approach, because it ignored the fact that what was really happening was that, on a transfer to the trustees of the Scheme, there is a new settlement by the transferring trustees for the benefit of the transferring member. The terms of the new settlement are governed by the rules of the Scheme which up until then had done no more than give the appearance of creating legal rights and obligations, but which were in fact a sham. For this new settlement to be a sham as well, it would be necessary for all of the parties to it to share the guilty mind as to what was intended to be done, because otherwise the *Snook* test for a sham would not be satisfied.

202. The Secretary of State advanced a further answer to Mr Moeran QC's submission, which had also been referred to in Mr Sawyer's skeleton argument. He said that it is not possible for the transferring trustees to transfer assets into a vehicle which is not an occupational pension scheme at the moment of transfer, both because it will be a breach of trust and because it would be inconsistent with the cash equivalent transfer provisions contained in sections 94 and 95 of PSA 1993.

203. The relevant provisions of section 95 are as follows:

> *(1) A member of a pension scheme who has acquired a right to take a cash equivalent in accordance with this Chapter may only take it by making an application in writing to the trustees or managers of the scheme requiring them to use the cash equivalent in one of the ways specified below.*
>
> *…*
>
> *(2) In the case of a member of an occupational pension scheme…, the ways referred to in subsection (1) are –*
>
> a) *for acquiring transfer credits allowed under the rules of another occupational pension scheme…*

204. As Mr Coppel QC submitted there are other ways in which transfers can take place (e.g. by purchasing annuities), but the only relevant one for present purposes is that the member is entitled to ask for his benefits to be transferred into another occupational pension scheme. The consequence of this is that the trustees of a transferring scheme are bound to have to consider whether the scheme to which the transferring member wishes his transfer credits to be transferred is in fact an occupational pension scheme. At the time the transferring member makes his application, and at the time it is considered by the transferring trustees, the Scheme will not have been an occupational pension scheme because it will have been a sham.

205. Mr Coppel QC also drew attention to the fact that it is most improbable that the trustees of a transferring scheme would ever transfer any parts of a member's asset pool from a genuine occupational pension scheme to one which at the time of transfer was a sham, without being on notice that this was the case. He illustrated this by reference to a decision of the Pensions Ombudsman in *Re N, Northumbria Police Authority* (PO-12763) 11 July 2018, which had also been relied on in the Board's skeleton argument. It explains the

standards to which transferring trustees will be held when transferring a pension fund to another pension scheme without conducting adequate checks in relation to the receiving scheme. The Pensions Ombudsman referred at paragraph [65] to the detailed materials that have been made available by TPR since at least February 2013 explaining the extensive checks that transferring trustees are expected to carry out and at paragraph [66] summarised the approach that transferring trustees are expected to take:

> *the overriding consideration for a scheme trustee or administrator must be to evaluate the transfer application carefully in order that a valid statutory transfer right is complied with and an invalid transfer application is legitimately withheld.*

206. I agree with the submissions of the Secretary of State and the Board on this point. It is contemplated by section 99 of PSA 1993 that the transferring trustees only receive their discharge from an obligation to provide benefits under the original occupational pension scheme if the transferring member exercises his option in accordance with section 95 of PSA 1993. I do not see how the member will be exercising an option under section 95 if his application is for a transfer elsewhere than to the trustees of what is at that time a valid occupational pension scheme. If they were to take that course, the transferring trustees would not be protected by the provisions of section 99. In the hypothetical circumstances with which Question 5 is concerned, the trustees of the Scheme are unlikely to be a bona fide purchaser of the legal estate without notice and it is therefore likely that the assets will continue to be held on the trusts of the original transferring occupational pension scheme. I do not see how the fact that the Scheme might become a valid occupational pension scheme once the assets are received makes any difference to that conclusion.

207. In particular I do not agree that Mr Moeran QC has provided an answer with his explanation that it is always possible to transfer assets from an existing occupational pension to the trustees of another scheme which prior to the transfer has no assets because the definition of occupational pension scheme in section 1 of PSA 1993 does not require assets to be held at the time of transfer. That situation is not analogous to a sham because, as he himself asserts, in that situation the recipient is an occupational pension scheme – it just happens to be one without any assets. In the hypothetical circumstances with which Question 5 is concerned the recipient is not an occupational pension scheme within the meaning of section 1 at the time of receipt, because it is a sham.

208. I also agree with Mr Sawyer's submission that the transferring trustee will in practice only ever have a restricted or limited power. It is in a very different situation from many settlors with an unrestricted power to settle assets on a trustee. A transferring trustee only has power in that capacity to transfer to the trustees of another occupational pension scheme. The power does not extend to settle assets on a person whose only status is the purported trustee of a pretence or sham which is not an occupational pension scheme at all.

209. In my view the decision in *Clark* supports this conclusion. Applying what Henderson LJ said in *Clark* to a transfer to the Scheme on the hypothesis contemplated by Question 5, the transfer will be unauthorised and is likely to be made in breach of trust, even if innocently so far as the transferring trustees were concerned. The consequence will be that beneficial title to the assets will not pass to the trustees of the Scheme. The receiving trustees of the Scheme will only be treated as *bona fide* purchasers for value without notice if they were not themselves on notice of the sham or the intent to treat the Scheme as something other than an occupational pension scheme. That will not be the case in the contexts with which these proceedings are concerned.

210. It follows that it is most improbable that there will ever be a transfer which is capable of being held on the terms of what amounts to a valid occupational pension scheme where it was no more than a pretence or sham immediately before the receipt. Whatever the state of mind of the transferring trustees, it would only be in the situation in which they were acting within the scope of their power and not in breach of trust, that this might arise, and it is difficult to identify circumstances in which that might be the case irrespective of their state of mind.

211. Quite independently from that conclusion I am satisfied that this can never be the case if the transferring trustees did not care whether or not the transferee scheme was a genuine occupational pension scheme (i.e. had a reckless state of mind). This seems to me to be consistent with the approach taken by Munby J in *A v A* at [50] and to be correct in principle. If the state of mind of one party to a transaction amounts to reckless indifference to the question of whether or not the transaction is intended by the other party (in this case the transferee trustees) to be genuine, they too will be party to the sham.

212. Turning to the appointment of a new independent trustee, I can deal first with what happened in the present case. An initial appointment was made by TPR on 13 June 2013, followed (without prejudice to the validity of the TPR appointment) by a confirmatory appointment by Henderson J on 19 June 2013. The power of TPR to make the appointment arises under section 7 of PA 1995 in relation to a trust scheme, which means an occupational pension scheme established under a trust (section 124(1) of PA 1995).

213. The Board said that TPR's power to do so could not have been exercised at all where the Scheme had not been an occupational pension scheme at the time of the appointment, which was why a confirmatory appointment from the court was sought in the present case. On the hypothesis underpinning Question 5, it is a necessary part of the Board's argument that TPR's appointment was invalid on the grounds that the Scheme, as a sham, was not an occupational pension scheme. It follows that the appointment by the court is the one which matters.

214. I did not understand Mr Sawyer to say that the order made by the court was not effective to vest the assets in Dalriada and grant to Dalriada the powers, right and duties expressed on the face of the order. Mr Sawyer's submission was simply that the funds received into the Scheme at the time that the members transferred in were still held on the trusts of the original transferring scheme and the Scheme could not for that reason be converted into an occupational pension scheme. He said that the subsequent appointment of an innocent trustee in the purported receiving scheme cannot alter this, as the appointment of a trustee cannot alter the trusts on which the assets are validly held or the right of the transferring trustee to recover the assets.

215. I do not agree with that submission. In my view the only question is the construction and effect of the terms of the order. If the court appoints the independent trustee to administer the trusts in accordance with the terms of the relevant documentation, which is what Henderson J did in the present case, and if the effect of that documentation being implemented in accordance with its terms is that the requirements for the establishment of an occupational pension scheme are satisfied, that is what the scheme will be. If that is not the case, but only if that is not the case, it will not.

216. Put another way, once the court has appointed new trustees to administer and give effect to the terms of the Scheme, the sham will no longer subsist. I do not see how there can be a

continuation of any shamming intent so far as either the new trustees or the court is concerned. Whether the Scheme then becomes an occupational pension scheme within the meaning of section 1 of PSA 1993 will simply depend on whether the statutory requirements are then satisfied.

217. Mr Moeran QC drew attention in his submissions to the fact that there are other situations in which an independent trustee may be appointed. He said that there were contexts other than appointments by the court and appointments by TPR when a new trustee may be appointed who may not have a sufficient shamming intent. He submitted that where that is the case, the *A v A* principles would apply and (to use the words of Munby J) "*the trust property [will have] been vested in someone who accepts that he holds the property as trustee on the trusts of a document which he believes to be a genuine instrument. He has no intention that the arrangement should be a sham.*"

218. In my view this rather illustrates the difficulty with the relief being sought under Question 5. While it may be the case that the principles discussed in *A v A* are applicable in some categories of new trustee appointment, they are not very easy to apply in isolation from the surrounding circumstances. Indeed, I think that there are too many variables to the context in which a new appointment may be made for it to be appropriate for the court to grant general declaratory relief of the type sought, more particularly where no party submitted that an allegation of sham in relation to an occupational pension scheme would be at all easy to pursue. In these circumstances, I do not think that the generalised declarations sought ought to be made.

Question 6

219. The sixth question arises if the Scheme is currently an "occupational pension scheme", but did not have that status throughout its existence and seeks to determine the extent to which prescribed offences and reductions or increases in asset value which occurred while it was not an "occupational pension scheme" fall within the scope of the fraud compensation provisions:

> *If the [Scheme] is currently an "occupational pension scheme" or "scheme" within the meaning of section 182 PA 2004 and is eligible to make a claim for fraud compensation payments, but there were times during the Scheme's existence when it was not such a scheme, then:*
>
> > *(a) is no compensation payable in respect of a prescribed offence or reduction in the value of scheme assets which occurred at a time when the scheme was not an occupational pension scheme;*
> > *(b) if, at such a time, there was an increase in value which would otherwise fall within section 184(3) PA 2004, is such increase not a "recovery of value" for the purposes of sections 184-185 PA 2004?*

220. The Board argued that no compensation is payable in respect of a prior reduction in asset value during a period in which the scheme was not an occupational scheme, and that any prior increase in value does not qualify as a recovery of value. Dalriada argues the contrary. The Secretary of State agrees with the Board. She also contends that credit must be given

for any recoveries in value made after the time that it ceased to be an occupational pension scheme.

221. This is a short point of statutory construction on which the parties' submissions were brief. The Board contended that the reduction in value for which compensation was payable under section 182(1)(b) of PA 2004 is in the value of the assets of the scheme, which means an occupational pension scheme. Dalriada said that the question of whether or not the scheme was an occupational pension scheme at the time of the reduction is simply not an issue that is raised by the statute.

222. In my view the Board's argument is the correct one. The use of the phrase "*the scheme*" in section 182(1)(b) of PA 2004 and indeed elsewhere in section 182 is plainly a reference back to the phrase "*an occupational pension scheme*" where they appear in the main part of section 182(1). Section 182(1)(b) is dealing with a circumstance (the reduction in value of assets) which may have taken place on one occasion or may have taken place over a period of time, but whichever is the case the assets that must have been reduced are assets of the scheme (i.e. an occupational pension scheme).

223. In my view this means that, at the time of the reduction in value, the assets that were reduced must have been assets of the scheme (i.e. an occupational pension scheme). This also reflects what I consider to be the purpose of the provision. The FCF is concerned with making fraud compensation payments in respect of reductions in the asset values of occupational pension schemes that are attributable to prescribed offences. In my view, the underlying assumption is that, at the time of the loss, the scheme is an occupational pension scheme, because that is the category of scheme in respect of which the FCF is intended to provide compensation. On that aspect of the statutory regime, the characteristics of the scheme at the time of the loss are in my view as significant as the characteristics of the scheme at the time the application is made (if not more so).

224. As to the recovery of assets of value within the contemplation of section 184(3) of PA 2004, the recovery leads to an increase in the value of the assets of the scheme and it is clear that here too the reference to the scheme is a reference to an occupational pension scheme. Mr Moeran QC submitted that what is sauce for the goose is sauce for the gander, and that if I were to conclude that the scheme must be an occupational scheme at the time of the reduction in assets it must also be an occupational scheme at the time of the recovery of value. I do not agree.

225. In my view the increase in value of the assets of the scheme must be an increase attributable to a payment received in respect of a reduction in value that occurred during the period that the scheme was an occupational pension scheme. It is not necessary for the payment or the increase to be received or achieved at a time when the scheme is still an occupational pension scheme. The primary reason for this is that the timing of any recovery is wholly arbitrary. While it makes sense that the reduction for which compensation is paid under section 182(1)(b) of PA 2004 should relate to losses incurred when the scheme has the qualities of being an occupational pension scheme for which the compensation regime is designed, there is no particular reason why the scheme should continue to have those qualities when recoveries are made in mitigation of those losses.

226. For these reasons I consider that the answer to Question 6(a) is that no compensation is payable in the circumstances described and the answer to Question 6(b) is that it is not

necessary for a recovery of value within the meaning of section 184(3) of PA 2004 to be received while the scheme is still an occupational pension scheme.