Ombudsman's Determination

Applicants	(i) Those listed at Appendix 1 (the **Applicants**); and (ii) Dalriada Trustees Limited (company number NI 38344) (**Dalriada**)
Scheme	Dominator 2012 Pension Scheme (**Dominator Scheme**), Donington MC Pension Scheme (**Donington MC Scheme**) and Commando 2012 Pension Scheme (**Commando Scheme**) (collectively, the **Schemes**)
Respondents	(i) Mr Stuart Garner (in his capacity as trustee of the Schemes) (the **Trustee**); (ii) LD Administration Ltd (company number 08922351) (in liquidation) (in its capacity as administrator in relation to the Schemes from 2014 to 2018) (**LD**); and (iii) Dalriada

Outcome

1 The Applicants' and Dalriada's complaints are upheld. To put matters right, the Trustee, LD and Dalriada, shall comply with my directions as set out in paragraphs 388 to 394 of this Determination.

Complaint summary

2 The Applicants' complaints are that:

2.1 the manner of investing the Schemes' funds does not accord with the Schemes' purpose;

2.2 the Trustee has acted under a conflict of interests;

2.3 the Trustee has breached its investment duties and has committed multiple breaches of trust;

2.4 the Trustee and LD have failed to provide an adequate administration process for any of the Schemes, bringing into question the accuracy of benefit statements and other information issued to members; and

2.5 all of which has resulted in members' benefits and rights in the Schemes being lost.

3 Dalriada has also separately made the same complaint in respect of the Trustee.

4 Throughout this Determination, I have referred to Mr Garner, in his role as the trustee of any or all of the Schemes, as the "**Trustee**". Where I have referred to Mr Garner in any other capacity, for example as director of Norton Motorcycle Holdings Limited (**Holdings**) or any of the companies in its group (which I shall refer to collectively as the **Group** throughout this Determination), I have referred to him as "**Mr Garner**".

Oral hearing

5 I held an oral hearing on 13 February 2020 (the **Oral Hearing**), as part of my investigation. I considered it necessary to do so because it appeared to me, from the evidence I had received, that the Trustee might be held personally liable for his acts and omissions.

6 The Trustee did not attend the Oral Hearing. The Oral Hearing was attended by Ms Margaret Liddell of LD and by five of the Applicants.

Summary of conclusions in respect of the Trustee

7 Having fully considered the evidence and submissions presented on the papers, and those provided at the Oral Hearing, I uphold the complaints. In summary:

7.1 the Trustee has acted dishonestly and in breach of his duty of no conflict, his duty not to profit and his duty to act with prudence;

7.2 the investments made by the Trustee in Holdings' preference shares on behalf of each of the Schemes were made in breach of the Trustee's statutory, investment and trust law duties;

7.3 the Trustee has breached his statutory duties to have in place adequate controls to: manage conflicts of interest; and ensure the effective administration of the Schemes;

7.4 the Trustee has breached his statutory duty to have acquired knowledge and understanding of the law relating to pensions and trusts; and

7.5 there has also been maladministration by the Trustee in relation to:

7.5.1 the Trustee's failure to manage conflicts of interest in relation to the Schemes;

7.5.2 the Trustee's failure to have regard to the Schemes' respective SIPs; and

7.5.3 the Trustee's failure to ensure that the Schemes' investments were, and remained, appropriate for the Schemes' members.

7.6 I have concluded that the Trustee is not excused from liability by the terms of the exoneration clauses or section 61 of the Trustee Act 1925 (**Section 61**).

Summary of conclusions in respect of LD

8 I have also concluded that there has been maladministration by LD, as LD lacked the necessary knowledge or experience to administer the Schemes.

Jurisdiction

9 Pursuant to section 146(1)(e) of the Pension Schemes Act 1993 (the **1993 Act**), Dalriada has brought a dispute against the Trustee; its fellow trustee of each of the Schemes.

10 As the dispute against the Trustee is the same as the complaint made by the Applicants against the Trustee, I have dealt with both matters in this Determination[1].

11 Some Applicants have named Dalriada as a Respondent to their respective complaints. I have dismissed those complaints as the acts and omissions in question were committed by the Trustee, before Dalriada was appointed as a trustee of the Schemes and Dalriada had no involvement in those acts or omissions. But I have retained Dalriada as a Respondent to the Determination in respect of the Applicants' complaints, for the avoidance of doubt for the purposes of carrying out my directions.

12 Under general trust law principles, any individual beneficiary has locus standi to require trustees to account for breaches of trust. Dalriada, exercising the powers of the trustees to the exclusion of the Trustee, also has power to seek recovery of any assets of the Schemes applied in breach of trust and/or to seek remedy in respect of any such breaches.

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

14 Any money recovered by the Schemes as a result of my directions is available for the general benefit of any member, including the Applicants, to the extent that they have been adversely affected. In *Hillsdown Holdings plc v Pensions Ombudsman [1997]* 1 All ER 862, Knox J quoted Lord Browne-Wilkinson at p 434 (House of Lords) in *Target Holdings v Redferns* [1996] 1 AC 421, who said that:

> "…the basic right of a beneficiary…is to have the whole fund vested in the trustees so as to be available to satisfy his equitable interest when, and if, it

[1] There have been additional applicants who have complained to my office in relation to the Schemes. However, I have not pursued those complaints further, as my directions apply for the benefit of all of the Schemes' members.

> falls into possession. Accordingly, in the case of a breach of such a trust involving the wrongful paying away of trust assets, the liability of the trustee is to restore to the trust fund…what ought to have been there."

15 Dalriada has *locus standi* (standing) in its own right to seek recovery of trust assets and/or ask the Ombudsman to make a Determination of whether there has been a breach of trust against the Trustee in relation to each of the Schemes. In an action to have a breach of trust redressed, it has been confirmed that no issues usually arise between one beneficiary and another, or as between a beneficiary and the current trustees. The object is to secure the return of the trust property for the benefit of all the beneficiaries according to their respective interests (Young v Murphy [1996] VR19). I have considered this issue further below in the context of the Rules of each of the Schemes.

The Pensions Regulator (TPR) and the Work and Pensions Committee

16 There has been much publicity concerning the administration of the various Norton Motorcycles companies and TPR's investigation into the Schemes.

17 It has been reported that the Chair of the House of Commons' Work and Pensions Committee (the **Select Committee**), Stephen Timms MP, has written to TPR to ask questions concerning TPR's investigation into the Schemes and Mr Garner's role in relation to them, as Trustee or otherwise. The Select Committee has asked: when TPR became aware of Mr Garner's conflict of interest in relation to the Schemes; whether TPR could have taken action earlier; whether TPR has learned any lessons from its handling of that case; what TPR is doing to protect savers in other schemes set up through pension liberation scams; and what members' expectations should be in relation to the return of their funds invested in such schemes.

18 Both the administration of the various Norton Motorcycles companies; and TPR's inquiries into the Schemes and Mr Garner's conduct, are separate matters from my investigation into the Applicants' and Dalriada's complaints and disputes. While there will necessarily have been some overlap between the respective scopes of all of these enquiries, my investigation has been carried out independently of those others and my findings are based only on information that my Office has obtained through carrying out this investigation.

19 The scope of my investigation does not consider or make any findings concerning TPR's knowledge of affairs concerning the Schemes

Detailed Determination

A Material facts

A.1 Background

20 Each Scheme was established by deed (**Deed**), executed by Mr Garner, both in his capacity as sole trustee of the Schemes, and in his capacity as director of Manorcrest

Limited (company number 08011440) (**Manorcrest**). Mr Garner appointed T12 Administration Limited (company number 07508277) to assist him in setting up the Schemes and to act as scheme administrator in respect of each Scheme. The Scheme documents, including the Deeds, the original Scheme Rules and the statements of investment principles were drafted by T12.

21 Mr Garner had been introduced to Peter Bradley and Andrew Meeson, who were both directors of T12, by Matthew Bradley of Bradley and Jefferies Solicitors, who had been Mr Garner's commercial solicitor for around twenty to thirty years. Both Mr Peter Bradley and Mr Meeson were subsequently jailed for pension tax fraud in 2013. Mr Peter Bradley and Mr Meeson introduced Mr Garner to Simon Colfer, whom Mr Garner knew by the name of Simon Davies. Mr Colfer promoted the Schemes to prospective members.

22 Each Deed was expressed, under Recital A, to take effect on the date of its execution, as follows:-

22.1 Donington MC Scheme: 13 March 2011;

22.2 Commando Scheme: 28 June 2012; and

22.3 Dominator Scheme: 27 September 2012.

23 Manorcrest was incorporated on 29 March 2012. Mr Garner has been Manorcrest's sole director since 5 April 2012. Documents filed at Companies House in respect of Manorcrest suggest that Manorcrest has, at all times, been a dormant company with no assets or liabilities and with share capital of £1 only.

24 I note that the date on which the Donington MC Scheme is stated, in its Deed, to have been established pre-dates the date of Manorcrest's incorporation. The Trustee has explained to my Office that the date stated in that Deed is incorrect. That error had arisen as a consequence of the use, by the legal firm that drafted the Deed, of a precedent document and that legal firm's failure to change the date to the date on which the Deed was signed. On the basis of this explanation and the dates on which Manorcrest was established, and the first member was admitted to the Donington MC Scheme, I consider that, despite the date stated in its Deed, the Donington MC Scheme must have been established at some point between 29 March 2012 and 14 April 2012 inclusive.

25 Members were admitted to the Schemes between April 2012 and December 2013, transferring in funds from other pension arrangements. The total amount transferred into the Schemes was £10,931,647.27.

26 I understand that at least some of the Applicants had been contacted by individuals who had encouraged them to join one of the Schemes, on the basis that they would receive a tax free "commission" once the transfer of their funds had been completed. I am informed also that those Applicants have incurred unauthorised payment charges from HMRC in relation to those commission payments. The status of those

"commission" payments, the events leading to their payment and the consequences for the Schemes' members is outside the scope of this investigation.

27 Since 27 June 2011, Mr Garner has been the sole director of Holdings, in which it seems the Schemes' funds were invested in preference shares. Mr Garner has, at all material times, held ordinary shares in Holdings.

28 Mr Garner has also been the sole director of two of Holdings' three wholly owned subsidiary companies, Norton Motorcycles (UK) Limited[2] (**UK**) and Norton Racing Limited[3] (**Racing**), since 27 June 2011, and has been a director of the third subsidiary, Donington Hall Estates Limited[4] (**Estates**), since its incorporation on 10 July 2013. I shall refer to UK, Racing and Estates below as the **Subsidiaries.**

29 On 21 May 2019, the Pensions Regulator (**TPR**) appointed Dalriada as an independent trustee with exclusive powers in relation to each of the Schemes, in accordance with its power to do so under section 7(3) of the Pensions Act 1995.

30 On 29 January 2020, Metro Bank PLC, which had fixed and floating charges over Holdings, UK and Estates, appointed administrators in relation to those companies.

31 It is understood that the Norton Motorcycles business has since been bought by an Indian company, in April 2020.

32 LD was dissolved after the Oral Hearing, on 17 March 2020.

A.2 Investment of the Schemes' funds

33 It appears, from documents filed at Companies House, that preference shares in Holdings were issued, between 20 October 2012 and 1 February 2013, to the Schemes at a nominal value of £0.01 per share and for which £1 per share was paid. Holdings' annual return, dated 28 September 2013, showed that:-

33.1 the Donington Scheme held 4,000,000 preference shares;

33.2 the Dominator Scheme held 2,000,000 preference shares; and

33.3 the Commando Scheme held 2,000,000 preference shares.

34 I have also seen a statement of capital, filed at Companies House on 12 May 2015, which indicates that a further 2,667,661 preference shares were allotted between 4 December 2012 and 4 December 2013. However, that statement of capital does not fit with other statements of capital. For example: the annual returns dated 28 September 2013, and 28 September 2014, show only the shares listed above in paragraph 33; and the nominal value of each preference share allotted in the statement of capital filed on 12 May 2015 is expressed as being £1 per share, not £0.01 per share. It is not clear, from the documents available at Companies House,

[2] company number 06718623.
[3] company number 06387522.
[4] company number 08604845.

exactly how many preference shares in Holdings were purchased by the Schemes (see Appendix 5, which summarises the material information available at Companies House regarding Holdings' shares). The Trustee has explained that, in the 12 May 2015 statement of capital, there was an error in recording the share value and that this was an anomaly. The Trustee has confirmed that the "unit price per share" was 1 pence.

35 It also seems, from documents filed at Companies House in relation to the Group, that Holdings and the Subsidiaries were performing badly at that time. For example, Racing's financial statements for the year ended 31 March 2013, showed net liabilities of £211,257 and, in its first year of trading, Estates made a loss of £18,772, as shown by its financial statements for the year ended 31 March 2014. A summary of the financial statements for Holdings and the Subsidiaries is included at Appendix 4.

36 It seems, from documents held by Companies House in relation to Holdings, that the Trustee invested the monies transferred into the Schemes "collectively" in Norton Motorcycles preference shares on a pooled basis. A summary of the activity in relation to Holdings' shares is included at Appendix 5.

37 It is not in dispute that: Scheme members' funds were invested, in their entirety, in preference shares in Holdings; and the Trustee did not take any written investment advice in relation to the investment of the Schemes' funds.

38 Three personal guarantees were entered into for the Schemes by Mr Garner as director of Holdings. Mr Garner personally guaranteed Holdings' liability to pay annually dividends of 5% on its preference shares to each Scheme; and to redeem the shares on a date no later than the tenth anniversary of the issue of the preference shares in relation to each Scheme (the **Guarantees**) [5]. Mr Garner has said that he has no recollection of having had sight of the guarantee for the Commando Scheme; nor could he locate any other similar guarantees (when at the time my Office did not know if there were others).

A.2.1 Relevant provisions of Scheme documents

39 I have set out below, in paragraphs 40 to 41, a summary of the provisions of the Schemes' documents that I consider relevant to my investigation into whether the Trustee acted in breach of trust in his investment of the Schemes' funds and the extent, if any, to which he might rely upon any exoneration or indemnity contained in any of those documents.

A.2.2 Relevant provisions of the Deeds

40 The Schemes' trustees' investment powers are set out in Clauses 15, 16 and 17 of the Deeds for the Donington MC Scheme and for the Dominator Scheme and in Clauses 13, 14 and 15 of the Commando Scheme's Deed. Those clauses are set out in Appendix 1.

[5] These guarantees have been provided under deeds; only one is dated, October 2012.

41 In addition, the following clause, which seeks to limit the Schemes' trustees' liability to members, is contained in each Deed:

> "21[6]. No member or any other person shall have any claim right or interest under the Scheme or any claim against the Provider or the Trustees in connection with the Scheme except under or in accordance with the provisions of this Establishing Deed. Neither the provider nor the Trustees shall be personally liable for any acts or omissions not due to their own wilful neglect or default and, in particular, shall have no responsibility to or in respect of a Member in connection with investments made at the option or direction of that Member or any person authorised to exercise such option or make such direction on the Member's behalf."

A.2.3 Members' Scheme application forms

42 The application form, which I understand members signed on joining their respective Scheme, contained the following clause:

> "I fully understand and agree that the Trustees of the Scheme are solely responsible for all decisions relating to the purchase, retention and sale of the investments forming part of the Scheme. I agree to hold the Trustees fully indemnified against any claim in respect of such decisions.
>
> I understand and agree that the Trustees will not permit any investments or payments by the scheme which would result in the loss of HM Revenue & Customs registered status…
>
> I understand and agree that the funds will be included in appropriate arrangements, details of which are available on request. I request the Scheme Administrator to arrange provision of appropriate benefits as may be due from time to time."

A.2.4 The Schemes' Statements of Investment Principles

43 It appears that each of the Schemes has fewer than one hundred members. Therefore, by virtue of Regulation 6(1) of the Occupational Pension Schemes (Investment) Regulations 2005 (the **Investment Regulations**), each Scheme was exempt from the statutory requirement, under section 35 of the Pensions Act 1995, to prepare and maintain a statement of investment principles (**SIP**).

44 However, I understand that a SIP was in place in relation to each of the Schemes, setting out the principles covering investment decisions of the Schemes' assets. The provisions of the SIP are set out in Appendix 2.

[6] Clauses 21 and 22 of the Donington Scheme and the Dominator Scheme; Clauses 19 and 20 of the Commando Scheme.

45 It is not clear when the SIPs were prepared for any of the Schemes, as they are all undated and I have seen no deed or other instrument adopting the SIP as part of any of the Schemes' governing documents. The Trustee has informed my Office, in a statement made in response to the Preliminary Decision that I issued on 15 April 2020 in respect of these complaints (the **Preliminary Decision**), that he was provided with and had sight of the SIPs at a time when the Schemes had already been set up.

46 Regarding the "decision making structure", set out in paragraph 5 of the Schemes' SIP, which implies that an investment adviser should have been engaged by the Trustee, and the reference in paragraph 2 of the SIP to advice having been taken from "advisers", I understand that the Trustee received initial investment advice from a company called Artemis Funding. However, the Trustee has consistently acknowledged that he has received no written investment advice, and he has certainly not provided any such written record to my Office during the course of my investigation.

A.3 Administration of the Schemes

A.3.1 LD's appointment as administrator of the Schemes

47 T12 was appointed as the first scheme administrator of each Scheme[7].

48 T12 was dissolved on 17 March 2015, and two of its directors, Andrew Meeson and Peter Bradley, were jailed for pension tax fraud in March 2013.

49 LD was the administrator in relation to each Scheme from 2 April 2014 to 3 September 2018.

50 At the Oral Hearing, Ms Margaret Liddell, director of LD, informed me that she had called T12's office in 2013, following Mr Meeson's conviction, with a view to taking over as scheme administrator, in relation to the schemes in respect of which T12 had been acting as scheme administrator. Following that telephone call, Ms Liddell met with Mr Bradley's wife and agreed to take on the role of scheme administrator in relation to approximately three hundred pension schemes, most of which were small self-invested schemes. Ms Liddell also became the Scheme administrator for the three Schemes, following discussions with the Trustee.

51 Ms Liddell informed me that, prior to Mr Meeson's and Mr Bradley's convictions, Ms Liddell believed that T12 had been held in high repute, so their conviction came as a surprise to her. Ms Liddell had previously introduced T12 to a number of small self-invested pension schemes.

52 I understand that, having prepared and filed the scheme returns for the pension schemes that LD had taken on from T12, LD then agreed to act as scheme administrator in relation to the Schemes from 2014. I have seen no contract or agreement under which LD was engaged by the Trustee to act as administrator in

[7] Recital D and Clause 8 (Donington MC Scheme and Dominator Scheme) / Clause 6 (Commando Scheme) of the Schemes' respective Deed.

relation to the Schemes. However, from the evidence provided to me, I understand that LD was responsible for the management of the Schemes and discharging the duties imposed on scheme administrators under the Finance Act 2004[8]. LD's duties included issuing annual member benefit statements and paying benefits to members, in accordance with the Schemes' governing provisions and filing annual scheme returns to HMRC. LD could only make those benefit payments on receipt of the necessary funds from the Trustee. In relation to each of the three Schemes I am satisfied that LD does fall within the definition of "administrator" for the purposes of my jurisdiction, under section 146 of the Pension Schemes Act 1993.

53 It should be noted that any breach of the requirements of a scheme administrator under the 2004 Act, is a matter for HMRC to deal with and is therefore outside the scope of my investigation.

A.3.2 The extent of LD's relevant knowledge of, and experience in, pension scheme administration

54 Ms Liddell informed me, by way of background to LD's decision to act as the Schemes' administrator, that it had been necessary for her to diversify her business following the economic crash of 2008. Ms Liddell had seen T12's dissolution as a business opportunity for LD.

55 When I questioned Ms Liddell about the level of scheme administration experience amongst LD's staff, she replied that LD's staff had been trying to acquire knowledge of pension scheme administration in preparation for the statutory automatic enrolment requirements which were being phased in at that time. However, Ms Liddell and her staff had received no training before LD was appointed as scheme administrator in respect of the Schemes and had no experience of administering occupational pension schemes.

56 LD received a "handover", in relation to the Schemes (as well as in relation to the other schemes in respect of which LD had taken on the role of scheme administrator) from one member of T12's staff. The handover took place remotely, without that member of T12's staff meeting LD's staff.

57 Ms Liddell said she had been concerned that Mr Garner's interests in relation to the Schemes were conflicted by his being the Trustee, as well as the sole director of Manorcrest. Ms Liddell had informed HMRC of her concerns. However, she pointed out that LD had nevertheless been required to continue with its duties as scheme administrator, despite its concerns regarding this conflict of interest.

58 Ms Liddell later submitted, in response to the Preliminary Decision, that she had been involved in lengthy discussions with the Trustee and a professional trustee, Capital Cranfield Trustees Limited (**Capital Cranfield**), who were "able to advise" LD.

[8] As stated in Clause 9 of the Dominator Scheme's and the Donington MC Scheme's respective Deeds and Clause 7 of the Commando Scheme's Deeds, and Rule 11.3 of the Schemes' respective Rules.

59 When I queried whether LD had received a copy of the Schemes' Rules that were in effect before the 2015 Rules had been put in place, Ms Liddell stated that she thought that the original Rules would have been sent to LD as part of the paperwork that LD received from T12. Ms Liddell stated that LD would have looked at the trust deeds "at some point" and that LD had been able to refer to the Schemes' Rules in order to deal with member requests to transfer out of the Schemes.

60 When I asked Ms Liddell about her knowledge of the statutory investment requirements of trustees of occupational pension schemes, she admitted that she had been unaware of those requirements.

A.3.3 LD's knowledge / awareness of the Schemes' investments

61 LD had been aware that Scheme funds had been invested in shares with a 5% annual coupon and that members' access to their Scheme funds was subject to a penalty being applied if they accessed the funds within a "five or ten year[9]" period.

62 LD had not been aware of the cash incentives that members of the Schemes had received on transferring into the Schemes, which I have mentioned in paragraph 26 above. LD had later become aware of those cash incentives when working with the police during their fraud investigation regarding Mr Colfer. Ms Liddell informed me that she had then been made aware that Mr Colfer, under the false name of Simon Davies, had been informing potential Scheme members that they could take a percentage of the amount that they transferred into their respective Scheme as a payment from outside the Scheme. Mr Colfer had incorrectly informed members that this payment would not constitute an unauthorised member payment under the Finance Act 2004. I understand and accept that this occurred before LD's involvement with any of the Schemes.

63 LD filed annual returns to HMRC in respect of the Schemes, which included a record of: the members admitted to the Schemes; the funds invested under the Schemes; and the investment returns. LD had not itself had sight of the information behind the figures it received from the Trustee regarding the amount invested or the investment returns, and did not look at the Schemes' audited accounts. Ms Liddell had not considered this to be any cause for concern at the time.

A.3.4 LD's handling of members' transfer requests

64 When members asked to transfer their funds out of their respective Scheme, LD was only able to do so on receiving the funds from the Trustee. In each case, when the statutory deadline for effecting the transfer out of the Scheme, under Part 4ZA of the Pension Schemes Act 1993 (the **Transfer Requirements**), had passed, LD had considered that the correct process was for the member concerned to raise a complaint via the Scheme's internal dispute resolution procedure (**IDRP**) and then to make a complaint to the Pensions Ombudsman if the dispute had not then been

[9] Mr Garner had told LD, according to Ms Liddell, that this period was ten years, although the SIP states that was five years.

resolved. Ms Liddell said, when I questioned her at the Oral Hearing, that LD did not report these breaches of the Transfer Requirements to TPR, as the Trustee had assured LD that he was dealing with TPR himself in that regard. However, since then, Ms Liddell has submitted and has provided evidence, on behalf of LD, that she was aware that Capital Cranfield had reported the Schemes to TPR in late 2013 or early 2014.

65 LD ceased to be the Schemes' administrator on 18 September 2018, although it continued to act as 'Scheme practitioner' in relation to the Schemes. LD had considered itself unable to fulfil its role as scheme administrator, as it had not been able to contact the Trustee or to obtain members' Scheme funds in order to fulfil their statutory transfer requests.

66 At the time of holding the Oral Hearing, LD had not sent the Schemes' files over to Dalriada, who had taken over from LD as administrator of the Schemes on 21 May 2019. LD had been holding on to the files due to the Trustee's failure to pay LD for its administration services in relation to the Schemes. However, Ms Liddell informed me that she would ensure that the files were sent to Dalriada after the Oral Hearing.

A.4 Information provided to members

67 I have had sight of a 'welcome' letter, provided by one of the Applicants which was sent on 7 September 2012, by the Trustee in relation to the Donington Scheme. It stated that the Donington Scheme was investing in "the preference share issue of Norton Motorcycles". Details of a website, which the member could log into, using a "unique password and username", were given "to help [the member] follow the [Donington Scheme] and some of its progress at Norton".

68 In 2014[10], LD issued members of the Schemes with a 'welcome pack' in relation to their respective Scheme. The welcome pack contained a letter from the Trustee, which stated that:

> "The [Donington Scheme] has had a good start. All members' funds are collectively invested into the Norton 10 year Preference Share Scheme and the share certificate is issued to the fund.
>
> The Preference shares are ranked higher than the ordinary shares and so carry a higher level of security and so reduce the risk to the fund. The Preference shares have an annual coupon of 5% which is left in the fund to help grow the capital value of the fund.
>
> Norton Motorcycles itself is trading very well, hiring more staff and exporting into Europe and shortly the USA. You can follow the news of Norton on the website we have given you the details of below.

[10] My Office has received an example of this, from one of the Applicants, dated 11 June 2014, in respect of the Donington MC Scheme. It seems that other members also received this.

> Your gross transfer value was £[ ] in total. After deducting the 5% administration fee the balance has been directly invested into the Norton Preference Share Scheme. As I mentioned Norton is preforming [*sic*] well and the coupon is accruing as planned at 5% per annum."

69 I understand that the Trustee sent an update to members of the Schemes (for example, I have had sight of a letter from the Trustee to an Applicant, dated 30 June 2014, in respect of the Donington Scheme), informing members that their fund had grown by the "annual 5% coupon" over the Donington Fund's "initial year". That Applicant was also sent a further update by the Trustee, also dated 30 June 2014, which stated that "the [Donington Scheme] has had a good second year…Your Year 1 fund value of £213,489.23 has now grown by the annual 5% coupon. This has now made your overall fund value for 2014, £224,163.69."

70 LD issued annual statements to members, showing annual growth of 5%, based on the figures that it received from the Trustee. As explained in paragraph 63 above, LD had not taken steps to verify that information.

71 The Applicants have all requested access to their benefits under their respective Scheme or transfers of their funds out of their Scheme. However, each Applicant has received no, or minimal, payment from their Scheme.

B Summary of the Applicants' position

72 The Applicants have submitted that the Trustee's inability to provide them with their requested benefits under their respective Schemes is due to investment failings by the Trustee and his failure to fulfil his duties, as the trustee of a pension scheme, to exercise due skill and care with Scheme assets.

73 In a previous investigation against the Trustee, in relation to its failure to provide transfer values in accordance with the statutory requirement to do so under Part 4ZA of the 1993 Act[11], I identified certain concerns, regarding the operation of the Schemes, which I set out in the Determination of that complaint[12]. The Applicants have asked me to investigate those concerns.

C Summary of the Trustee's position

74 In response to my findings, which I set out in my Preliminary Decision, I have received submissions from the Trustee's Counsel, Peter Caldwell, as well as a witness statement from the Trustee, dated 1 May 2020, with supporting documents.

C.1 Submissions regarding procedure

75 Mr Caldwell has, on behalf of the Trustee, made submissions regarding the procedure that my Office has followed during this investigation:

[11] PO-22695: https://www.pensions-ombudsman.org.uk/wp-content/uploads/PO-22695.pdf.
[12] Paragraphs 36 to 55 of the Determination of PO-22695.

75.1 The Trustee had addressed in correspondence the reasons why he had been unable to participate in the Oral Hearing. Likewise, the Trustee had requested that I delay issuing my Preliminary Decision until I had received the Trustee's reply to the issues raised in the Notice of Hearing that had been sent to the parties in advance of the Oral Hearing. Mr Caldwell invited me to reflect on the impression that the Trustee's absence from the proceedings may have caused and discount any adverse conclusion that may previously have been reached in this respect.

75.2 While the Trustee had received the bundle of documents to which I had made reference, the Trustee had not been provided with any statement exhibiting those documents or explaining their provenance. Of greater concern was that the Trustee had not been served with statements or particulars of the complaints made by the Applicants. In his statement, the Trustee has said that he was advised by his former solicitor, Martin Jenkins of Irwin Mitchell Solicitors, not to attend the hearing "as I had not received the bundle of evidence".

75.3 My Office's failure to supply the Trustee with the documents received from the Applicants was a breach of Rule 5(2) of the Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995[13] (the **Procedure Rules**). The Trustee's statement addresses the observations made by me in the Preliminary Decision. However, the Trustee has been unable to address evidence which has been considered by me, but which has not been supplied by me to him.

75.4 The Trustee submits that proceedings which may lead to the imposition of a penalty over and above compensation for loss are subject to the requirements of Article 6 of the European Convention on Human Rights, referring to the case of *Engel v Netherlands* (1976) 1 E.H.R.R. 647, and that it would be unlawful for me, as a public body, to act in a manner incompatible with a Convention right, referring to section 6 of the Human Rights Act 1998.

76 Accordingly, Mr Caldwell has invited me to comply with Rule 5(2) of the Procedure Rules and supply copies of all the documents required by Rule 5(2) to the Trustee. Mr Caldwell further requested me to allow a reasonable period of time following the supply of those documents, to allow the Trustee to address his concerns in further submissions, before I finalise my decision.

C.2 Background

77 Mr Garner bought the rights to the Norton brand for approximately £1.65 million, in 2008. He considered, by 2011/12, that the business had strong potential. A ten-year

[13] Rule 5(2) of the Procedure Rules provides that: "Where the Pensions Ombudsman proposes to investigate the complaint or dispute, he shall forthwith supply a copy of the details of the complaint or dispute together with any amendments or supplementary statements, written representations or other documents received from the complainant or his representative to the respondent.".

business plan was implemented, which included the commitment to the development of two new motorcycle engines, for which funds needed to be raised. At that time, as banks were reluctant to provide finance, Mr Garner sought to raise the necessary funds from investment, while providing a pension scheme for Norton employees.

C.3 In respect of T12's appointment

78 The Trustee has stated as follows:-

78.1 The Trustee placed his trust in the wrong people when he set up the Schemes. He had been introduced to these individuals by his commercial solicitor, whom he had known for twenty to thirty years. The Trustee had had trust and confidence in this relationship. However, Both Mr Peter Bradley and Mr Meeson were subsequently jailed for pension tax fraud in 2013 and Mr Colfer was convicted of fraud in 2018 for the way that he had promoted the Schemes.

78.2 The Trustee was "incredibly shocked" when he found out about that the individuals whom he had been working with, who had appeared to be professionals, had been convicted of fraud.

78.3 The Trustee considers himself to have been a victim of Mr Colfer's, Mr Peter Bradley's and Mr Meeson's fraud.

78.4 Prior to appointing T12 to set up the Schemes and to be scheme administrator in relation to each Scheme, the Trustee conducted background checks on T12 and the individuals involved:-

78.4.1 The Trustee reviewed T12's website and carried out internet searches.

78.4.2 A false name (Simon Davies) had been provided by Mr Colfer.

78.4.3 The Trustee had considered proposals from alternative pension scheme providers.

78.4.4 The individuals concerned, whom the Trustee met, appeared to be reputable people. For example, Andrew Meeson had been President of the Association of Taxation Technicians.

78.4.5 T12 had set up a number of other pension schemes, so appeared to have the relevant experience. The Trustee has, however, since learnt that those who set up pension schemes through Andrew Meeson and Peter Bradley have experienced similar difficulties to those experienced by the Trustee.

78.4.6 The Trustee accepts that he was naïve to have trusted Mr Meeson, Mr Bradley and Mr Colfer, but highlights that, in any event, benefits to the sum of £2 million have been paid to members in accordance with the purpose of the Schemes.

C.4 On his role as Trustee

79 Over the past few years, the Trustee has worked extremely hard 7 days per week and has pushed himself to the limit in many ways. The Trustee accepts that he struggled to cope with the requirements of being the sole trustee of the Schemes.

80 Although the Trustee has always attempted to deal with matters as best he could, honestly and reasonably, this has had a profound impact on him.

C.5 On the structure of the Schemes

81 The Trustee consulted with individuals in respect of the structuring of the Schemes at the relevant time. However, as Andrew Meeson, of T12, had structured the Schemes, the Trustee is unable to comment on the Schemes' structure.

82 Mr Colfer promoted the Schemes to prospective members and the Scheme documents were drafted by T12.

C.6 On the purpose of the Schemes

83 The purpose of the Schemes was to provide pension and lump sum benefits to members.

84 Between 2014 and 2017, "Norton facilitated transfers out of the Schemes in the sum of approximately £2 million, upon the requests of members". This has been evidenced by HSBC bank statements, showing transfers out to members. Upon receiving a transfer request from LD, Norton transferred the funds to the Schemes' HSBC account, for onward payment to LD, referencing the member's name.

C.7 On his conflicting roles as Trustee and in relation to Holdings, its Subsidiaries and Manorcrest

85 When the Schemes were established, the Trustee did not consider that there was a conflict between his various positions and his duty to the Schemes' beneficiaries and he had not been informed that that was the case.

86 At the time, the Trustee was unaware of the "precise requirements under section 249A of the Pensions Act 2004 and the Codes of Practice, to have in place an effective system of governance and to ensure that there are processes in place to manage conflicts" and he had not been informed that this was necessary.

87 Mr Caldwell has submitted, on the Trustee's behalf, that while the Trustee has acknowledged that he did not establish and operate adequate controls to manage conflicts of interest throughout the whole life of the Schemes, proper controls were put in place from 2018, when the Trustee sought the advice of Dalriada and self-reported the Scheme to TPR to conduct a review of the Schemes' regulatory compliance. Despite the absence of such controls in the earlier years of the Schemes, the Trustee did not act in a manner intended to prejudice members' interests. The Trustee at all times considered that the interests of Norton, as a

successful company, and the interests of the beneficiaries as shareholders in the company, were wholly aligned.

88 At no point has the Trustee ever personally profited from the Schemes. In his witness statement, the Trustee has made the arguments set out in the paragraphs below.

89 He has been in receipt of a monthly salary in his role as "Norton Motorcycles Director" of £2,500.00 per month.

90 The tax liability on any unpaid director's loan was his alone.

91 The total amount of £160,773 that he owed to the companies under director's loans, subsequently decreased.

92 He is now worse off financially than "when Norton was incorporated", so does not consider that he has profited from his position.

93 There were no pension scheme management costs or fees to members, and he did not charge any fees in his role as Trustee. Transfers to members were made at the full value of the investment plus the coupon, without any charges applied. All costs were absorbed by "Norton".

94 "Norton Motorcycles' assets were managed with members' best interests and their preference share position respected. No dividends have ever been paid to the Ordinary shareholders. I have always engaged an external accountant, HSKS Greenhalgh."

95 While the Trustee accepts that he should have taken advice in respect of his fiduciary duties, he had believed that most of these functions would be carried out by the Scheme administrator.

96 He believed that all members of the Schemes had known from the outset that the investment strategy was fundamentally based in an investment in the Norton business. He believed that, by doing all that he could to grow the business and add value to the brand, he was acting in the members' best interests as this would provide the means by which they would secure the return on their investment that had been forecast.

97 In his role as Trustee, he always acted honestly although he accepts he did not have experience of this role.

98 As soon as he became aware of "the position regarding Simon Davies, Andrew Meeson and Peter Bradley", in late 2013, he sought to appoint a new trustee to take over from him. He considered that a professional independent trustee should take over, given what he had found out about how the Schemes had been set up, and approached several independent trustee companies in that regard. However, due to T12's involvement, no independent trustee was willing to take on the role as trustee of the Schemes.

99 When the Trustee sought to appoint Dalriada, in late 2017, Dalriada advised him that they would need to approach TPR due to the issues with T12 setting up the Schemes. The Trustee consented to, and fully co-operated with, this.

100 The Trustee co-operated fully with the investigation that was subsequently carried out by TPR, which took over a year and which resulted in Dalriada's taking over as the Schemes' trustee. The announcement that was sent to members of the Schemes by Dalriada, following its appointment as trustee of the Schemes, was agreed between the Trustee, TPR and Dalriada.

101 The Trustee did, in fact, assure Ms Liddell that he was dealing with TPR regarding his breaches of his statutory duty to effect members' requests to transfer out of the Schemes.

102 Regarding the Trustee's statement that members were charged no fees, Mr Caldwell has submitted on the Trustee's behalf that a normal annual commission to a pension fund manager for an occupational pension scheme might have been 3-4% per annum. The administration fees paid to T12 and subsequently to LD were paid by "the Company". Members who transferred out of the Schemes were paid the full amount of their invested capital, plus the accrued 5% per annum. No fees were charged to them and no profits were taken. While the Trustee was naïve as to his duties as Trustee, he did not seek to use this role to benefit himself as against the interests of the Schemes' members.

103 Mr Caldwell has further submitted, in relation to the Trustee's statement concerning director's loans he took from Holdings and its Subsidiaries, that: Mr Garner regularly repaid his director's loans; and any sums unpaid by him at the end of a tax year resulted in a personal tax liability to him rather than a liability to the beneficiaries. At no point did the indebtedness created by these loans cause such a deficit to the value of the company that it had any impact on the value of the beneficiaries' funds.

104 While the Trustee accepts that he ought to have better managed the conflicts of interest, it would be wrong to conclude that any remuneration or benefits derived from his role as director and CEO of "the company" was taken at the expense of the beneficiaries. In considering the circumstances of a director deriving a profit or benefit from a company there is a clear difference between benefits that affect the value of the business and those that do not. For a business valued at in excess of £50,000,000, the director's liability to repay a loan of £160,000 would not and did not adversely affect preferential shareholders' interests. A proper distinction between the existence of a conflict (which is acknowledged) and the causation of actual loss or expense to the beneficiaries, which is disputed, needs to be drawn.

C.8 <u>On the investment of the Schemes' funds and the Trustee's investment duties</u>

105 Members transferred into the Schemes on the basis that their funds would be invested in preference shares in the Norton Motorcycles business. As Trustee, he was required, by Clause 16 of the Deeds, to take into account any specific written

wishes of members, although the Trustee remained solely responsible for all investment decisions.

106 The Trustee considered investment in Norton Motorcycles to be a good investment at the time when the Schemes were established, having significant growth potential and a strong brand.

107 The Trustee had been misinformed regarding the minimum period for which members' funds were to be invested in Holdings. The Trustee had been advised that the investment had been sold as a ten-year scheme to members and that this would "enable the company to deliver the anticipated growth". Various documents sent to members[14] refer to the preference shares as having a ten-year life, demonstrating that it was the Trustee's honest belief that the investment was for a term of 10 years.

108 Mr Caldwell submitted, on the Trustee's behalf, that I had taken too narrow a view of the terms of the investment in my Preliminary Decision. Members were informed that the investment related to a ten-year period, during which it was expected that there would be no access to funds in the first two years and with incentives, by penalties, not to transfer out from the funds during the first five years.

109 It is not the case that Holdings and its Subsidiaries were struggling financially or that members' shares were used for their operation. Mr Garner:

> "bought Norton Motorcycles in 2008 and the company took £40 million in revenue; the company was trading successfully and increased in value. Unfortunately, between 2012 and 2014 events occurred within Norton's supply chain, whereby motorbike parts were not delivered, so production was affected. This meant that company sales and liquidity temporarily suffered. In spite of this, the business continued to grow, and the customer base and brand equity was good. It was therefore my view that members' investment was a good investment and accorded with the Schemes' purpose.".

110 Mr Caldwell further submitted that, as Norton was dependent on a large input of capital for investment in research, development and manufacturing costs in order to develop new models and engines, when considering whether the Trustee acted prudently in investing Scheme funds in Holdings it would be unrealistic to judge the performance of a five to ten year investment in a company of this nature, based on its performance in Year 2. In fact, the value of the company, despite its ultimate insolvency, grew exponentially, and did achieve shareholder value exceeding the anticipated yield on the beneficiaries' investments.

111 Members were fully aware of the nature of their investment in the Schemes, the Schemes having been promoted to them, by Simon Colfer (aka Mr Davies), as an investment in preference shares in Norton Motorcycles. This was the selling point for the Schemes and seemingly the attraction for the members. The welcome letter that

[14] The Trustee has referred to: an extract from the Donington MC Scheme website; a letter signed by Mr Garner in his capacity as CEO of Norton Motorcycles; and letters from the Trustee to Scheme members dated 11 June 2014, 30 June 2014, and 21 July 2014.

members received set out that the respective Scheme invested in the preference shares of "Norton Motorcycles".

112 Paragraph 13.2 of the Scheme Rules, which members would have received, sets out that it is the decision of the Trustee as to how Scheme funds are invested and the degree of investment choice open to a member.

113 In 2012, when the Schemes were promoted, the banks were risk averse and other funds were failing, so alternative investments and structures were a good opportunity for members at the time.

114 At no point were members misled as to the actual or proposed investment strategy.

115 The Trustee only had sight of the SIPs at a time when the Schemes had already been set up. It was only then that he discovered that the investment period was in fact five years, not ten years, as he had originally understood.

116 The Trustee accepts that he was not fully conversant with the Schemes' governing and policy documents, as required under section 247 of the Pensions Act 2004, and admits that he was not aware, or made aware, of this requirement.

117 The Trustee was not aware of the requirement to have regard to the need for diversification of investments, insofar as appropriate, imposed by Regulation 7(2) of the Investment Regulations. The Trustee first became aware of this requirement during discussions with potential new Scheme trustees, such as Capital Cranfield.

118 When the lack of diversification within the Schemes was raised as an issue by prospective trustees, the Trustee attempted to rectify this and considered the options for diversification. However, "due to the exceptionally high number of transfer requests out of the scheme much earlier than had been anticipated, there was insufficient liquidity to diversify the schemes".

119 While accepting that he could, and should, have been aware of the possibility that a large number of members would request a transfer out of their respective Schemes within a short period after the penalties for realising the investments under the Schemes had ceased to apply, the Trustee does not consider that he could reasonably have predicted that members would seek to transfer out of the Schemes before the end of the five-year penalty period. The Trustee's expectation, based on the original advice that he had received from Mr Meeson, was that the Schemes incentivised a ten-year investment.

120 When he became aware of the matter of diversification, the Trustee considered the possibility of diversifying by investing funds into company property. However, to do so would have required greater liquidity than was available. It was not possible to make alternative investments and at the same time achieve a return for members.

121 Mr Caldwell has submitted on the Trustee's behalf that, while the Trustee's conduct in respect of diversification may be criticised in relation to having failed to take independent advice at the outset, it should not be seen as continuing conduct in

circumstances where he had no, or very little, capacity to change the basis of the investments.

122 In response to a suggestion that the Schemes had been established with fewer than one hundred members each, to deliberately avoid the more rigorous investment duties regarding diversification, that would have applied under the Investment Regulations had the Schemes had more than one hundred members each. He said if that had been the intention of those who devised the Schemes, the Trustee was completely unaware of it. The Trustee did not have the degree of knowledge of pensions regulation, so did not query this structure, and he was not involved in devising the structure of the Schemes.

123 At all times, the Trustee had regard to members' financial interests.

124 Approximately £2 million worth of transfers were paid out to other pension providers or as lump sums to qualifying members, following members' requests between 2014 and 2017. Ms Liddell had told the Trustee that, in her experience, this was exceptionally high, and it caused liquidity issues for Norton Motorcycles.

125 There came a point where, if all members' transfer requests had been actioned, this would have resulted in members' funds being transferred out at zero. This would have been against members' best financial interests and members' interests were in fact best served by retaining the shares. Although, there were liquidity problems, the business and shares still had value. In due course, following the recent sale of Norton, members should be due to receive a substantial return.

126 The Trustee consulted the stockbrokers WH Ireland on listing Norton on the Alternative Investment Market and was provided with a pre-float valuation of the company by them of between £60 and £70 million. At no point has the Trustee been dishonest about Norton's valuation.

127 The flotation did not go ahead, as a consequence of the liquidity issues. Throughout 2019, the Trustee sought to obtain a buyer for Norton, to achieve as much money for the business as possible and therefore for members. In 2019, the Trustee instructed Breeze Corporate Finance to review funding and to seek a buyer or investor for the business. In January 2020, the Trustee travelled with the managing director of Breeze to meet prospective buyers in Delhi. However, when he returned home with an investment offer, Metro Bank had already appointed administrators, BDO Limited. UK was sold on 17 April 2020 to a listed Indian business for approximately £20 million in cash and enterprise value. Following the sale, the Norton balance sheet shows that there will be surplus to enable payment back to preference shareholders. The Trustee continues to assist BDO Limited in the realisation of Norton property, including Donnington Hall Estates which is a subsidiary, valued between £4 million and £7 million. The Trustee is focussing on the sale of assets to maximise preference shareholder returns.

128 The statement of capital dated 12 May 2015, in relation to Holdings, that does not fit with other statements of capital was an anomaly. As far as the Trustee is aware,

everything else was otherwise recorded correctly. "For the avoidance of doubt, the unit price per share was 1 pence".

129 The Trustee said "At all stages, I have sought to act, as Trustee, in the members' best financial interests. I considered Norton to be a great investment and I did my best to make the business a success. I accept I should have sought independent advice at the outset, but genuinely believed that the Schemes would benefit both the business and the Members. When I came to realise that there were problems with my own position and the liquidity of the business as the basis of the investment, I tried to put things right. I have worked hard to sell the business to new owners and to achieve the best value for members."

130 Mr Caldwell has submitted that, following the exposure of the Schemes to those involved in T12, the Trustee did attempt to engage a new trustee to take on the Schemes. However, given the taint of the association with T12, the companies he approached declined to take on the role. Regrettably therefore the Trustee was unable to divest himself of the responsibilities which he accepts would have been best discharged by a professional trustee.

131 The Trustee agreed, on Dalriada's advice having approached Dalriada in 2017, to self-report the Schemes to TPR. The Trustee co-operated with TPR's investigation of the Schemes and has continued to engage with TPR since then.

C.9 On the administration of the Schemes

132 The Schemes have always been operated on a day-to-day basis by Scheme administrators.

133 The Trustee originally appointed T12, in 2012, to carry out the Schemes' administration. Mr Meeson and Mr Peter Bradley, directors of T12, appeared as professionals with substantial experience.

134 LD took over the Schemes' administration in 2014. LD had taken over the administration of a number of schemes from T12, so Ms Liddell contacted the Trustee to suggest that LD took over the Schemes' administration. Prior to LD's taking on the role, the Trustee reviewed LD's website and discussed LD experience with Ms Liddell.

135 A senior employee of LD, Mr T, conducted the majority of the day-to-day correspondence with members. The Trustee was in contact with Mr T several times a week, by telephone and email, to discuss administrative matters, in particular members' transfer requests.

136 It was however unfortunately the case that LD did not have the necessary experience, skills or knowledge to manage the Schemes. This was not apparent to the Trustee at the time and the Trustee assumed that LD was carrying out the work that it was paid to do, with the relevant knowledge and experience. LD was paid £4,000 per month to manage the Schemes.

137 Regarding the Schemes' administrator's role, paragraph 7 of the Deeds states that the administrator is responsible for the management of the Schemes. It is further set out at paragraph 11.3 of the respective Scheme rules that the Scheme administrator is responsible for discharging the duties imposed by the "rules". Any day-to-day issues raised by members were dealt with by the Schemes' administrators. An example demonstrating this is a letter dated 30 June 2014, from LD to a member of the Donington MC Scheme, which was included in the Oral Hearing bundle, it dealt with the member's concerns and requested that any further concerns were directed to Ms Liddell. LD provided the annual updates to members concerning their investment performance.

138 The Trustee accepts that, although it was T12's and later LD's role to manage the Schemes, he did not adequately monitor their administration as he was required to do by section 249A of the Pensions Act 2004. The Trustee had no specific system of internal controls or checks on the administration, apart from his regular contact with the administrators. Unfortunately, the Trustee was not aware of this requirement at the time. This was not, however, deliberate or dishonest.

139 Mr Caldwell has submitted that, due to LD's failure to grant the Trustee access to files held by LD despite the Trustee having requested access, the Trustee has been unable to refer to that information in making his statement.

C.10 <u>On the information provided to members about the performance and value of the Schemes' investments</u>

140 The information provided to members about the performance and value of the Schemes was always accurate and correct to the best of the Trustee's belief.

141 Mr Caldwell has submitted, on the Trustee's behalf, that at all times the value of each members' fund was the value of the preference shares in Holdings purchased by the capital sum invested, plus the annual 5% coupon on the capital sum invested. This was consistent with the SIPs. At all times the value of the company exceeded the value of the preference shares and net liabilities.

142 In his statement, the Trustee has said that Members were kept updated as follows:-

142.1 Upon joining the Schemes, members received a welcome letter signed by the Trustee. The letter referred new members to the Norton website and provided a unique password and username to allow members to access Norton's news.

142.2 Members were updated on how their investment was performing by annual letter, which included details of: how Norton was trading; any plans for expansion; and how members' annual coupons were performing.

142.3 Members received an annual summary table showing: the total Scheme value; total increases or decreases; and projections of what the funds could achieve.

142.4 The annual benefit statements were issued to members by the Schemes' administrators, based on information that the Trustee provided.

143 The Trustee would confirm to LD, when required to, that the value of the Members' share continued to meet the projected value of the capital invested plus the coupon. This was no less than the truth. Even in 2019, WH Ireland valued the business at £60 – 70 million. The Trustee never provided false information to LD on the value of the business.

144 In support of this, Mr Caldwell has submitted on the Trustee's behalf, that it would be wrong and against ordinary business principles to limit an assessment of the value of the Group to a consideration of its balance sheet year on year. The market value of a company, such as Norton, comprises the value of the brand and its potential for growth. That is an uncontroversial position. Thus, in 2019, when the Trustee approached "highly reputable London stockbrokers WH Ireland", he was advised that the value of the Group was £60-70 million. On any view, the value of the Schemes far exceeded the value of funds invested (plus annual coupon). Accordingly, when the Trustee advised LD that this remained the case, year on year, he was telling the truth.

145 The Trustee accepts that, by 2018, the "Norton Motorcycles company" was in financial difficulty. In 2019, members were advised that "we" were seeking investments and were kept fully updated in that regard. The "company" went into administration on 29 January 2020, and a statement was issued on the "company" website to update members.

146 At all times, the Trustee has sought to provide honest updates to members regarding the value of their investments.

147 Regarding the Trustee's appointment of Mr CE, Mr CE was a former Norton employee whom the Trustee later appointed in 2017/18, as a point of contact for members. It transpired that Mr CE had been convicted of tax fraud in 2015. The Trustee was prepared to give Mr CE a second chance, despite his past. His role at Norton was limited to answering telephone calls to assist with the volume of calls from members.

C.11 <u>On the Donington MC Scheme's Deed pre-dating Manorcrest's incorporation</u>

148 The reason for the date of the Donington MC Scheme's Deed pre-dating Manorcrest's incorporation was an error on the part of the legal firm who drafted the Deed. The Deed was not falsified and at no point has the Trustee acted without integrity.

C.12 <u>On the Applicants' complaint of maladministration on the Trustee's part</u>

149 The Trustee does not accept any assertion that he has not sought to put right any wrong caused to members. The Trustee has sought the advice of various authorities and professionals in order to rectify issues in the best interests of members. The Trustee highlights, in particular, the following:-

149.1 When requested, by HMRC in 2017, to attend an interview with Ms Liddell in relation to HMRC's investigation into "the Schemes [*sic*] created by Andrew

Meeson", the Trustee engaged fully with HMRC and corresponded with it to assist its investigation.

149.2 Following contact with HMRC regarding its investigation, the Trustee sought advice from Independent Tax to seek advice for members.

149.3 The Trustee has co-operated fully with the police during their investigations into Simon Colfer / Davies, Mr Meeson and Mr Peter Bradley. The Trustee has provided a witness statement to South Wales Police, which was relied upon by the prosecution.

149.4 The Trustee accepts that mistakes have been made, due to naivety (in particular, in trusting individuals who purported to be professionals) and inexperience, as opposed to dishonesty.

150 Regarding the Trustee's failure to respond to members when they tried to contact him:-

150.1 Norton received an exceptionally high number of transfer requests and there were simply not sufficient liquid assets to deal with all of the requests. If transfer requests had been agreed and paid out at a time when there was not sufficient liquidity, the members would have been transferred out at zero.

150.2 The Trustee started to receive personal abuse from members who did not appear to accept this and admits he did not engage with members who were subjecting him to this abuse. This resulted in several members of Norton staff handing in their notice due to the way in which they were spoken to by members.

150.3 The Trustee attempted to manage the situation as best he could, but became overwhelmed.

150.4 The Trustee highlights that Rule 9 of the Schemes' Rules sets out that members' requests to transfer will be dealt with by the Scheme administrators, who will make relevant enquiries.

151 The Trustee has engaged with my Office as best he was able to at all relevant stages, referring to correspondence from his solicitors, JMW Solicitors LLP, dated 10 March 2020, which sets out in detail his correspondence with my Office and the reason he did not attend the Oral Hearing. In particular, that letter explained that the Trustee had been advised by his former solicitor not to attend the hearing as he had not received the bundle of evidence.

151.1 The Trustee is willing to co-operate fully with my investigation.

151.2 If I were to direct that the Trustee pay the sum of £6,000 to each Applicant, as I suggested in my Preliminary Decision, the Trustee would be forced to commence bankruptcy proceedings. In light of the above comments and observations, along with the submissions made by the Trustee's lawyer, the

Trustee has proposed that he makes a reduced, ex gratia, payment to each Applicant.

C.13 On the Trustee's honesty

152 Mr Caldwell has submitted that, while the Trustee accepts that he has erred in failing to diversify the funds beyond the investments in preference shares, his conduct towards members was never dishonest. As stated by the Trustee, members were informed at the outset that their funds were to be invested in preference shares in the Group. That was the stated purpose of the fund and it is reasonable to conclude that the nature of the investment, in "the iconic British company Norton", was most members' motivation for investing in the Schemes.

153 While investing all of the Schemes' funds in the preference shares could not be said to have been wholly prudent, it was done openly, honestly and with the implied agreement of the beneficiaries. The Trustee made no false representations or rash promises, and the basis of the investment, although flawed, was exactly what had been promised to the beneficiaries.

154 It is plain, despite the ultimate failure of the company, that from the outset the Trustee tried to make Norton a success. Norton was a genuine business with considerable potential for growth. While it is possible that the Trustee allowed his concerns for the company to outweigh the discharge of his obligations as Trustee, it cannot reasonably be said that he did not try to maximise the value of the company in which the beneficiaries were shareholders.

155 If the Trustee genuinely believed that he was acting in members' best interests by growing the Group, this factor weighs heavily in his favour when considering whether the state of his mind was dishonest. Mr Caldwell has cited Millet LJ in the case of Armitage v Nurse, paragraph 251, at E-F:

> "It is the duty of a trustee to manage the trust property and deal with it in the interests of the beneficiaries. If he acts in a way which he does not honestly believe is in their interests, then he is acting dishonestly. It does not matter whether he stands or thinks he stands to gain personally from his actions."

156 Mr Caldwell has further cited Millet LJ at paragraph 252, with emphasis added:

> "A trustee who is guilty of such conduct either consciously takes a risk that loss will result, or is recklessly indifferent whether it will or not. If the risk eventuates he is personally liable. <u>But if he consciously takes the risk in good faith and with the best intentions, honestly believing that the risk if one which ought to be taken in the interests of the beneficiaries, there is no reason why he should not be protected by an exemption clause which excludes liability for wilful default."</u>

157 Mr Caldwell submits that having acted in good faith with the best intentions, the Trustee cannot be said to have been recklessly indifferent to the members' interests.

C.14 On my proposed directions in the Preliminary Decision

158 Mr Caldwell has submitted that a direction for the Trustee to pay interest on the invested funds is in excess of my jurisdiction provided by paragraph 6 of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996[15].

159 Mr Caldwell has invited me to review my conclusions in the Preliminary Decision based on the submissions made on behalf of the Trustee.

160 Regarding my proposed directions in the Preliminary Decision, for the Trustee to pay penalties for exceptional maladministration causing injustice, it is impossible for the Trustee to address findings of injustice in the absence of the statements or applications made by the Applicants.

161 The effect of the directions that I proposed in my Preliminary Decision is more than merely compensatory and it is recalled that Article 6 of the ECHR is engaged.

162 The Trustee has stated that an order in the terms that I proposed would lead to his personal insolvency and has submitted that this would be a disproportionate outcome to these proceedings. Mr Caldwell has invited me to propose that the Trustee makes a more limited *ex gratia* payment, to reflect the Applicants' inconvenience.

D Summary of LD's position

163 LD became involved with the Schemes as their administrator in good faith when it took over the Schemes' administration duties from T12 Ltd in 2014. LD was not aware, at the time, of the alleged breaches of trustee duty by the Trustee.

164 LD was only the Schemes' administrator between 2014 and 2018, so it was not involved as administrator until after the Schemes' investments had been made. LD did not contact TPR in relation to the Schemes' investments, as it was not aware of the issues that existed in that regard. LD states that the reason that it did not comply with the requirements to submit company accounts to HMRC was because that had always been something that the Trustee had dealt with and the Trustee increasingly took over the Schemes' administration.

165 LD states that, when it took over as the Schemes' administrator, there was much work to be done in relation to the Schemes. LD concedes that it ought to have considered the Schemes' governing documentation in greater detail and that its staff should have been given the necessary training to inform them of the requirements of the role of scheme administrator and the applicable statutory duties. LD also concedes that, when it realised that there were problems with the liquidity of the Schemes' funds, it ought to have reported its concerns to TPR. However, LD had not realised that it was under any duty to do so.

[15] Paragraph 6 of the Regulations referred to provides that, for the purposes of section 151A of the PSA 1993, under which I may direct a respondent to a complaint to pay interest on any payment in respect of benefit under a pension scheme which I consider ought to have been paid earlier, the prescribed rate of interest shall be the base rate for the time being quoted by the reference banks.

166 LD has submitted, since the Oral Hearing and in response to my Preliminary Decision, that although LD lacked some knowledge to act as scheme administrator, it had engaged with a "fully qualified trustee company" who were able to advise LD. LD provided that trustee company with all of the relevant information regarding the Schemes including the SIP, welcome letters, website information and company accounts for the relevant Norton businesses. The trustee company was completing due diligence in order to decide whether to become trustee of the Schemes. LD spent four months sending information and arranging meetings between the Trustee and that trustee company. LD believed that the trustee company was in discussion with HMRC and TPR, which meant that TPR was aware of the situation regarding the Schemes from 18 November 2013 to 30 April 2014.

167 LD did not realise that there was a requirement for a pension scheme's investments to be diversified. Even if it had been aware of that requirement, LD does not consider that it would have been able to influence the Trustee in his investment choices. When it became aware of the nature of the Schemes' investments, LD had considered that the investment, in preference shares which purportedly entitled the Schemes' members to a fixed dividend of 5% annually, was a good investment for the Schemes.

168 Since the Oral Hearing, Ms Liddell has further submitted, on LD's behalf, that it had no reason to question the rate of growth of the investments. As the investments were preference shares, in any year the rate of growth would have been the coupon, at 5% of the investment value. This coupon could not have been changed regardless of performance.

E Conclusions

Procedure followed during this investigation

169 Mr Caldwell on behalf of the Trustee, has submitted that my Office has breached the requirements of Rule 5(2) of the Procedure Rules, which require my Office to supply the details of any complaint made, together with copies of supporting documentation received from the complainant, to the respondent. Mr Caldwell asserts that this has resulted in a breach of Article 6 of the European Convention on Human Rights (**Article 6**) as the Trustee was allegedly unable to prepare for, and therefore attend, the Oral Hearing.

170 My Office has dealt in detail with Mr Caldwell's submissions by correspondence. The allegations are refuted. I am satisfied from the correspondence trail between my Office and the Trustee and/or his representatives that the Trustee has been sent all particulars of the Applicants' complaints; and my Office had been given no reason to suspect that he had not received them. The Trustee has been given every opportunity and considerable time, while my Office has been investigating the issues raised by the Applicants, to request any further details that he considered he needed in relation to any of the complaints made against him. It is my view that the correspondence sent to the Trustee was sufficient to have given him the chance to

understand, put right and/or respond to the complaints made against him. My Office has, therefore, complied with the requirements of Rule 5(2) of the Procedure Rules. Perhaps (see footnote 16 below) the Trustee did not read the correspondence sent to him by my Office at the outset. But this is not a matter within my Office's control. Any failure on the Trustee's part does not constitute a breach by my Office of Rule 5(2) of the Procedure Rules.

171 Furthermore, the notice of the Oral Hearing, which was sent to the parties three weeks in advance of the Oral Hearing, was also a comprehensive explanation of the complaints made against the Trustee and the issues covered by my investigation. Had there been a breach of Rule 5(2), which we refute in the strongest possible terms, it was so rectified.

172 I have outlined, below, the steps that my Office has taken to comply with Rule 5(2) of the Procedure Rules and Article 6 ECHR.

Compliance with Rule 5(2) of the Procedure Rules

173 To understand the backdrop to this Determination, it is necessary to have regard to complaints first made in 2017. The majority of the Applicants had first complained to my Office in 2017 that the Trustee had not actioned their request to access their funds invested under their Scheme, in the form, either of a transfer out of the Scheme, or the provision of benefits under the Scheme.

174 Throughout 2018 and 2019, my Office received an increasing number of such complaints. In each case, once the complaint had been accepted for investigation, my Office wrote to the Trustee, enclosing a copy of the complaint form that my Office had received from the relevant Applicant, together with any supporting documentation. In each case, my Office requested a formal response to the complaint and allowed the Trustee three weeks in which to respond to the complaint. My Office's letters to the Trustee were addressed to the Trustee at the postal address for UK, that had been stated in recent correspondence from the Trustee to Scheme members.

175 The Trustee did not provide any formal response to any of those complaints. So, my Office wrote again further to its formal powers under section 150(1) of the 1993 Act. In response to my Office's formal request for information, the Trustee, acknowledged a complaint which was subsequently determined by the Deputy Pensions Ombudsman on 2 November 2018[16] . Despite acknowledging that complaint, the Trustee failed to provide a response dealing with the allegations against him and did not inform my Office that he had not received the necessary details of the complaint to enable him to do so. Nor did he engage with the further three complaints that led to that Determination (see paragraph 178 below).

[16] PO-19196. For clarity, the applicant in relation to PO-19196 is not one of the Applicants.

176 My Office followed up initial letters to the Trustee by email and/or post, sent to both the Trustee's business email address and that of his secretary.

177 It is clear that the Trustee was aware of the complaints made against him. For example, a 'read receipt' email came back from an email sent in respect of one of the Applicants by the Adjudicator handling that complaint[17].

178 The Deputy Ombudsman and I determined, in total, four of the original complaints made to my Office against the Trustee[18], all of which were upheld. The Trustee was notified of each of those Determinations and was sent a copy, by post, to UK's address, together with details of how he could appeal those Determinations should he choose to do so. I note that the Trustee subsequently made a statement to the 'FT Adviser' publication, in relation to its article of 21 June 2019, commenting on the situation of the applicant in one of the cases that had been determined (PO-22695) and on the appointment, to the Schemes, of an independent trustee.

179 In my Determination of PO-22695, while I upheld the applicant's complaint and directed the Trustee to pay the transfer value as requested, I also made certain observations, in paragraphs 36 to 55 of the Determination, concerning the manner in which the Trustee had invested the Scheme's funds and managed the administration of the Schemes. I noted that the applicant would be entitled to make a fresh complaint to my Office, on the basis of those observations, if the Trustee did not pay the applicant's transfer value in accordance with my directions under that Determination.

180 Following the publication of that Determination, other Applicants whose own complaints were ongoing at that time, amended their complaints so that the basis of their complaints was as set out in paragraphs 36 to 55 of that Determination. On receipt of each of those amended complaints my Office wrote to the Trustee to notify him of the amendments and to request a formal response. In each case, the Applicant's original complaint form, as well as the subsequent correspondence from the Applicant in which the Applicant amended his or her complaint, was included with that letter to the Trustee. The Trustee was given three weeks to respond to each amended complaint.

181 My Office also received additional complaints, from members of the Scheme who had not previously made a complaint to my Office, the details of which were also sent to the Trustee. All of this correspondence was sent, by post, to the Trustee at UK's address as and when my Office received the complaints.

182 My Office emailed the Trustee in November 2019, to remind him that he was required to respond to the complaints made against him in accordance with the applicable

[17] The Adjudicator had sent her email to the Trustee on 24 January 2019, copying in Mr Garner's secretary, to remind the Trustee that his formal response was due in respect of the complaint in question, which the Adjudicator had sent to the Trustee by post on 1 November 2018. However, the 'read receipt' email, received by the Adjudicator on 27 June 2019, shows that it took the Trustee nearly five months to open his email.

[18] PO-19196, PO-21059, PO-20474 and PO-22695.

timescales and also to make the Trustee aware that an Oral Hearing would be held as part of my Office's investigation into those complaints. This was followed up by another email to the Trustee, at his business email address, on 11 December 2019, proposing three potential dates for the Oral Hearing and giving the Trustee the opportunity to indicate his preferred date.

183 The Trustee replied on the same date, confirming that he would be available to attend the Oral Hearing on 13 February 2020. The Trustee did not ask for any further details of the complaints that had been made against him and that were to be investigated at the Oral Hearing, which had been mentioned in our email to the Trustee in November 2019.

184 The Trustee was sent a copy of the bundle of documents to be considered at the Oral Hearing on 10 February 2020, by email to his personal email address; this email address being one which the Trustee had previously acknowledged our correspondences when used. We are aware that the Trustee told his then legal adviser, Mr Jenkins, that he had not received the bundle of documents. But the Trustee's current legal advisers, JMW Solicitors LLP (**JMW**) has since confirmed on 20 May 2020 that "it is agreed that the bundle of documents (containing items 1 to 38) was served upon [the Trustee]"[19]. JMW stated that, it was accepted that the Trustee was aware of the nature of the complaints against him as detailed in the List of Issues sent to him with the notice of the Oral Hearing. But it also said witness statements and full particulars of the complaints had not been served and that, to have formed the List of Issues that were addressed at the Oral Hearing, a substantial amount of material must have been received and collated from the Applicants.

185 My Office responded to JMW on 26 May 2020 and set out the details regarding my Office's correspondence with the Trustee, contained in paragraphs 173 to 183 above, in support of my Office's compliance with Rule 5(2) of the Procedure Rules. In response, JMW has acknowledged that there has been an "ongoing dialogue" between my Office and the Trustee for a number of years and that JMW does not dispute that the necessary documents have been sent by my Office.

186 However, as the Trustee maintains that he has not had sight of those documents and JMW has requested that the documents be provided direct to them so that JMW can be certain that all relevant material has been received and can be reviewed, my Office has resent them with this Determination. Given the many and ample opportunities that the Trustee has had to make my Office aware that he had not received documents necessary to enable him to understand the nature and basis of the complaints made against him and to request further copies, I do not consider it necessary, or indeed that it would be fair, to allow this to delay my investigation and the Determination of the complaints in hand.

[19] This was stated in a letter, from the Trustee's currently instructed solicitors, JMW Solicitors LLP, dated 20 May 2020.

Compliance with Article 6 ECHR

187 Mr Caldwell has submitted, on the Trustee's behalf, that the Trustee has not been given an opportunity to attend a fair and public hearing, as required by Article 6 ECHR, as he had not received the necessary information to enable him to prepare his case for the Oral Hearing. In addition to the steps that my Office took to ensure that the Trustee was aware of the complaints made against him and the issues that I would be exploring at the Oral Hearing, my Office took every step to ensure that the Trustee would be able to attend and contribute to the Oral Hearing.

188 The Trustee made my Office aware that he had concerns for his personal safety, during telephone conversations, on 6 February 2020 and 7 February 2020, respectively. My Office therefore took steps to ensure the safety of all parties at the Oral Hearing, such as the hiring of security guards for the duration of the Oral Hearing. The Trustee explained that if he did not feel able to attend the Oral Hearing it was be because he was concerned about criticism and abuse from other attendees and the effect on his family. He did not say it was due to any inability to understand or contribute to the proceedings. We had offered to meet the Trustee before the Oral Hearing and ensure his safe passage into and from his personally allocated conference room. Unfortunately, notwithstanding all the arrangements made to accommodate and protect the Trustee, he chose not to attend the Oral Hearing.

189 I therefore refute any accusation that my Office has failed to comply with the requirement, under Article 6 of the ECHR, to provide the Trustee with a fair and public hearing.

Order of conclusions

190 I will consider the Applicants' and Dalriada's complaints under the following headings, to determine whether the Trustee and/or LD, as applicable, has acted in maladministration, or (in the Trustee's case only) has committed any breach of trust.

E.1 Status and structure of the Schemes
E.2 Mr Garner's roles as Trustee and in relation to Manorcrest, Holdings and the Subsidiaries
E.3 Investment of the Schemes' funds
E.4 Administration of the Schemes
E.5 Information provided to members
E.6 The Trustee's liability
E.7 My response to the Trustee's submissions on the Directions
E.8 Dalriada's costs and fees

E.1 Status and structure of the Schemes

191 In my Preliminary Decision I had set out my views on the status and structure of the Schemes and the Trustee has since responded that he does not take issue with my observations.

E.1.1 The Schemes' status as occupational pension schemes

192 The statutory investment duties, under Part I of the 1995 Act, only apply to occupational pension schemes. It is, therefore, necessary to determine whether the Schemes are occupational pension schemes, in order to decide the extent to which the Trustee was required to comply with Part I of the 1995 Act, in investing the Schemes' funds.

193 Section 1(1) of the 1993 Act, defines the term "occupational pension scheme" as:

> "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."

194 Section 1(2) of the 1993 Act applies as follows:

> " 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."

195 Section 181(1) of the Pension Schemes Act 1993, defines "employment" as follows:

> "employment" includes any trade, business, profession, office or vocation and "employed" shall be construed accordingly except in the expression "employed earner".

196 Following the judgment in the case of *Pi Consulting v The Pensions Regulator*[20] (**Pi Consulting**), the following two main questions need to be answered affirmatively in order to conclude that the Schemes are occupational pension schemes[21]:

> "(a) Was the scheme in question 'for the purpose of providing benefits to, or in respect of, people with service in employments of a description or for that purpose and also for the purpose of providing benefits to, or in respect of, other people'? [(the **Purpose Issue**)]
>
> (b) Was the scheme in question established by, or by persons who include, a person to whom section 1(2) of PSA 1993 applied when the scheme was established? [(the **Founder Issue**)]"

197 In Pi Consulting, Mr Justice Morgan considered that the Founder Issue gave rise to two sub-issues:

> (a) For the purposes of section 1(2)(a) of PSA 1993, did the founder have to employ a person of the relevant description at the time when the scheme was established? (**Sub-Issue (a)**)
>
> (b) If the answer to (a) was 'yes', did the founder employ such a person at that time? (**Sub-Issue (b)**).

198 Considering the Purpose Issue, in Pi Consulting, Morgan J found that the purpose of the scheme in question should be considered objectively, "rather than turning upon subjective matters such as, the motives, or the intentions, or the beliefs, of one, or even all, of the parties to the documents which established the scheme"[22].

199 As Morgan J stated in Pi Consulting[23]:

> "Section 1(1) of [the 1993 Act] refers to the purpose of the scheme being to provide benefits for certain people. Thus, the court needs to identify the people who can take benefits under the scheme."

200 The purpose of each Scheme is stated clearly in Recital A (see Appendix 1) as being the sole purpose to provide pensions and lump sum benefits under occupational pension arrangements to certain people and this is reflected in the Rules. The people who can take benefits under each Scheme are identified in Recitals A and B and in Rule 3 of each Scheme's governing documents.

201 I understand that payments have been made from the Schemes to members, possibly to the total value of £2 million. I have seen copies of bank statements, in respect of the transfers out of two members' funds, to support that statement, which I accept as evidence that some members were indeed granted access to their funds on request.

[20] [2013] 100 PBLR (024) - [2013] EWHC 3181 (Ch).
[21] Paragraph 22 of Pi Consulting.
[22] Paragraphs 36 and 39.
[23] Paragraph 41.

202 Therefore, I consider that each of the Schemes is within the scope of section 1(1)(a)(ii) of the 1993 Act, and therefore satisfies the Purpose Issue.

203 Considering the Founder Issue, Morgan J made no finding in Pi Consulting, in relation to Sub-Issue (a). Morgan J did not consider that such a finding was necessary in that instance, as he had first considered Sub-Issue (b) and had answered it affirmatively in relation to the pension schemes that he was considering.

204 In considering Sub-Issue (b), Morgan J agreed with the parties' submissions that a company director held an "office" in accordance with the definition of "employment" under section 181(1) of the 1993 Act. It followed, that the director of the founding company of each of the schemes in question was in "employment" and was therefore "employed" [24].

205 Looking at section 1(2)(a) of the 1993 Act (see paragraph 194 above), Morgan J found that, in cases where the director of a pension scheme's founding company received no remuneration[25], the person who employed that director was the founding company.

206 On that basis, Morgan J found that, in the case of each of the pension schemes under consideration in Pi Consulting:

> "by reason of the fact that the founder was a limited company which had a director at the point in time when the relevant scheme was established and, in the case of each scheme, the director was in an employment of the description concerned, then the founder test in section 1(2)(a) of [the 1993 Act] was satisfied. This is so even if counsel for the Pensions Regulator is right that the founder must have a relevant employee at the point in time of the establishment of the scheme."[26].

207 When the Schemes were established[27], Manorcrest had at least one individual director[28]. The fact that Manorcrest was a dormant company (see paragraph 23 above) indicates that its directors were not entitled to any remuneration. On that basis, applying the reasoning in Pi Consulting, I consider that Sub-Issue (b) of the Founder Issue is satisfied in relation to each Scheme. I have concluded, that each

[24] Paragraph 63 of Pi Consulting.
[25] If the director of a pension scheme's founding company were entitled to receive remuneration, section 1(3) of the 1993 Act would apply, in which case the person responsible for paying the director's remuneration (who could be a person other than the company in which the director held office as a director) would be taken to employ the office holder. Section 1(3) of the 1993 Act was not held to be relevant in Pi. Consulting as the evidence suggested that the directors of the companies concerned were not entitled to receive remuneration.
[26] Paragraph 72 of the 1993 Act.
[27] In relation to the Donington MC Scheme, this is on the basis that that Scheme was established at some point between Manorcrest's incorporation and the admission of the first member of that Scheme, as explained in paragraph 24 above.
[28] Mr Garner was appointed as a director of Manorcrest on 29 March 2012 and Mr Roy Sheraton was a director of Manorcrest from its incorporation on 29 March 2012 until 5 April 2012.

of the Schemes is an occupational pension scheme, as defined under section 1(1) of the 1993 Act.

E.1.2 The structure of the Schemes' funds

208 I note that the provisions of the Schemes' governing documents set out in Appendix 1 above are identical to those of the pension scheme that was considered in the case of *Dalriada Trustees v Woodward*[29] (**Woodward**). In Woodward, the defendants had submitted that the schemes in question were divided into "sub-trusts", each member having his or her own fund or 'pot' under the schemes. The Chancellor, Sir Andrew Morritt, who was the judge in that case, disagreed with that submission and found that the schemes were set up under single trusts, in which members' funds were pooled[30]:

> "The argument for [the defendants] rests largely on the terms of clause 13. The use therein of the word 'Arrangement' appears to be against the background of the definition of that word in s.152 Finance Act 2004. That section also includes the definition of money purchase benefits. It is, in my view, clear that the 'separate and clearly designated account' to which clause 13 refers is intended to reflect the 'amount available for the provision of benefits…to the member' by reference to which, in accordance with s.152(4), the rate or amount of the pension or lump sum benefit to which that member is entitled is to be calculated. Such an accounting tool does not predicate a series of sub-trusts, one for each member; it is consistent with a single trust scheme for all the members whose benefits are variable by reference to the contributions made by or in reference to them. The requirements of clauses 16 and 19 do not lead to any different conclusion." (paragraph 32 of Woodward).

209 The Chancellor, in Woodward, also considered that a right of a member to require the return to him of his "separate and clearly designated account":

> "would be inconsistent with the trusts being both irrevocable and non-terminable by a member, as provided by clauses 3 and 7. Second, such a right, if exercised, would give rise to unauthorised payments. Not only would such a right have to be declared in the application for registration, as required by s.153(3) [of the Finance Act 2004], but the failure to declare it would constitute a ground for deregistration under s.158(1)(e), consequential liability to a deregistration charge under s.242 and a breach of the trustees duty under clause 5. This would be seriously detrimental to all the members not just the one to whom the unauthorised payments had been made. Third, the consequential 'pension liberation' would infringe s.18 to 20 Pensions Act 2004." (paragraph 34 of Woodward).

[29] [2012] 086 PBLR (017) - [2012] EWHC 21626 (Ch).
[30] The clauses referred to in the judgment of Woodward were numbered the same as those set out in Appendix 1 in relation to the Schemes.

210 The Chancellor found, that a member of any of the pension schemes considered in Woodward was "one of many beneficiaries entitled to benefits from the trust assets, the rate or amount of which is ascertainable in accordance with the rules and by reference to the amount credited to his account for contributions made by or in reference to him and investment returns thereon." (paragraph 35 of Woodward).

211 The Chancellor further observed, at paragraph 37 of Woodward, that:

> "If the underlying facts are made good then Dalriada is entitled to sue in respect of them. This is clear from the passage in Lewin on Trusts 18th Ed paragraph 39–76 where the editors write:
>
> *The other trustees, including any judicial or other new trustees, have locus standi to take proceedings against defaulting trustees. They can obtain replacement of lost assets even though they were themselves also guilty of the breach. Usually, where trustees take proceedings against former trustees to have a breach of trust redressed, no issues arise between one beneficiary and another, or as between a beneficiary and the current trustees. The object is to secure the return of the trust property for the benefit of all the beneficiaries according to their respective interests.*
>
> The proposition is well established by the authorities cited in the footnotes, not least *Young v Murphy* [1996] VR19. The availability of defences to a claim by an individual beneficiary, as indicated in *Target Holdings v Redfern*, is irrelevant to such a claim."

212 Given that the provisions of each of the Schemes are identical to those considered in Woodward in all material respects and I have seen nothing to cause me to consider otherwise, I find that no member of any of the Schemes has any sub-trust under which his or her benefits are maintained or ringfenced in any way.

213 The Trustee invested the monies transferred into the Schemes "collectively" in Holdings' preference shares on a pooled basis. The pension statements issued to members purported to identify the initial sums transferred in by the Applicants and the return on that investment on an assumption a coupon was paid on the notional investment in the preference shares.

214 Therefore, any reduction in the Schemes' assets by way of lost investments or any other way, will have reduced each member's beneficial entitlement under their respective Scheme, on a pro rata basis.

E.2 Mr Garner's roles as Trustee and in relation to Manorcrest, Holdings and the Subsidiaries

215 As explained in paragraphs 20, 23, 27 and 28 above, until TPR appointed Dalriada as independent trustee with exclusive powers on 21 May 2019, Mr Garner was the sole trustee of all three Schemes, as well as being the sole director of Manorcrest Limited (appointed 29 March 2012) and the CEO and owner of Holdings and the

Subsidiaries. Clearly, Mr Garner's interests, in his various capacities relating to Holdings and the Subsidiaries, conflicted with his duties to the Schemes' beneficiaries in his capacity as Trustee.

216 The Trustee was under a fiduciary duty not to profit from his position in relation to Holdings and the Subsidiaries at the expense of the Schemes' beneficiaries and not to be in a position of conflict of duty or interests.

217 The Trustee was also under a common law duty to act with prudence, requiring him to take such care as an ordinary prudent man of business would take in managing his own affairs[31]. Case law[32] has further established that that standard of prudence is to be determined by reference to the actions of an ordinary man of business, who was under a moral obligation to provide for others.

E.2.1 TPR's Code of Practice no.13

218 Code of Practice No.13 (the **2013 Code**), published by TPR in November 2013, and entitled 'Governance and administration of occupational defined contributions trust-based pension schemes', applied to the Trustee. The 2013 Code was replaced by a new code[33] in July 2016 (the **2016 Code**).

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

220 Paragraph 143 of the 2013 Code also states that the statutory requirement under section 249A of the Pensions Act 2004, to have in place an effective system of governance, includes a requirement for pension scheme trustees to ensure that they have processes in place to manage their conflicts of interest.

221 The **2016 Code** includes a section entitled 'Conflicts of interest'. TPR's expectations regarding the steps that pension scheme trustees should take to manage conflicts of interest are set out in paragraphs 61 and 62 of the 2016 Code:

> "61. Conflicts of interest may arise from time to time in the course of running a pension scheme, either among trustees themselves or with service providers or advisers. Part of the requirement in law to establish and operate adequate internal controls[34] includes having processes in place to identify and manage any conflicts of interest.
>
> 62. We expect these controls to include, as a minimum:
>
> - a written policy setting out the trustee board's approach to dealing with conflicts

[31] Speight v Gaunt [1883] EWCA Civ 1.
[32] Re *Whiteley* (1886) 33 ChD 347.
[33] Code of practice no: 13: 'Governance and administration of occupational trust-based schemes providing money purchase benefits'.
[34] i.e. in accordance with section 249A of the Pensions Act 2004.

- a register of interests (which should be reviewed at every regular board meeting)
- declarations of interests and conflicts made at the appointment of all trustees and advisers
- contracts and terms of appointment to require advisers and service providers to operate their own conflicts policy and disclose all conflicts to the trustee board."

222 The Trustee has admitted that he was not aware of the above governance requirements, or of the requirement, under section 247 of the Pensions Act 2004, to have acquired knowledge and understanding of the law relating to pensions and trusts within six months of becoming Trustee of the Schemes, so no steps were taken to manage any conflict of duty or interests in relation to any of the Schemes and no policy was in place to do so.

223 Further, Holdings' and the Subsidiaries' financial statements show that Mr Garner had taken out directors' loans from those companies. For example, as at 31 March 2018, the Group accounts showed that Mr Garner owed a total of £160,773. This suggests to me that, in addition to his failure to manage his conflicted duties and interests, Mr Garner was putting his own interests before those of the Schemes' members by taking advantage of his position as director of Holdings and the Subsidiaries to access monies in the form of directors' loans from Holdings and/or the Subsidiaries.

224 Mr Garner's various roles, in relation to Holdings, the Subsidiaries, Manorcrest (set out in paragraph 216 above) and as Trustee, clearly resulted in his interests being conflicted.

225 The Trustee has breached the requirements of section 249A of the Pensions Act 2004, and has acted in breach of his fiduciary duty not to be in a position of conflict of duty or interests. The Trustee also failed to act in accordance with the 2013 Code, and I find that such failure to have regard to the 2013 Code amounts to maladministration on the Trustee's part.

226 The Trustee has submitted that he has not, at any point, profited from the Schemes, pointing out that members were not charged any fees or pension scheme management costs, that no dividends were paid to ordinary shareholders of Holdings and that the tax liability payable on his loans from Holdings and its Subsidiaries was his alone. The Trustee further submitted that the directors' loans did not cause such a deficit in "the company's" value (by which I assume the Trustee meant UK's value) as to have had any impact on the value of members' funds, referring to the "company's value" having been "in excess of £50,000,000". The Trustee has said that "Norton Motorcycles" assets were always managed with members' best interests and their preference share position respected, that no dividends were paid to Ordinary shareholders and that he has always engaged an external accountant, HSKS Greenhalgh.

227 I questioned the Trustee regarding his submission that no fees had been charged to members of the Schemes, as it was apparent from a benefit statement relating to one of the Applicants, which was included in the Oral Hearing bundle, that a 5% administration charge had in fact been levied on that Applicant's fund. The Trustee has confirmed that the administration charge applied by T12 was declared at the outset, prior to funds being transferred into the Schemes; and no annual fees or charges were applied.

228 Nevertheless, Mr Garner took director loans from Holdings and/or the Subsidiaries at a time when, as Trustee, he was failing to provide transfer values to Scheme members due to a lack of liquidity of funds in the Schemes. The payment, from the Schemes to Holdings, of several millions of pounds, will clearly have benefitted Mr Garner's business financially. This raises serious questions as to the Trustee's integrity. I cannot see how any trustee could take director loans from a company, in which the pension schemes' assets were invested, while at the same time claiming, as trustee of that pension scheme, that he could not access monies from that company to comply with his statutory duty to provide the scheme members with a transfer value or benefits under the scheme. Moreover, the evidence indicates that the Trustee was not even paying into the Schemes the dividend payments from Holdings due from the preference shares.

229 In any case, the Trustee seems to have missed the point in relation to his failure to avoid or manage his conflicts of interests. Regardless of whether the Trustee actually benefitted financially, either by taking fees from members' funds, or by taking directors' loans from Holdings and its Subsidiaries once members' funds had been invested in Holdings, it is clear that the Trustee's intention was to use members' funds, obtained in his capacity as Trustee, to grow a business that he would benefit from in his capacity as CEO and director of Holdings and of each of the Subsidiaries, in breach of his duty not to profit from his position as Trustee. Mr Garner's role in relation to those companies clearly created a conflict of interest with his role as Trustee.

230 I note that Mr Garner had entered into the Guarantees when each Scheme invested in Holdings' preference shares. However, the Trustee has informed my Office that he has no recollection of having had sight of the Guarantees. Given the large amount that the Trustee, in his capacity as Mr Garner, had assumed personal liability, in the event that Holdings was unable to pay the annual dividend and redeem the shares, I find it most surprising that the Trustee seems to have forgotten having sight of the Guarantees. I understand that the annual 5% coupon has not been paid into the Schemes in every year since the purchase of the preference shares. It seems, therefore, that the Guarantees were neither acted upon by Mr Garner nor enforced by the Trustee. I have seen no evidence that the Trustee either put in place any controls to ensure that demands were made on the Guarantees or delegated that function to any other person, which indicates to me that the Trustee may not have had any serious intention to have ensured that the Guarantees were acted upon. On

that basis, I do not consider that the Trustee's entering into the Guarantees has in any way mitigated his conflict of interest.

231 As a consequence of the Trustee's investment of the Schemes' funds in Holdings, an action in respect of which the Trustee's duties to Scheme members conflicted with his duties as director and CEO of Holdings and its Subsidiaries, members' funds have been lost. As I shall explore further in Section E.3 of this Determination, investing the Schemes' funds in their entirety in one investment cannot be said to have been a reasonable or prudent manner of investing those funds.

232 The Trustee's submissions: that he was unaware of any duty or requirement to avoid conflicts of interest; and that he made attempts to appoint a professional trustee on becoming aware of the issues concerning T12, are not in dispute. However, they do not assist him in relation to the complaints made against him concerning his failure to comply with both: the statutory requirements; and his duty to act in accordance with his fiduciary duties in relation to managing conflicts of interest and not profiting from his position as Trustee.

233 The Trustee cannot have been oblivious to the fact that, as Trustee, he was responsible for large sums of money transferred into the Schemes by members, which those members would rely upon to sustain themselves during their later years. However, the Trustee did not make enquiries regarding the requirements imposed upon him in his role as Trustee. I cannot see that any reasonable pension scheme trustee would have assumed their role without having at least enquired as to the existence of any specific duties to which they were subject.

234 The Trustee's later attempts to engage a professional trustee and his co-operation with TPR's investigation concerning the Schemes do not alter the fact that he chose not to inform himself of the duties imposed on him as Trustee at the outset. It seems that the Trustee chose not to take any action until the circumstances made it necessary to do so, by which time he had already invested all of the Schemes' assets in his own company, in flagrant breach of his fiduciary duties.

235 On that basis, I find that the Trustee acted in breach of trust by failing to fulfil his duty to avoid conflicts of interest and his duty not to profit from his position as Trustee. I find, further, that the Trustee acted in breach of sections 247 and 249A of the Pensions Act 2004, and acted in maladministration, by failing to have regard to the Code in relation to managing conflicts of interest.

E.3 Investment of the Schemes' funds

236 I will consider, in this section, to what extent the investment of the Schemes' funds in Holdings: was within the scope of the powers granted to the Trustee under the Deeds and Rules; and satisfied the statutory and common law requirements in relation to investing pension scheme funds. I will also consider the extent to which the Trustee has committed maladministration in connection with his investment acts and/or omissions.

E.3.1 Investment powers and duties

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

E.3.2 Investment powers / duties under the Deeds

238 The relevant provisions of the Deeds, which govern the Schemes' respective trustee investment powers, are contained in Clauses 15 to 17[35], which are included in Appendix 1 to this Determination.

239 I note that Clause 16 of each Deed[36] required the Trustee to take into account any specific written wishes of a member of the relevant Scheme, as to the manner in which that member's fund was to be invested. It is not in dispute that members transferred into the Schemes on the basis that their funds would be invested in the Norton Motorcycles business, although the application form contains no express instruction by Scheme members to invest their funds in that manner. In any event, the Trustee would not have been bound by any such notification in writing; his duty under Clause 16 was merely to take into account any such written wishes.

240 It appears that the Trustee exercised his wide-ranging investment powers, under Clauses 16 and 17[37] of the Deeds, having made his own decision to invest the entire fund of each Scheme in Holdings' preference shares.

E.3.3 Fraud on the power

241 I have considered whether the investment in Holdings' preference shares amounted to a fraud on the power of investment. There was a complete lack of diversification in investing virtually all the Schemes assets in the Holdings preference shares (I consider this further in paragraphs 252 to 260 below).

242 Holdings' and the Subsidiaries' accounts, from the years during which the preference shares in Holdings appear to have been purchased by the Schemes, suggest that those companies were struggling financially and that some or all of the share premium may have been used to fund the operation of one or more of the Subsidiaries. For example, UK's accounts for the year ended 31 March 2013, show that UK's creditors (amounts falling due after more than one year) had increased from £140,555 in the previous year to £6,044,439. A high-level summary of Holdings' and the Subsidiaries' accounts over the material time is included at Appendix 3.

243 The Trustee has submitted that, in fact, the "company" (I assume UK) received £40 million in revenue, was trading successfully and increased in value. However, the Trustee has provided no conclusive evidence of this. The Trustee has admitted that production was affected between 2012 and 2014, when "events occurred within

[35] or, for the Commando Scheme, Clauses 13 to 15.
[36] or Clause 14 in relation to the Commando Scheme.
[37] or Clauses 14 and 15 in relation to the Commando Scheme.

Norton's supply chain, whereby motorbike parts were not delivered, so production was effected [*sic*]", which resulted in company sales and liquidity suffering temporarily.

244 The period during which, by the Trustee's admission, production and liquidity were suffering coincided with the period during which members' funds were transferred into the Schemes and invested in Holdings' preference shares. The Trustee has submitted that, despite the issues with sales and liquidity, the business continued to grow, and the customer base and brand equity were good, so he considered members' investments in Holdings to be good investments.

245 Bearing in mind the production and liquidity issues concerning Holdings and the Subsidiaries around the time when the Trustee invested the Schemes' funds in Holdings' preference shares, of which the Trustee was aware, as evidenced by his statement and submissions, I cannot see that the Trustee could have considered exercising his investment powers, in the manner that he did, to have been a good investment and to have accorded with the Schemes' purpose of "providing pensions and lump sum benefits under occupational pension arrangements". It seems, instead, that the Trustee purchased preference shares in Holdings in order to provide working capital to Holdings and the Subsidiaries at a time when they were struggling with liquidity issues.

246 I find that the Trustee's application of the Schemes' funds amounted to a fraud on the power of investment.

247 This concept was explained, by Bean J in the case of *Dalriada v Faulds*[38] as follows:

> "**66** The final string to Mr Spink's bow, if I am wrong both on s 173 and on the meaning of 'investments', is the argument that the MPVA loans constituted a fraud on the power of investment. This time-honoured but (at least to the layman) misleading phrase does not connote dishonesty. It was explained by Lord Parker of Waddington in *Vatcher v Paull* [1915] AC 372 at 378:
>
> > *It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power. Perhaps the most common instance of this is where the exercise is due to some bargain between the appointor and appointee, whereby the appointor, or some other person not an object of the power, is to derive a benefit. But such a bargain is not essential. It is enough that the appointor's purpose and intention is to secure a benefit for himself, or some other person not an object of the power.*
>
> **67** *Thomas on Powers* puts it in this way (at paragraph 9-01):
>
> > *Thus there are two basic elements in a fraudulent exercise of a power first, a disposition beyond the scope of the power by the donee, whose position*

[38] [2011] 104 PBLR - [2011] EWHC 3391 (Ch)

is referable to the terms, express or implied, of the instrument creating the power; and, secondly, a deliberate breach of the implied obligation not to exercise that power for an ulterior purpose. The first element is common to both a fraudulent and an excessive execution. It is the second element which distinguishes a fraud on a power.

68*Thomas* goes on to emphasise (at paragraph 9-04) that the scope and purpose of a power must be determined objectively:

The true intention of the donor of the power as to its scope and purpose must, of course, be ascertained from the instrument creating the power, even where the donor and the donee are the same person."

248 The intention behind the power of investment is clear from the Schemes' stated sole purpose under Recital A of the Deeds. I consider that, in investing in Holdings preference shares, the Trustee committed a fraud on the power of investment and, in doing so, acted in breach of trust. Even if the Trustee did not act in conscious breach of trust, I find that he acted recklessly or indifferently. For the avoidance of doubt, although I have found that the manner in which the Trustee invested Scheme funds amounts to a fraud on the power of investment, I am satisfied that the Schemes were set up for the purpose stated in Recital A to each of the Deeds.

E.3.4 Statutory investment duties under the 1995 Act

249 Section 34(1) of the 1995 Act, provides the Trustee with a wide-ranging power "to make an investment of any kind as if they were absolutely entitled to the assets of the scheme", subject to: section 36(1) of the 1995 Act; and any restrictions imposed by the respective Scheme.

250 Section 36(1) (Choosing Investments), requires trustees to exercise their powers of investment in accordance with: i) the Investment Regulations; and ii) subsections 36(3) and 36(4), to the extent that the trustees have not delegated the exercise of such powers to a fund manager in accordance with section 34 of the 1995 Act.

E.3.4.1 The Investment Regulations

251 I understand that each of the Schemes has fewer than one hundred members[39]. On that basis, Regulation 7(1) of the Investment Regulations applies to restrict the application of the specific requirements, under Regulations 4 and 5, in relation to trustees' exercise of their investment powers. However, the Trustee was still required, by Regulation 7(2), to "have regard to the need for diversification of investments, in so far as appropriate to the circumstances of the [respective Scheme]".

252 I am concerned that three separate, but seemingly very similar, schemes, each with fewer than one hundred members, were established over such a short timeframe from each other. It seems to me that this was a deliberate move, on the part of one

[39] The Donington MC Scheme has 98 members, the Commando Scheme has 88 members and the Dominator Scheme has 69 members.

or more of the individuals involved in setting up the Schemes, which may or may not include the Trustee, to ensure the avoidance of the more rigorous investment duty requirements that would otherwise have applied under the 1995 Act and the Investment Regulations. The Trustee has submitted that he lacked an adequate degree of knowledge of pensions regulation to query this structure and that he was not involved in devising the structure of the Schemes. I am not required to determine this point, so I will not take it further or make any finding as to whether the Schemes were deliberately set up to avoid being subject to the more rigorous requirements of the Investment Regulations. However, the Trustee's intention, which he has not disputed, was that there would be wholesale investments made in Holdings by the Schemes.

253 It is not disputed that the Trustee invested all of the funds which represented the contributions into the Schemes in preference shares in Norton Motorcycle Holdings[40]. By the Trustee's own admission, he was not even aware of the requirement to diversify the Schemes' investments until discussions with Capital Cranfield were underway in late 2013. The Trustee, by his own admission, was unaware of, and therefore had not considered, the requirement to have regard to the need for diversification of the Schemes' investments in accordance with Regulation 7(2) of the Investment Regulations, at any point leading up to his investment of the Schemes' funds in Holdings.

254 The Trustee has submitted that, on becoming aware of the diversification requirement, his attempts to diversify were thwarted by the high volume of transfer requests made by Scheme members, which resulted in liquidity being insufficient to enable him to diversify the Schemes' investments. He said that some of those transfer requests were made at times when such requests would not have been predictable, as the five-year period within which penalty charges for transferring out were imposed had not been completed.

255 I do not consider that the Trustee's argument, essentially that he should be absolved of the requirement under Regulation 7(2) as he later considered diversifying investments but was prevented from doing so due to a lack of liquidity, assists him. Had the Trustee diversified the Schemes' investments properly or adequately from the outset, the liquidity of the Schemes' investments might have been less severely impacted by members' decisions to transfer their funds out of their respective Schemes when they did.

256 I shall consider now the Trustee's submission that he could not have predicted that such a high volume of transfer requests would be made before or just after the initial five-year period of investment had elapsed. It is not disputed that the Schemes' investment in Holdings was advertised to members on the basis that the investment

[40] I note that this also appears to have been in breach of the statutory requirements concerning employer-related investments, under section 40 of the 1995 Act and Regulation 12 of the Investment Regulations. However, I have not investigated this point, as it is expressly outside the scope of my jurisdiction, by virtue of Regulation 4(2) of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996. However, I will bring this to the attention of the Pensions Regulator.

had a ten-year duration, or that penalties would apply to a member's fund should he or she decide to withdraw his or her fund before five years had elapsed from the date of investment. However, members were not barred from withdrawing their funds before the end of the ten-year period or even during the initial five-year period within which penalty charges would be applied.

257 Regardless of the investment terms, members had a statutory right to transfer their funds out of their respective Schemes, on application to the Trustee in writing, in accordance with Part 4ZA of the 1993 Act. Had the Trustee taken investment advice in accordance with his obligation to do so under section 36 of the 1995 Act, which I shall explore in more detail in section E3.4.2 below, I consider it more likely than not that that advice would also have highlighted the requirement to maintain liquidity in the Schemes' investments, in order to cater for transfer requests made earlier than expected, and to consider diversifying the Schemes' investments.

258 Had the Trustee made even basic enquiries regarding his duties and obligations as a pension scheme trustee, I consider, on the balance of probabilities, that the existence of protection and rights available to members of a pension scheme would have come to his attention. For example, a simple internet search would have brought up TPR's guidance, which is aimed specifically at new pension scheme trustees and is known of across the pensions industry. Had the Trustee taken these basic steps to inform himself of his responsibilities, I consider that he would have been alive to the potential for members to transfer their funds out of the Schemes before the five or ten year period had elapsed and ensured that the Schemes' assets were diversified adequately, given the potential requirement for liquidity at any time following the Schemes' establishment. It seems, however, that the Trustee closed his eyes to any possibility that he might, in his role as a pension scheme trustee, be subject to statutory and common law obligations and duties.

259 I find that the Trustee acted in breach of the requirements of Regulation 7(2) by failing to have regard to the need to diversify investments taking into account all of the circumstances of the Schemes. The Trustee's later thoughts on diversifying the investments, which he has said were thwarted by the lack of liquidity in the Schemes' investments, do not alter my finding.

E.3.4.2 Section 36(3) and (4) (Choosing investments: requirement to obtain and consider proper advice)

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

> "(3) Before investing in any manner…the trustees must obtain and consider proper advice on the question whether the investment is satisfactory having regard to the requirements of regulations under subsection (1), so far as relating to the suitability of investments…"
>
> "(4) Trustees retaining any investment must –

(a) determine at what intervals the circumstances, and in particular the nature of the investment, make it desirable to obtain such advice as is mentioned in subsection (3), and
(b) obtain and consider such advice accordingly."

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

262 Under section 36(7), trustees will not be regarded as having complied with section 36(3), or 36(4), unless the advice that they have obtained is in writing.

263 I stated, in my Preliminary Decision, that I had been informed that the Trustee had conceded that he did not take written investment advice in relation to the Schemes' investment in Holdings. The Trustee has not disputed that in his submissions. Further, given the requirement to have regard to the need to diversify investments, under Regulation 7(2), it seems more likely than not that, had the Trustee obtained investment advice in accordance with section 36 of the 1995 Act, he would have been advised against investing the Schemes' assets solely in Holdings' preference shares. I find that the Trustee has acted in breach of the requirement to obtain written advice under subsections 36(3) and (4) section 36 of the 1995 Act.

E.3.5 Delegation of the Trustee's power of investment

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

265 Section 34(4) of the 1995 Act, provides that trustees would not be responsible for the acts or defaults of a fund manager in the exercise of any discretion delegated to him under section 34(2), if the trustees had taken all reasonable steps to satisfy themselves, "(a) that the fund manager has the appropriate knowledge and experience for managing the investments of the scheme, and (b) that he is carrying out the work competently and complying with section 36 [of the 1995 Act]".

266 I have seen no suggestion that the Trustee had delegated his investment decision-making discretion to a fund manager. Therefore, the Trustee remains liable for any breach of any obligation to take care or exercise skill in the performance of any of his investment functions.

E.3.6 Duties under case law

267 The following requirements for scheme trustees to meet when exercising their powers of investment exist under case law:-

267.1 Trustees are required, in investing scheme assets, to take such care as an ordinary prudent person would take if he invested "for the benefit of other people for whom he felt morally bound to provide" (Re Whiteley [1886] UKHL1).

267.2 A distinction has been drawn by the House of Lords between investments made by a business person and those made by trustees, the requirement of trustees being that trustees must avoid "all investments attended with hazard" (Learoyd v Whiteley [1887] 12 AC 727).

267.3 Trustees must act in members' best financial interests (Cowan v Scargill) [1984] 2 All ER 750).

268 Looking further at the case of Cowan v Scargill, Megarry V-C said, at paragraph 41, that the starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries. This duty of the trustees towards their beneficiaries is paramount. When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally their best financial interests. In the case of a power of investment, the power must be exercised so as to yield the best return for the beneficiaries, judged in relation to the risks of the investments in question; and the prospects of the yield of income and capital appreciation both have to be considered in judging the return from the investment.

269 Citing the case of Re: Whiteley, Megary V-C said, at paragraphs 49 to 50, that the standard required of a trustee in exercising his powers of investment is that he must take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide. That duty includes the duty to seek advice on matters which the trustee does not understand, such as the making of investments and, on receiving that advice, to act with the same degree of prudence. This requirement is not discharged merely by showing that the trustee has acted in good faith and with sincerity. Honesty and sincerity are not the same as prudence and reasonableness. Some of the most sincere people are the most unreasonable. Deliberately not taking advice is a reckless breach of trust.

270 I do not consider that, in investing the entirety of the Schemes' assets in one company, without taking investment advice, the Trustee can be considered to have met the above requirements. I consider that the Trustee has breached his equitable duty to exercise due skill and care in the performance of his investment functions. Investing all of the Schemes' assets in the shares of one company was high-risk in nature and there was a complete lack of diversification of investment, which showed a lack of regard for members' financial interests and a failure to avoid hazardous investments, contrary to the requirements imposed on trustees by *Cowan v Scargill* and *Learoyd v Whiteley*.

271 Further, having looked at Holdings' and the Subsidiaries' accounts relating to the material time, I cannot understand how investing in Holdings could have been considered to be a prudent investment, despite the Trustee's submissions that Holdings' value was at all times higher than the amount invested in Holdings' preference shares by the Schemes[41]. For example, Holdings' accounts, for the year ended 31 March 2012, showed that Holdings had made a loss of £1,049,350, and its two subsidiaries at that time had either made a loss[42] or a modest profit, which had not been verified by the companies' auditors[43]. The discrepancy in the information filed at Companies House concerning Holdings' allotted preference share capital (see paragraph 34 above) is also of some concern to me, notwithstanding the Trustee's explanation that this was due to a mistake.

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272 The Trustee has also submitted that I have taken too narrow a view of the terms of the investment, which had been expected to be a five to ten year investment, and that it would unrealistic to judge its performance based on the company's performance in Year 2 of the term of the investment, given the nature of the company and the investment. Had the investment in Holdings been one of a diverse portfolio of investments of Scheme assets which included other, more liquid, investments, there might have been some merit to that submission. However, in this case, the investment in Holdings was each Scheme's only investment. I have already explained the significance of members' statutory transfer rights under pension schemes and the need to ensure that a pension scheme's assets have sufficient liquidity to enable its trustees to comply with any statutory transfer requests. Given this requirement, I consider the Group's financial performance at all stages throughout the term of the investment to have been relevant.

273 I have already found that the Schemes lacked liquidity, with the consequence that members were unable to access their funds in accordance with their entitlement to do so, due to the Trustee's investment decisions.

274 The Trustee has admitted that he only became aware of the five-year duration of the investments, having been wrongly informed that the duration was ten years, on having sight of the SIPs, after the Schemes had been set up. However, as I have already found, even the most basic of enquiries into his role, duties and responsibilities, would have resulted in the Trustee's awareness of members' statutory transfer rights.

275 The Trustee has stated that there came a point where actioning members' transfer requests would have resulted in members' funds being transferred out at "zero" and

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[41] The Trustee has, in response to my request of him to provide evidence to support his submissions concerning Holdings' value, provided me with limited documentation, none of which is verified by auditors and which does not sufficiently support those submissions.

[42] Racing had made a loss of £9,690 over that same year.

[43] UK was reported, in Holdings' accounts, to have made a profit of £68,116. However, UK's accounts also showed creditors over more than £1 million, for which security had been given and the auditors had been unable to give an opinion on UK's financial statements as insufficient information to verify the opening balances had been made available to the auditors.

that it was in their financial interests not to action their transfer requests but instead to retain their shares as they still had value. This statement seems somewhat contradictory. In order to transfer out a member's fund at "zero", the fund would have to have been of no value. However, the Trustee has said that the shares had in fact retained their value. Given the existence of members' statutory right to transfer their funds out of their respective Schemes, it was not within the Trustee's gift to decide, on the members' behalf, that their funds would instead be held within the Scheme or to decide that it was in members' best interests to do so.

276 I note the Trustee's statement that, shortly before Holdings, UK and Estates, were put into administration, he had attempted to sell the business and that a sale has since been agreed. However, that does not assist him in defending the complaints made against him as it does not alter the fact that his initial failure to have regard for, or act in accordance with, any of the duties imposed upon him in respect of investing the Schemes' assets, has resulted in the Schemes' members being deprived of their pension funds.

277 As I have explained in Section E.2, the existence of the Guarantees seems to have been of no practical effect in terms of the security or reliability of the Schemes' investment in Holdings' preference shares. Given that the Trustee could not recall having signed the Guarantees in his capacity as Mr Garner, I cannot see how he intended fulfilling his obligations under the Guarantees.

278 I find that the Trustee has failed to meet the minimum standards imposed on him by case law regarding investing the Schemes' funds, and has failed to discharge his equitable duty to exercise due skill and care in the performance of his investment functions, which constitutes a breach of trust on the Trustee's part.

279 For the avoidance of doubt, the sums (as detailed in my Directions below) in respect of the preference shares for the Schemes, are presently due by the Trustee. This is so, notwithstanding the terms of the Guarantees providing that the preference shares shall be redeemed by Holdings, on or before the tenth anniversary of their issue. The basis for that is because the investment transactions amount to a breach of trust that should never have been entered into by the Trustee; the Trustee is personally liable, for that breach of trust.

E.3.7 The Schemes' statements of investment principles

280 As explained in paragraphs 43 and 44 above, although the Schemes were not required to have in place a SIP, it appears that a SIP existed in respect of each Scheme.

281 I have seen no evidence to suggest that the Trustee's investment decisions complied with the SIPs and the Trustee has submitted that he had not actually seen the SIPs until some time after the Schemes had been established.

282 Despite the intention (set out in Paragraph 2 of each SIP) that the Trustee would review the SIPs regularly and at least once every three years, or sooner, following

any material change in the assets or liability of the Schemes, I have seen no evidence that this was done.

283 The Trustee does not appear to have invested the assets of the Schemes prudently or with sufficient care and skill to ensure that the Schemes could provide the benefits promised to members, which was required by paragraph 3 of the SIPs. I have already addressed this point, in the context of the requirements that were imposed on the Trustee by case law, in Section E.5.6 above.

284 As I have explained in paragraph 45 above, the extent to which the SIP for each Scheme forms part of its governing documents is unclear. There was no statutory obligation on the Trustee to have prepared or maintained a SIP for any of the Schemes. However, a SIP had been prepared for each Scheme and, while the Trustee has submitted that he did not see it until after the Schemes had been set up, he has admitted to having seen the SIPs at some point during his office as Trustee of the Schemes. I understand that members received a copy of the SIP for their respective Scheme and so could reasonably have expected that the SIP's provisions would have been followed. I find that it was maladministration for the Trustee to fail to have appropriate regard to the SIP, or to act in accordance with its provisions.

E.3.8 TPR's Code

285 Whether or not a pension scheme is required to have a SIP in place, paragraph 90 of the 2016 Code states that "[TPR expects] trustee boards to clearly document their investment governance, including the objectives, roles, responsibilities and reporting relationships of all parties involved in making investment decisions."

286 The 2016 Code gives further guidance concerning steps that TPR expects trustees to take with a view to ensuring that members' investments are and remain appropriate for each member's own circumstances.

> "**Setting investment objectives and investment strategies**
>
> We also expect trustee boards to regularly take steps to engage with members about the date they may wish to take their benefits and any preferences they have about how to take their DC benefits, and to consider any information provided when determining investment options to offer to members and strategies for the scheme. This includes considering matters such as the likelihood of members wishing to gain flexible access to their benefits and preferences for particular approaches to investment (e.g. sustainable funds).
>
> We recognise that the investment needs of members will vary across the membership profile and over the lifetime of the membership. We expect trustee boards to consider the scheme's investment strategy as a whole (not just the component funds) and to take into account the characteristics of different segments of members, for example by proximity to retirement or likelihood of selecting a particular retirement option."

287 The SIP set out the duration over which members' funds were expected to remain invested under the Schemes and appears to have attempted to fulfil the requirements under paragraph 90 of the 2016 Code.

288 I have seen no evidence, however, that the Trustee considered members' individual requirements, or the likelihood that a large number of members would decide to withdraw their benefits shortly after the end of the five-year investment period.

289 I find that the Trustee's apparent lack of regard to the 2016 Code constitutes maladministration on his part.

E.4 Administration of the Schemes

290 I will consider below the acts and omissions of LD and of the Trustee in relation to the Schemes' administration.

E.4.1 LD

291 By Ms Liddell's own admission, as set out in Section A.3.2 above, LD lacked the necessary experience to act as scheme administrator of the Schemes when it took over that role from T12 in 2014. LD's staff appear to have received no proper training, so their inexperience and lack of knowledge continued throughout the term of LD's appointment as administrator of the Schemes.

292 Ms Liddell has denied any allegation that LD was complicit with the Trustee in providing misleading information to Scheme members regarding: the state of Holdings and the Subsidiaries as a going concern; the Schemes' investments; and the ability to transfer benefits out. However, I do consider that, by taking on the role of scheme administrator in relation to the Schemes, LD was required to carry out that administration with the necessary skill and care to ensure that the Schemes were administered properly. It was maladministration for LD not to acquire the necessary pensions administrative skills or knowledge; or to inform its staff of the requirements of the role of Scheme administrator; and failing to report to TPR (albeit that Capital Cranfield say that it subsequently did), its concerns regarding the Trustee and the Scheme.

293 The maladministration committed by LD took place over a prolonged period, throughout the whole of LD's term as administrator of the Schemes, materially affecting the Applicants, who, had they been alerted to the problems with the Schemes earlier, might have been able to take steps to mitigate their losses. Some members have, sadly, died and others have been prevented from making important life decisions, such as retiring. I consider that an award for non-financial injustice, falling within the 'Exceptional' category, should be granted to the Applicants.

E.4.2 The Trustee

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

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

295 The Trustee has admitted that he did not have in place, or operate, internal controls in relation to the Schemes' administration, as he was not aware of the requirements in that regard.

296 Additionally, paragraph 168 of the 2013 Code, which was in force when the Trustee appointed LD as administrator of the Schemes, contained the following requirement concerning the appointment of service providers:

> "168. Trustees should evaluate the suitability of all advisers and service providers prior to appointment. Trustees need to establish and document controls to manage the appointment of advisers and service providers and the delivery of information, advice and services provided by them. Trustees also need to establish and review what procedures and controls their advisers and providers have in place to ensure the quality and accuracy of the service they provide is suitable. Trustees should find out:
> - what professional indemnity cover they have?
> - what qualifications and accreditations they have and how they keep their professional knowledge up to date?
> - whether they have experience of dealing with schemes of a similar size and type to their scheme".

297 The Trustee has submitted that, prior to appointing LD, he had looked at LD's website and asked Ms Liddell about her relevant experience. The Trustee has also said that he spoke regularly to a senior staff member at LD, Mr T, concerning the Schemes' administration. However, by the Trustee's own admission, he was not aware of the existence or requirements of section 249A of the Pensions Act 2004. Section 247 of the Pensions Act 2004, and Regulation 3 of the Occupational Pension Schemes (Trustees' Knowledge and Understanding) Regulations 2006, required the Trustee to have acquired knowledge and understanding of the law relating to pensions and trusts within six months of his being appointed as Trustee. Clearly, the Trustee did not fulfil that statutory requirement. The Trustee has admitted that he did not put in place, document or operate any internal controls in relation to LD's appointment. I consider that the Trustee's failure to operate the necessary internal controls regarding the Schemes' administration, or to inform himself of the existence of the requirement to do so, as required by statute, amounts to breach of trust on the Trustee's part.

E.5 Information provided to members

298 The benefit statements, which I understand were issued to members on an annual basis (see paragraph 70 above) gave the impression of investment growth, at 5% per annum, which may or may not have reflected the actual value of members' respective funds.

299 Holdings' and the Subsidiaries' accounts show clear signs that those companies were in financial difficulty during the period within which the statements were issued to members of the Schemes, which accords with the Trustee's admission that sales and liquidity were affected by production issues during that period.

300 In particular, UK, which was supposedly Norton's main trading company, seems to have been trading at a loss, or failing to make a substantial profit and, by 2018, had made loans to connected parties, to the sum of £653,827, which had been deemed irrecoverable or recognised as impaired and unlikely to be recovered.

301 When the Group financial statements were audited in 2018, the auditor was unable to express an opinion on those financial statements, due to insufficient evidence being available to verify the opening balances. The auditor expressed a "material uncertainty" as to the Group's ability to continue as a going concern. The Group's financial difficulties were later confirmed, when Holdings, UK and Estates went into administration on 29 January 2020.

302 The Trustee has submitted that Holdings' value was at all times adequate to cover the value of the preference shares held by the Schemes and that an assessment of a company's value cannot be limited to looking at its balance sheet. The Trustee has provided several documents[44] intended to evidence the Trustee's submissions regarding the Group's value. The information that the Trustee has provided has not been verified and I would be minded to find a breach of trust on the Trustee's part for giving members a false impression of the value of their Scheme funds, contrary to his duty to act honestly and in good faith, if I were required to determine this point. However, as I have already found the Trustee to have committed multiple breaches of trust concerning the investment of the Schemes' funds, I do not need to make a finding on this point.

303 I note that the Trustee has claimed that he and 'Norton' had also been victims of fraud committed by the individuals who had set up the Schemes. For example, in his email to Scheme members of 15 June 2019, in which the Trustee announced that TPR had appointed Dalriada as independent trustee of the Schemes, the Trustee stated that "Myself and Norton have also suffered greatly from individuals at the front of the scheme, something which has cost myself and Norton many millions of pounds to sort out". The Trustee has also made submissions to that effect.

[44] A forecast analysis of Norton's potential value, prepared by WH Ireland with a view to floating Norton on the stock exchange; valuations of two Norton properties, dating back to December 2018 and January 2019; and a copy of a profit and loss schedule for "Norton" (I assume this relates to UK), with no evidence that it has been audited.

304 However, I note also that, in February 2019, the Trustee appointed a Mr CE, who had been convicted and jailed for tax fraud in 2015, as the contact for members of the Schemes. I find it surprising that the Trustee appears not to have learned his lesson, regarding his choice of business associates, from his previous encounters with the fraudulent individuals, whom he claims have cost him and his business so much money. I note the Trustee's submission that he was prepared to give Mr CE a second chance and that his role was very limited. However, I am somewhat taken aback that the Trustee saw fit to employ Mr CE in a role connected with the Trustee's own role as a fiduciary and cannot see that any reasonable trustee would have made the decision to do so.

305 Additionally, the Trustee has failed to respond to members, and LD, when they tried to contact him in relation to the Trustee's failure to provide transfer values and benefits under the Schemes. I note the Trustee's submission that he chose not to respond to abusive correspondence that he has said he received from members. I do not condone any such behaviour on members' part. However, the difficulty that LD and the members experienced in contacting the Trustee and the Trustee's lack of openness about the situation concerning members' pension funds, remains and must be taken into consideration.

306 The Trustee has also failed to engage with my Office throughout the course of my investigation until shortly before the Oral Hearing, which the Trustee did not attend.

307 I find that the Trustee's maladministration has caused an exceptional level of distress and inconvenience to the Applicants preventing them from making important life decisions over a prolonged period, such as retiring from their occupations, and I shall direct that the Trustee makes a payment to the Applicants of an amount which recognises the level of distress and inconvenience which they have suffered.

E.5.1 LD's liability

308 LD has submitted that, given that the Schemes' entire funds were invested in preference shares with a fixed coupon of 5% per annum, it saw no reason to question the figures provided to it by the Trustee in respect of the value of members' Scheme funds.

309 The preference shares' coupon was indeed fixed. I agree that it was not within LD's role as Scheme administrator to have investigated Holding's value in order to confirm the capital value of the shares themselves, but the circumstances in this case might have alerted it to make enquiries. That said, I make no finding whether LD acted in maladministration in this respect.

E.6 The Trustee's liability

310 I have found that the Trustee has committed various breaches of trust, by failing to:

310.1 manage the clear conflict of interest that resulted from the Trustee's position as director and CEO of Holdings and its Subsidiaries and director of Manorcrest;

310.2 have proper regard for the need to diversify the Schemes' investments as required by Regulation 7(2) and case law;

310.3 take investment advice as required by section 36 of the 1995 Act; and

310.4 act in accordance with sections 247 and 249A of the Pensions Act 2004.

311 I shall now consider the effect of the statutory provisions under section 33 of the Pensions Act 1995 (**Section 33**), and also, to the extent that Section 33 might not apply, for example in respect of administration breaches, or the extent to which the Trustee might be able to rely on the exoneration provisions under the Schemes. Finally, I shall consider Section 61 (assuming it applies), and the extent to which the Trustee should be afforded relief from personal liability under its provisions.

E.6.1 Section 33

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

"(1) Liability for breach of an obligation under any rule of law to take care or exercise skill in the performance of any investment functions, where the function is exercisable:

(a) By a trustee of a trust scheme, or

(b) By a person to whom the function has been delegated under section 34,

cannot be excluded or restricted by any instrument or agreement.

(2) In this section, references to excluding or restricting liability include:

(a) making the liability or its enforcement subject to restrictive or onerous conditions,

(b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy".

313 The Deeds contained exoneration clauses for the Trustee, which I have set out at paragraph 41 above. On joining the Schemes, members signed an application form which contained the indemnity set out at paragraph 42 above.

314 Section 33 prevents trustees of a pension scheme from excluding or restricting liability to take care or exercise skill in the performance of their investment functions by any instrument. It has been confirmed that Section 33 applies both to breaches of

statutory investment duties and breach of the equitable duty to exercise due skill and care in the performance of the investment functions (Dalriada Trustees v McCauley).

315 The wording of Section 33 also does not confine its effect to exclusion clauses within a pension scheme's trust deed and rules liability "cannot be excluded or restricted by any instrument or agreement". So, the scope of Section 33 extends to any attempt, made outside a pension scheme's trust deed and rules, to exclude or restrict the pension scheme's trustees' liability to take care or exercise skill in the performance of their investment functions.

316 A purposive interpretation of Section 33 requires indemnities (particularly a member indemnity) to be included. The impact of any indemnity would prejudice the member in consequence of his pursuing his right or remedy (section 33(2)(b)). To allow an indemnity under Section 33, especially where I have found dishonesty (see below section E.6.2), would render Section 33 open to circumvention and ineffective in practice. As a matter of public law policy where there has been dishonesty it cannot be correct to give effect to any indemnity.

317 I consider that that the application form to join the pension scheme containing the indemnity in this case can properly be regarded as forming part of the documents comprising the Schemes. "Pension scheme" for the purposes of section 1(5) of the 1993 Act is defined as a "…scheme or other arrangements, *comprised in one or more instruments or agreements* (my emphasis) having or capable of having effect so as to provide benefits".

318 On that basis, I consider that Section 33 applies to both the exoneration clauses under the Deeds and the indemnity given by members on joining their respective Scheme[45]. This renders both the exoneration clauses and the indemnity ineffective in preventing the Trustee from being held personally liable for any loss suffered by members in relation to the Trustee's breach of his investment duties, imposed by statute (see Section E.3.4) and/or common law (see Section E.3.6) by having invested the Schemes' assets in Holdings.

E.6.2 Exoneration provisions under the Deeds

319 The exoneration clauses under the Deed are set out in paragraph 41 above. Of particular relevance are the following provisions under those clauses:

> "Neither the Provider nor the Trustees shall be personally liable for any acts or omissions not due to their own **wilful neglect or default** and, in particular, shall have no responsibility to or in respect of a Member in connection with investments made at the option or direction of that Member or any person

[45] It has also been acknowledged, in the Court of Appeal judgment of Robert Sofer v SwissIndependent Trustees SA [2020] EWCA Civ 699, that it is arguable that an indemnity must be subject to a implied term that it does not apply to any underlying transaction where the defendant has acted dishonestly (paragraph 52 of the judgment). I have considered the question of the Trustee's honesty below, in Section E.6.2.

authorised to exercise such option or make such direction on the Member's behalf." (bold emphasis added).

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

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

321 Mr Caldwell has referred to the latter part of the citation above in his submissions, to support the Trustee's submission that, having acted in good faith with the best intentions (as set out in the Trustee's statement), the Trustee cannot be said to have been recklessly indifferent to the interests of beneficiaries.

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

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

323 Under the heading "Taking Risks" Lord Nicholls said:

> "All investment involves risk. Imprudence is not dishonesty, although imprudence may be carried recklessly to lengths which call into question the honesty of the person making the decision. This is especially so where the transaction services another purpose in which that person has an interest of his own. This type of risk is to be sharply distinguished from the case where a trustee, with or without the benefit of advice, is aware that a particular investment or application of trust property is outside his powers, but nevertheless he decides to proceed in the belief or hope that this will be beneficial to beneficiaries or, at least, not prejudicial to them. He takes a risk that a clearly unauthorised transaction will not cause loss. A risk of this nature is for the account of those who take it. If the risk materialises and causes loss, those who knowingly took the risk will be accountable accordingly."

324 In Walker v Stones [2001] 2 WLR 623, Sir Christopher Slade, giving the only full judgment said that, while there is a difference of emphasis between the judgments in Royal Brunei Airlines and Armitage, as far as they relate to the concept of dishonesty they were not irreconcilable and that he could see no grounds for applying a different test of honesty in the context of a trustee exemption clause from that applicable to the liability of an accessory in breach of trust. With regard to Millett LJ's dictum on a trustee's honest belief he said:

> "I think it most unlikely that he would have intended this dictum to apply in a case where a solicitor-trustee's perception of the interests of the beneficiaries was so unreasonable that no reasonable solicitor-trustee could have held such a belief".

325 Sir Christopher Slade restated the proposition - "at least in the case of a solicitor-trustee" - that honest belief would not be found where a trustee's perception of the interest of the beneficiaries was so unreasonable that, by an objective standard, no reasonable trustee-solicitor could have thought that what he did or agreed to do was for the benefit of the beneficiaries. He explained that he limited the proposition to trustee-solicitors because on the facts he was only concerned with a trustee-solicitor and because he accepted that the test for honesty may vary from case to case depending on the role and calling of the trustee. Lord Justice Nourse and Lord Justice Mantell agreed with his judgment without adding anything of their own.

326 In Mortgage Express Limited v S Newman & Co (a firm) (The Solicitors Indemnity Fund limited, Pt 20 defendant) [2001] All ER (D) 08 (Mar), Etherton J said:

> "It is now well established that dishonesty, in the context of civil liability, embraces both a subjective and an objective element. The well known statement on this issue is that of Lord Nicholls in Royal Brunei Airlines v Tan … The inter-relationship between the objective and subjective standards can produce both conceptual and practical difficulties. I was referred, for example, to … Walker v Stones…".

327 Etherton J considered Sir Christopher Slade's dictum, and said that he did not consider that Sir Christopher Slade could have been intending to abolish the critical

distinction between incompetence and dishonesty – that incompetence, even if gross, does not amount to dishonesty without more.

328 In the later case of Fattal v Walbrook Trustees (Jersey) Limited [2010] EWHC 2767 (Ch)46, it was accepted, at para 81, that the law concerning the interpretation of exoneration clauses, as set out in Walker v Stones, was not confined to applying to solicitor-trustees. As set out in Fattal v Walbrook47 the test for dishonesty, at least in the case of a professional trustee, seems to be that the trustee has committed a deliberate breach of trust and either: (a) knew, or was recklessly indifferent as to whether, it was contrary to the interests of the beneficiaries; or (b) believed it to be in the interests of the beneficiaries, but so unreasonably that no reasonable professional trustee could have thought that what he did was for the benefit of the beneficiaries.

329 While the Trustee received no remuneration in respect of his office as Trustee, his position could be regarded as analogous to that of a professional trustee. The Schemes were, by the Trustee's own submission, promoted to members as an opportunity to invest in the Norton Motorcycles business and the Trustee benefitted, in his capacity as Mr Garner, from large cash sums being transferred from the Schemes into his company. On that basis, I consider that the test for dishonesty set out in Fattal v Walbrook applies here.

330 The subject of scrutiny is the investment of Scheme funds in preference shares in Holdings in order to raise capital for Holdings to use for its benefit, by an individual who was the sole director of that company and its Subsidiaries, as well as being CEO of those companies. That individual (the Trustee) would, therefore, have had continuous knowledge of the financial circumstances of Holdings and its Subsidiaries. Although, by his own admission, the Trustee lacked experience as a pension scheme trustee, I cannot see how the existence, or at least the possibility of the existence, of a duty of care in relation to his handling of members' funds can have escaped his notice. Particularly so, given that as a professional experienced individual, in his capacity as a director, he would or should be aware of the concept of director's fiduciary duties, which are akin.

331 I have already found that the Trustee acted in breach of trust by: breaching his fiduciary duty to manage conflicts of interest and his duty not to profit from his position as Trustee (see Section E.2); failing to have in place and operate the necessary internal controls to manage conflicts of interest, as required by section 249A of the Pensions Act 2004 (Section E.2); investing all of the Schemes' assets in Holdings' preference shares (see Section E.3); failing to inform himself of the requirement to have in place internal controls to ensure the proper administration of the Scheme, in breach of section 247 of the Pensions Act 2004 (Section E.4.2); and failing to put in

[46] which acknowledged, at para 81, that there had been "twists and turns in the legal definition of dishonesty", referring to the cases of Twinsectra Ltd v Yardley [2002] AC 164, Barlow Clowes v Eurotrust International Ltd [2006] 1 WLR 1476 and Abou-Rahmah v Abacha [2006] EWCA Civ 1492.

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

place such controls (Section E.4.2). I have also found that it was maladministration on the Trustee's part to have: failed to have regard to the Schemes' SIPs (Section E.3.7); failed to have regard to the 2013 Code and the 2016 Code as detailed in Section E.2 and Section E.4; and failed to respond to attempts made by members and by my Office to contact him (Section E.5). All of these breaches of duty and findings of maladministration are intertwined and have led, directly or indirectly, to the loss of Scheme funds. Therefore, I have considered together the Trustee's liability in relation to all of these breaches of trust and findings of maladministration, and the extent to which the exoneration clause applies (or would apply, but for Section 33 to the extent that it is relevant).

332 Throughout his lengthy statement and supporting submissions, the Trustee has consistently argued (alongside other arguments) that he took the risk in investing all of members' funds in Holdings' preference shares in good faith and with the best intentions, honestly believing that the risk was one which ought to be taken in the interests of the beneficiaries.

333 As I have explained, the applicable test, which has been developed by case law since Armitage, is partly objective. Here the circumstances call into question the Trustee's honesty on the basis that he had interests of his own. Mr Garner was a major shareholder in Holdings, as well as being sole director at the material times and reliant on it and/or the Subsidiaries for continued income. The Trustee's honesty may be questioned because he failed to ask questions concerning his duties and necessary level of knowledge as a Trustee and take advice before investing the entirety of the Schemes' assets in Holdings' preference shares.

334 Although the nature of the objective test in *Walker v Stones*, which was accepted in *Fattal v Walbrook Trustees*, is in some respects unclear, I consider that there is a distinction between a trustee's conduct constituting a breach of trust and the belief he held at the time of the breach. For the reasons set out below, I consider that the Trustee's perception of the interests of the Schemes' beneficiaries was so unreasonable that no reasonable trustee could have held such a belief.

335 As explained, in sections E.2 and E.3, the Trustee was aware of the issues that Holdings and its Subsidiaries were experiencing when he invested all of the Schemes' funds in Holdings' preference shares. I consider that the Trustee was only able to sustain the belief, on his part, that the investment of all of the Schemes' assets in Holdings' preference shares was in the members' interests because he turned a blind eye and refrained from asking obvious questions. He closed his eyes and ears for fear of learning information he would rather not know, that is, he was under certain fiduciary and statutory duties as Trustee which, if fulfilled, would have forced him to conclude that the investment in Holdings was not in the members' interests, so acting in breach of his fundamental fiduciary duties. His belief that he was acting in the members' interests by investing members' entire funds in Holdings was not based on information and understanding having sought advice, but on the simplistic notion that

if Holdings received a large injection of capital, 'Norton' was bound to grow in value, guaranteeing members the return of their investment, plus the 5% per annum coupon, so this had to be in the members' interests. I consider that a reasonable and honest trustee in the Trustee's position would have raised questions to assure himself that the investments in Holdings were proper transactions in the members' interests and that his actions accorded with his duties and obligations as Trustee. The failure to ask those questions was dishonest, not because it was negligent not to ask, but because any honest reasonable trustee would have asked them.

336 It is not disputed that the Trustee took no investment advice when he made the investment of members' funds in Holdings' preference shares. Without any professional advice, I cannot see how the Trustee could reasonably have believed that these transactions were in the Schemes' members' interests. I do not consider that any reasonable trustee would have been happy to make a decision on that basis. The Trustee's submissions confirm that he was aware that, when he invested the Schemes' assets in Holdings, the Group was suffering sales and liquidity issues. I consider that a reasonable trustee would have taken minimum steps to satisfy himself that the investment in Holdings was in the members' interest. This step, which I consider a reasonable trustee would have taken, was not made. In the circumstances, I do not see how a reasonable trustee could have held the Trustee's belief.

337 The fact that the Trustee was aware of the production, sales and cashflow issues suggests that he deliberately pursued a policy of favouring Holdings and the Subsidiaries at the expense of the members, which arguably is dishonest under the *Armitage* approach, as well as under the subjective and objective approach accepted in *Fattal*. The conflict of interest between the Trustee's fiduciary duty to the Schemes' beneficiaries, and the interests of Holdings and the Subsidiaries, are obvious and yet the investment of each Scheme's entire fund, without diversification, proceeded. These transactions conflicted, in the most obvious way, with the Trustee's fiduciary duty to keep the Schemes' beneficiaries' interests paramount. Given the facts, I do not accept that a reasonable trustee could have believed that investing all of members' assets in Holdings would be in the members' interests. In making this investment, the Trustee specifically intended benefiting Holdings and the Subsidiaries, which were not the object of the trust, knowing that this would be at the expense of the beneficiaries' financial interests if the business failed. No matter how honest or pure their motives, no reasonable trustee would regard this course as honest.

338 The Trustee benefited Holdings by a decision taken with its business in mind in his capacity as Mr Garner, and not by the exercise of his own, independent judgment as Trustee.

339 The Trustee has submitted that 'Norton' was dependent on a large input of capital for investment in research, development and manufacturing costs, in order to develop

new models and engines, and that it would be unrealistic to judge the performance of a five to ten year investment in a company of this nature based on its performance in Year 2. He also submitted that the value of the business grew exponentially and achieved shareholder value exceeding the anticipated yield on the members' investments.

340 This submission does not assist the Trustee in supporting his belief that investing the Schemes' assets was in the members' interests. There could have been no certainty that the research and development would result in the successful development and sale of new models or engines. In any event, the business ultimately failed, as Holdings, UK and Estates, all went into administration on 29 January 2020.

341 I have not seen sufficient evidence to support the Trustee's submissions that the business was at all times valued as highly as he has said it was. In any event, given the state of the Group accounts when the investments were made and the Trustee's own admission that the business was experiencing production and liquidity issues at that time, I do not consider that objective honesty is satisfied. A reasonable trustee would not have invested the whole of a pension scheme's assets in a company that was experiencing financial difficulties at the time. The Trustee used his position in his capacity as Mr Garner, to protect the financial interest of Holdings by deliberately sacrificing the financial interests of the Schemes' members. The Trustee's entering into the Guarantees and then failing to put in place any mechanism to ensure that the Guarantees were of any practical use to him, as Trustee, in securing members' funds under the investments in Holdings, or indeed to ensure that he even remembered that he had entered into those Guarantees, further demonstrates the lack of regard that the Trustee had for the members' financial interests under the Schemes.

342 Finally, there are background circumstances which I consider to be relevant to the question of whether a reasonable trustee would have believed that investing the Schemes' assets in Holdings was in the members' interests. The Trustee has submitted that "alternative investments and structures" were a good opportunity for members at the time, when banks were risk averse and other funds were failing. However, I have seen no evidence that the Trustee considered how this background might have affected the risk profile of members' investments in 'Norton'. If anything, it seems to me that the banks' risk averse stance at the time should have alerted a reasonable trustee for the need to take extra care in investing pension scheme assets.

343 Mr Garner, no doubt in his executive capacity, will have knowledge and awareness of the news and reaction, in 1995, to Robert Maxwell misappropriating monies from his companies and their pension plans to finance his corporate expansion. This was well publicised to all persons, whether pension trustees or otherwise.

344 In my judgment, it is this general blunting of his moral antennae which explains why the Trustee had a lower standard of honesty, as well as his recklessness for others'

rights. He was reckless of the members' right that they could expect the Trustee to take and heed advice in proposing to invest their pension funds in Holdings.

345 An honest and reasonable person would have had regard to the circumstances known to him (especially the production and liquidity issues at the time of the investment), including the nature and purpose of the proposed transaction, the nature and importance of his roles and any conflicts of interests and the seriousness of the adverse consequences to the beneficiaries.

346 I conclude, on the balance of probabilities, having regard to the evidence and submissions received, that the Trustee's belief that investing the entirety of the Schemes' funds in Holdings was in the members' interests, and his failure to take advice on the matter, or inform himself of his responsibilities and duties, as a pension scheme trustee, was so unreasonable that no reasonable trustee could have held such a belief. Alternatively, looking at the first limb of the test set out in Fattal, I find that the Trustee was recklessly indifferent as to whether his various breaches of trust and his maladministration were contrary to the interests of the beneficiaries. Therefore, I find that the Trustee's belief was not honest. The Trustee, having acted with wilful neglect and default, is unable to rely upon the exoneration provisions under the Deeds.

347 For completeness, I will consider also the subjective test set out in *Armitage*, which would apply if the Trustee were not to be regarded as a quasi-professional trustee. Mr Caldwell has referred to the latter part of the citation from *Armitage* that I have set out in paragraph 320 above, arguing that the Trustee acted in good faith and with the best intentions. Mr Caldwell did not focus on the earlier part of that citation, which has established that, where a trustee is recklessly indifferent to whether the risk taken will result in loss, taking that risk would amount to wilful default on the trustee's part. As I have explained, the Trustee's failure to make even basic enquiries as to the existence of any duties or obligations imposed on him as Trustee, clearly amounts to reckless indifference regarding his duties and obligations as Trustee, such that he cannot rely on the exemption clause in respect of any of my findings of breach of trust or maladministration.

348 It is also established, in *Armitage*, that "The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries, is the minimum necessary to give substance to the trusts" (para 29 of *Armitage*). A trustee's duty to act honestly and in good faith are part of the "irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust". As I have already found, knowing what he knew about Holdings and its Subsidiaries at the time of investing the Schemes' assets in Holdings, the Trustee cannot be said to have acted in good faith.

349 Therefore, even if the Trustee's role as Trustee were not to be considered analogous to that of a professional trustee, meaning that the test for honesty had to be entirely

subjective, I find that the Trustee would still be unable to rely on the exemption clause for relief from liability resulting from any of the breaches of trust or from the maladministration that I have found he has committed.

E.6.3 Section 61

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

351 I had intended to consider any evidence, or representation, that the Trustee might have put forward in support of the application of Section 61 at the Oral Hearing, but I was unable to do so as the Trustee did not attend and had generally failed to co-operate with this investigation until the Oral Hearing had taken place. Assuming that Section 61 could still apply, despite my finding that the Trustee is prevented from relying upon the exoneration provisions under the Schemes' Deeds and/or the indemnity given by members in their Scheme application forms, I have, however, taken into account the Trustee's statement and the written submissions, in support of that statement, received from Mr Caldwell.

352 Having already found, in Section E.6.2, that the Trustee failed to act honestly or reasonably, I cannot see that the criteria set out in Section 61 can apply to the Trustee's acts and omissions. Therefore, I find that the Trustee is unable to rely on Section 61 for any relief from personal liability for the various breaches of trust that I have found him to have committed.

E.7 My response to the Trustee's submissions on the Directions

353 I shall consider now Mr Caldwell's submissions concerning the directions that I proposed in my Preliminary Decision.

354 To summarise, in my Preliminary Decision, I had proposed directing that the Trustee pay to the Schemes an amount equal to the amount of funds that had been applied by the Schemes to purchase preference shares in Holdings, plus simple interest at the rate of 8% per annum from the date of investment.

355 I had also proposed directing the Trustee to pay £6,000 to each Applicant in recognition of the distress and inconvenience caused to them by the Trustee's exceptional maladministration.

356 Mr Caldwell has submitted, on the Trustee's behalf, that the imposition of interest at the rate proposed in my Preliminary Decision is in excess of the jurisdiction provided to me by Regulation 6 of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (**Regulation 6**):

"(1) For the purposes of section 151A of the 1993 Act (interest on late payment of benefit), the prescribed rate of interest shall be the base rate for the time being quoted by the reference banks.

(2) In paragraph (1) above—

(a) "base rate" means the rate for the time being quoted by the reference banks as applicable to sterling deposits or, where there is for the time being more than one such base rate, the rate which, when the base rate quoted by each bank is ranked in a descending sequence of four, is first in the sequence; and

(b) "reference banks" means the four largest persons for the time being who—

(i) have permission under Part 4A of the Financial Services and Markets Act 2000 to accept deposits,

(ii) are incorporated in the United Kingdom and carrying on there a regulated activity of accepting deposits, and

(iii) quote a base rate applicable to sterling deposits."

357 Regulation 6 relates to directions that I make under section 151A of the Pension Schemes Act 1993, which concerns late payment of benefit under a pension scheme:

"151A Interest on late payment of benefit

Where under this Part the Pensions Ombudsman directs a person responsible for the management of an occupational or personal pension scheme to make any payment in respect of benefit under the scheme which, in his opinion, ought to have been paid earlier, his direction may also require the payment of interest at the prescribed rate."

358 The payment that I had proposed directing the Trustee to make was not in respect of late payment of benefit. It related to Scheme funds that had been lost due to the Trustee's errors and omissions concerning the investment of those funds. Therefore, Regulation 6 does not apply to my directions in respect of these complaints.

359 Mr Caldwell has also stated that the effect of my proposed directions, outlined above, is "more than merely compensatory" and that Article 6 of the ECHR is engaged, on the basis that my investigation into these complaints may lead to the imposition of a penalty over and above compensation for loss.

360 My directions under this Determination seek to put right the wrong committed by the Trustee by acting in breach of trust as explained in this Determination. As a consequence of those breaches of trust, Scheme members' funds have been lost in their entirety. The members have also missed out on the investment growth that they might have benefitted from had they invested their funds elsewhere.

361 Had the pension funds not been invested in Holdings' preference shares, it is reasonable to assume that the money would have been invested in more appropriate investments which would have produced an investment return. It is open to me to direct that the Trustee restores the money which has been invested in breach of trust in Holdings' preference shares, plus the investment return that might reasonably have been achieved had the money not been invested in breach of trust.

362 Regarding the payment for distress and inconvenience caused by the Trustee's maladministration, that I had proposed directing the Trustee to pay, in my Preliminary Decision, the Trustee has informed me that, should he be required to make such a payment to the Applicants at the rate that I had suggested, it would result in his own personal bankruptcy. The Trustee has suggested that, instead, he makes a more limited ex gratia payment. I do not agree with that suggestion; and the Trustee is liable to pay all the amounts (including distress & inconvenience payments) further to my directions.

363 Section 151(2) of the 1993 Act, provides that, where I make a Determination in respect of a complaint made to my Office, I may "direct any person responsible for the management of the scheme to which the complaint or reference relates to take, or refrain from taking, such steps as [I] may specify".

364 Directions that I make under section 151(2) of the 1993 Act, may include payments that take account of the Applicants' distress and inconvenience that they have suffered as a consequence of maladministration committed by the respondent. In this case, I consider that an award for non-financial injustice, of an exceptional level, is appropriate. The Trustee's maladministration was committed recklessly. He repeatedly failed to engage with my Office throughout the course of the Applicants' complaints until very shortly before the Oral Hearing, and his conduct has caused the Applicants a great deal of emotional distress, inconvenience and suffering.

365 Given the Trustee's conduct, I do not consider it appropriate to leave it up to him to make *ex gratia* payments to the Applicants, as he sees fit.

E.8 Dalriada's costs and fees

366 I have not considered in this Determination the extent, if any, to which Dalriada might be able to recover its costs and fees in relation to its work carried out in respect of the Schemes and/or any costs incurred by Dalriada in investigating matters related to the Trustee's various breaches of trust and maladministration.

367 My understanding is that Dalriada's fees are to be paid from the Schemes' resources and that they are then to be treated as a debt due from Manorcrest, as the sponsoring employer in relation to the Schemes. This is in line with section 8 of the 1995 Act.

368 To the extent to which I might have jurisdiction to consider and make a finding in relation to this matter, and I make no finding in this Determination as to whether I

have such jurisdiction, Dalriada's recovery of its costs and fees would need to be dealt with under a separate complaint.

Decision

369 I have found a number of breaches by the Trustee of his duties and maladministration on both the Trustee's and LD's part. Adopting the same headings as above, they are set out below.

E.1 Status and structure of the Schemes

370 As explained in paragraphs 192 to 207 above, I find that the Schemes are occupational pension schemes. Therefore, the statutory investment requirements under Part I of the 1995 Act, applied to the Trustee at all material times.

371 I find that the Schemes' assets are pooled and not ringfenced. On that basis, monies recovered from the Trustee by Dalriada are to be applied for the benefit of the Schemes' members as a whole (paragraphs 208 to 214 above).

372 I find that the Schemes were set up for the purpose declared by Recital A of each of the Deeds (paragraphs 198 to 202 above).

E.2 Mr Garner's roles as Trustee and in relation to Manorcrest, Holdings and the Subsidiaries

373 As explained in paragraphs 215 to 235 above, the Trustee has breached his fiduciary duties: not to profit from his position as Trustee; and to avoid conflicts of interest. The Trustee has also breached his duty to act with prudence and has failed to comply with his statutory duties under sections 247 and 249A of the Pensions Act 2004.

E.3 Investment of the Schemes' funds

374 I find that the Trustee has breached his investment duties under statute, including the requirement to have regard to the need for diversification of investments under Regulation 7(2) of the Investment Regulations, and the requirement to obtain proper advice in writing before investing scheme assets, under section 36 of the 1995 Act (see paragraphs 249 to 263 above).

375 I have seen no evidence that the Trustee delegated his investment duties to a fund manager (see paragraphs 264 to 266 above).

376 I also find that the Trustee failed to exercise due skill and care in the performance of its investment functions and breached his equitable duty of care to beneficiaries, and acted dishonestly, by investing in Holdings preference shares (paragraphs 267 to 279 and 319 to 349).

377 I also find that the investment in the Holdings preference shares amounted to a fraud on the power of investment (paragraphs 241 to 248).

E.4 Administration of the Schemes

378 As explained in paragraphs 292 to 294, LD's acceptance of the role of administrator of the Schemes, without having acquired the necessary skills, experience or knowledge to act in that capacity, and without obtaining the necessary training to inform its staff of the requirements of the role of scheme administrator, together with its failure to report its concerns regarding the Scheme to TPR, amounts to exceptional maladministration.

379 The Trustee failed to have in place the necessary internal controls to ensure the sound administration of the Schemes, despite being required to do so under section 249A of the Pensions Act 2004 (see paragraphs 295 to 298 above), and failed to inform himself of that requirement within the statutory time limit for doing so under section 247 of the Pensions Act 2004 (paragraph 298). The Trustee also failed to carry out the necessary checks to ensure that LD was suitably qualified to act as scheme administrator in relation to the Schemes. I find that this amounts to breach of trust on the Trustee's part.

E.5 Information provided to members

380 I have not made a finding as to whether the Trustee wilfully and dishonestly misled members, regarding the value of their funds under the Schemes, by providing false information to LD, who then sent annual benefit statements to members on the basis of that information. However, had I been required to make a finding on this matter, I would have been minded to have found against the Trustee, as explained in paragraphs 299 to 308 above.

E.6 The Trustee's liability

381 I have found that Section 33 prevents the Trustee from benefitting from the Schemes' respective exoneration clauses and/or from the indemnity contained in the membership application form in respect of the Trustee's various breaches of trust regarding his investment duties, as explained in Section E.6.1.

382 I have also found that, regardless of Section 33, the Trustee would have been, and is, unable to rely on the Schemes' exoneration clause in respect of any of my findings of breach of trust and/or maladministration, as he cannot be said to have acted in good faith in committing any of those breaches of trust and/or acts of maladministration, as explained in Section E.6.2.

383 The Trustee is unable to rely upon any protection from personal liability under Section 61, to the extent that Section 61 applies, as he cannot be said to have acted reasonably or honestly, as explained in Section E.6.3.

E.7 My response to the Trustee's submissions on the directions

384 Regulation 6 does not apply to my directions in respect of these complaints, so I am not prevented from directing the Trustee to pay simple interest at the rate of 8%, as I had suggested I might in the Preliminary Decision (paragraphs 357 to 358 above).

385 It is open to me to direct that the Trustee restore the money which has been invested in breach of trust in Holdings' preference shares, plus the investment return that might reasonably have been achieved had the money not been invested in breach of trust. To do so is not to impose a penalty on the Trustee that is more than merely compensatory (paragraphs 359 to 361 above).

386 I do not accept the Trustee's proposal to pay an *ex gratia* payment to the Applicants instead of the amount that I had suggested in the Preliminary Decision that I would direct him to pay (paragraphs 362 to 365 above).

E.8 Dalriada's costs and fees

387 To the extent that I have jurisdiction to determine such a matter (and I make no finding as to whether I have such jurisdiction), Dalriada's recovery of its costs and fees would need to be dealt with under a separate complaint (paragraphs 366 to 368 above).

Directions

388 The Trustee shall pay:

388.1 when notified by Dalriada (paragraph 391 below), into each Scheme, subject to paragraph 390 below, that sum paid by each Scheme (see paragraph 33 above) for the purchase of preference shares in Holdings;

388.2 that amount referred to in paragraph 34 above in respect of additional preference shares; and

388.3 simple interest at the rate of 8% per annum from date of investment of such amounts until the date of the Determination (together the **Restorative Payment**).

389 The Trustee shall, within 28 days of Dalriada having notified it of the Restorative Payment, pay:

389.1 the Restorative Payment; plus

389.2 simple interest at the rate of 8% from the date of notification, to the date of payment to Dalriada (together the **Total Amount**);

for Dalriada to hold on trust for each of the Schemes.

390 Sums calculated further to paragraphs 391.3 and 391.4 below, shall be offset from the Restorative Amount.

391 Dalriada shall, as soon as practicable, after the date of the Determination (having taken such advice and carried out such other enquiries, as it considers to be appropriate), establish and/or calculate, to the best of its ability from available records for each Scheme:

391.1 the date of investment of the preference shares;

391.2 the amounts in so far as they relate to the preference shares mentioned in paragraph 34 above;

391.3 any transfer payments that have been paid to any member; and

391.4 any dividend payments paid under the Guarantees.

392 To the extent that Dalriada has received the Total Amount, and without prejudice to the Trustee's obligation to pay the Total Amount in full, Dalriada shall pay to each Scheme such proportion of the Total Amount that reflects the proportion due to each Scheme, and determine the allocation between the members, or other beneficiaries, in accordance with each of the Scheme's trust deed and rules.

393 To the extent that any proceeds of any future sale of Holdings (see paragraph 31 above) result in any Scheme redeeming preference shares, Dalriada shall calculate those sums and pay to the Trustee such monies if any due, only to such an extent that the Trustee has first paid in full the Total Amount.

394 For the exceptional maladministration causing injustice, within 28 days of the date of the Determination

394.1 the Trustee shall pay the sum of £6,000 to each Applicant; and

394.2 LD shall pay the sum of £3,000 to each Applicant, subject to funds being available given its dissolution.

Anthony Arter

Pensions Ombudsman

23 June 2020

Appendix 1

Extract of Schemes' Deed and Rules

Recital A – the purpose of each Scheme is solely to provide "pensions and lump sum benefits under occupational pension arrangements made by individuals and individuals' employers".

Recital B - those eligible to join the Schemes include all past, present or future officers and employees of the Provider and their immediate family members."

Rule 3.1 provides that:

"A person who wishes to become a member (or the legal guardian acting for a person under the age of 16 or, in England, Wales and Northern Ireland 18 if not in employment, who is to be a member) or substitute member must go through an application procedure, as required by the scheme Administrator. The application procedure must include the following declarations:
(1) The member (or a legal guardian acting for the member) or substitute member agrees to be bound by these rules.
(2) The scheme administrator agrees, on behalf of the provider, to administer the scheme as required by these rules.
A person with automatic eligibility (see rule 3.2) may become a member or substitute member on request provided he or she is under age 75 (unless permitted by rule 3.3); any other applicant requires in addition the agreement of the trustees or provider.
Where the legal guardian is representing a prospective member under the age of 16 (or in England, Wales and Northern Ireland 18 if not in employment), the legal guardian must give an undertaking that he or she understands that any payments to the scheme can only be used to provide benefits to the member under the rules, and will not be repaid except as permitted by the rules."

Rule 3.2 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 fall outside the above definition may only join the scheme with the consent of the trustees or the provider."

Rule 3.3 provides that:

"Subject to the agreement of the trustees or provider an ex-spouse of a member may become a member of the scheme. An ex-spouse becoming a member of the scheme through this rule may do so after he or she has attained age 75 but must draw benefits immediately (see rule 5.4)."

Clause 3: “The Provider shall establish the Scheme under irrevocable trust on the terms set out in this Deed”.

Clause 5: “The Provider and the Trustees shall execute such documents, give such undertakings or take whatever other action as may from time to time be required in order to establish and maintain the status of the Scheme as a Registered Pension Scheme under Part 4 of the Finance Act 2004 and, if applicable, registration with The Pensions Regulator”.

Clause 6 : “The Rules form an integral part of this Deed. The definitions contained in the Rules apply for the construction of this Deed…”.

Clause 9: “…The Scheme Administrator will secure that the Scheme is in all respects managed in accordance with this Deed and in a manner consistent with the Scheme being treated as a Registered Scheme.”

Clause 13: “The Trustees shall ensure that, in relation to each Arrangement of a Member, all contributions and other amounts paid by or in respect of the Member to the Scheme as permitted by the Rules are applied in accordance with the Arrangement and that, in the case of each and every Arrangement, a separate and clearly designated account is maintained in respect of each Member’s Fund under the Scheme.”

Clause 14: “An option conferred on a Member in accordance with an Arrangement under the Scheme may be exercised only by giving notice –
14.1 in writing to the Scheme Administrator at such address as is nominated by the Trustees for that purpose; or
14.2 by such electronic means as may be approved by the Trustees for that purpose.”
Clause 15: “All assets, investments, deposits and monies held for the purpose of the Scheme shall be in the legal ownership and under the control of the Trustees. However, the Trustees may, with the written consent of the Provider [i.e. Manorcrest], place those assets, investments, deposits and monies in the name of or under the control of a body corporate as nominee.”

Clause 16: “The Trustees shall have and be entitled to exercise all powers rights and privileges necessary or proper to enable the Trustees to carry out all or any transaction, act deed or matter arising under or in connection with the Scheme, but the Trustees shall, subject to the restrictions contained in this Deed and any requirements of the Board of Revenue & Customs at the time, take into account any specific written wishes of a Member (or of any person acting on a Member’s behalf with the Member’s prior written authorisation) as to the manner in which such Member’s fund is invested.”

Clause 17: “The Trustees may, with the consent of the Provider, engage in any lawful transaction not specifically authorised by the other provisions of this Deed which would, in the opinion of the Trustees, benefit the Scheme or any arrangements under the Scheme. This is however subject to the status of the Scheme not being prejudiced, whether by

reason of a breach of the requirements and restrictions concerning permitted investment issued by the Board of Revenue & Customs in respect of pension schemes or otherwise."

Clause 19: "All the expenses of administration management and investment of the Scheme shall be charged to and paid out of the designated account(s) of the Member(s) in respect of whom such costs have been incurred. The Provider shall also have power to levy such further expenses as may be incurred in connection with the Scheme as it may, in its sole discretion, deem necessary."

Rule 2 of the Schemes' Rules defines "Member's Fund" as "the aggregate, under an arrangement, of the accumulated values of:

- The contributions paid to the scheme by or in respect of the member,
- Any transfer payment accepted by the scheme in respect of the member,
- Any pension credit rights accepted by the scheme in respect of the member, and
- Any income or capital gain arising from the investment of such amounts.

It excludes:

- Any administrative expenses of the scheme and any payments of commission, and
- Any pension debit arising as a result of a pension sharing order."

Appendix 2

Key provisions of the Schemes' SIPs

Paragraph 2 of the SIP states that: "it is the intention of the Trustees to review investment principles regularly and at least once in every three years; or sooner following any material change in the asset or liability of the Scheme".

Paragraph 3 of the SIP requires Trustees to invest the assets of the Scheme "prudently to ensure that the benefits promised to members are provided". The SIPs for the Donington MC Scheme and the Dominator Scheme both provide that:

> "In setting investment strategy, the Trustees invest primarily in preference shares in the capital of Norton Motorcycle Holdings Limited…The Trustees intend to ensure that the Scheme has an appropriate degree of liquidity given predicted cash flows."

Paragraph 3 of the SIP, in relation to the Commando Scheme, is identical to that of the SIPs for the other two Schemes, except that the company in which the Trustees are to invest is Norton Motorcycles (UK) Limited, a direct, wholly-owned subsidiary of Holdings'.

Paragraph 4 of the SIP states that funds invested in the relevant Scheme are "designed to maximise their return over a five year plus period to coincide with the investment in preference shares issued by the Company [i.e. Holdings, or UK as applicable]. In order to protect the investments of all members of the Scheme, funds cannot be withdrawn during the 24 months from the date of transfer to the Scheme and further, the Scheme applies charges on a sliding scale for the early transfer out of funds from the Scheme after 24 months and prior to five years of investment in it", those charges being set out in a table underneath paragraph 4 of the SIP. After the fifth year of investment, there would have been no charge for fund transfers, beyond normal administration costs that members were notified of from time to time.

Paragraph 5 of the SIP places responsibility upon the Trustees of the Scheme for the investment policy of the Scheme's assets. It states that:

> "The Trustees take some decisions, but reserve the right to delegate others. When deciding which investment decisions to take and which to delegate, the Trustees take into account whether they have received appropriate training and expert advice in order to make an informed decision. The Trustees have established the following decision making structure:
>
> 5.1 Trustees
>
> (a) Structures and processes for carrying out their role
>
> (b) Select and monitor planned assets strategy
>
> (c) Make on-going decisions relevant to the operation principles of the Scheme and its investment strategy

(d) Select and monitor the direct investments in the Company

5.2 Investment Adviser

(a) Advises on all aspects of the investment of the Scheme's assets including implementation and monitoring

(b) Advises on this statement

(c) Provides required training"

Paragraph 7 of the SIP states that:

"The Trustees recognise a number of risks involved in the investment of this Scheme's assets, including trading risks in respect of the overall Company, liquidity risk and political risk."

Appendix 3

Applicants

Pensions Ombudsman's Reference	Name of Applicant	Name of Scheme
PO-22835	Mr S	Dominator 2012 Pension Scheme
PO-25130	Mr G	Dominator 2012 Pension Scheme
PO-23674	Mr E	Donington MC Pension Scheme
PO-26680	Mr H	Dominator 2012 Pension Scheme
PO-28011	Mr C	Commando 2012 Pension Scheme
PO-19721	Mr M	Commando 2012 Pension Scheme
PO-29468	Mr T	Dominator 2012 Pension Scheme
CAS-24184-Q3T4	Mr MG	Donington MC Pension Scheme
CAS-31090-Y2S7	Mrs EW	Dominator 2012 Pension Scheme
CAS-32554-Y7H5	Mr EW	Dominator 2012 Pension Scheme
CAS-32840-N3V6	Mrs TD	Donington MC Pension Scheme
CAS-32617-T9W5	Ms ER	Donington 2012 Pension Scheme
CAS-32260-H6J4	Mr TB	Commando 2012 Pension Scheme
CAS-36041-M1R0	Mr SH	Donington MC Pension Scheme

CAS-36570-D7P4	Mrs N	Commando 2012 Pension Scheme
CAS-34462-F3X5	Mr ES	Donington MC Pension Scheme
CAS-38944-H7V8	Ms EG	Donington MC Pension Scheme
CAS-42363-G9H3	Mrs SE	Dominator 2012 Pension Scheme
CAS-33416-V7V6	Mr SJ	Commando 2012 Pension Scheme
CAS-13470-H5X7	Mr D	Commando 2012 Pension Scheme
CAS-29171-F4C1	Mr SS	Commando 2012 Pension Scheme
CAS-13011-J9L7	Mr SW	Donington MC Pension Scheme
CAS-18425-V2C6	Miss NG	Commando 2012 Pension Scheme
CAS-30372-N1Z5	Mrs GK	Commando 2012 Pension Scheme
CAS-30918-M4P3	Ms N	Commando 2012 Pension Scheme
PO-22207	Ms SI	Donington MC Pension Scheme
PO-28674	Mrs SC	Donington MC Pension Scheme
PO-22397	Mr TA	Dominator 2012 Pension Scheme
PO-28169	Mr DT	Dominator 2012 Pension Scheme
PO-28645	Mr EA	Dominator 2012 Pension Scheme
CAS-47119-H3K2	Mrs SO	Commando 2012 Pension Scheme

Appendix 4

Summary of Holdings' and the Subsidiaries' Accounts

Year ended	Norton Motorcycle Holdings Limited (07031974) ("Holdings")	Norton Motorcycles (UK) Limited (06718623) ("UK")	Norton Motorcycles Racing Limited (06387522) (Racing)	Donington Hall Estates Limited (08604845) (Estates)
31 October 2008	No accounts filed (incorporated on 28 September 2009)	No accounts filed (incorporated on 8 October 2008)	Accounts suggest a loss over the year of £5,793 Abbreviated balance sheet suggests most current assets have not yet been paid for (amounts falling due to creditors within 1 year £125,201; total current assets £128,265)	No accounts filed (incorporated on 10 July 2013)
31 March 2010	No accounts filed (incorporated on 28 September 2009)	Directors are Stuart Garner and Stephen Murray Company Secretary is Peter Paxton. Creditors: • Falling due within one year: £1,122,515 • Falling due after more than one year: £1,500,000 Profit and loss account not included, but balance sheet figure for profit and loss account is £633,559 Investments include 100% shareholding of Norton America	Amounts falling due to creditors within 1 year: £241,836 (net current assets £(38,561)) Amounts falling due to creditors after 1 year: £50,000 (net liabilities £(46,704)) Loss for the year of £(46,705) Listed as a going concern on the basis that the directors will continue to support Racing through their loan accounts for at least 12 months from the date of approval of the financial statements	No accounts filed (incorporated on 10 July 2013)

		LLC (Aggregate capital and reserves £6,143,391).		
31 March 2011	Directors: Stuart Garner and Chris Walker (Stephen Murray, Matthew Bradley, Peter Nichols and J Fields had all resigned on 27 September 2010) The auditors opined that the financial statements gave a true and fair view of the state of the company's affairs as at 31 March 2011 "and of its loss for the period then ended" Profit and loss account: • Turnover: (£7,755) – administrative expenses Notes to accounts: Accounting policies: • A loan of £500,000 has been received, falling due on 31 August 2012 with the option not to repay but instead to allow the loan provider (who is also an investor) the option to retain one half of their existing equity stake of 10% already held in the company • Mentions that UK has received a government backed bank loan under an export guarantee scheme • Since the year end, further shares have been allotted for a consideration of "£640,000 plus further conditional consideration" Fixed asset investments:	Director: Stuart Garner (no company secretary) Auditors' opinion qualified regarding stock, as the auditors could not verify the figure as at 31 March 2011 as they had not been appointed at that time, so had not observed the physical counting of stock. The company did not maintain a perpetual stock inventory Called up share capital: £1 Profit and loss account: £720,798 Notes to the accounts reference trade finance facilities of £625,000 with Santander UK plc (agreed in principle at the time) and negotiations with "potential investors to acquire a small minority stake in the company via an allotment of shares for consideration in excess of £2 million". On the basis of this and the projected cash flow information prepared by the directors (which we have not seen), the directors considered it appropriate to prepare the financial statements on the going concern basis Investments include 100% shareholding of Norton America LLC (Aggregate capital and reserves £2,629,271) Creditors include:	Loss of £256,644 Current assets of £9 Net current liabilities £(237,280) (due to £237,289 owed to creditors within one year) Creditors – amounts falling due after one year £50,000 Auditor's opinion refers to doubts re: going concern	No accounts filed (incorporated on 10 July 2013)

	• investments include 100% shareholding in: ○ UK (Aggregate capital and reserves: £720,799; profit £87,239) ○ Racing (Aggregate capital and reserves: £(254,892); profit: £(30,578)) Debtors: Amounts falling due within one year: • includes £484,872 owed by Group undertakings Called up share capital (allotted and fully paid for cash at par during the period): • 100,000 Ordinary A shares at 1p each • 25,000 Ordinary B shares at 1p each Reserves: • Share premium for a cash share issue was £1,054,870 • A loan to a subsidiary, of £1,046,950, was written off	• an amount of £1,000,000 for which security has been given; and • £1,000,000 of debt falling due in more than five years, repayable otherwise than by instalments £46,277 was loaned to Mr Garner during this accounting year, on top of the £46 that he had borrowed during the previous year. Mr Garner paid back £10,320 of this during this accounting year		
31 March 2012	Director: Stuart Garner Secretary: Kay Johnson Balance sheet shows £(1,049,350) for the profit and loss account figure Notes to the accounts: Fixed asset investments: • investments include 100% shareholding in:	Director: Stuart Garner Auditors' report included a disclaimer of opinion on the financial statements, on the following bases (so no auditor's opinion given on the financial statements): • Limited evidence to support the opening stock balance, as the auditors were not present at the counting of physical stock and the	No current assets £285,287 owed to creditors and falling due within one year Net liabilities £(266,333) Loss of £(266,333). Accounts prepared on going concern basis, but the company is funded by loans from "related businesses" (with no formal	No accounts filed (incorporated on 10 July 2013)

	○ UK (Aggregate capital and reserves: £788,915; profit £68,116) ○ Racing (Aggregate capital and reserves: £(266,333); profit: £(9,690)) Called up share capital: • 6,580 Ordinary A shares were allotted as fully paid at a premium of £110 03 per share during the year Transactions with directors: • £1,118 loaned to Stuart Garner during the year	company did not maintain a perpetual stock inventory • Unable to confirm the existence of £393,651 of the total £804,395 figure given for stock as at 31 March 2012 • Evidence re: trade debtors (£186,392) was limited as unable to confirm the recovery of those amounts due • Evidence re: development cost additions (£416,395) was limited as unable to substantiate the evaluation made by the director of the parts and labour costs incurred in those additions • There was "potential for the uncertainties to interact with one another such that we have been unable to obtain sufficient appropriate audit evidence regarding the possible effect of the uncertainties taken together." Notes to the accounts: Accounting policies: • "The company meets its day to day working capital requirements through funds received in the form of a loan from the parent company." Investments: • Included 100% shareholding of Norton America LLC (Aggregate capital and reserves: £2,639, 813) Creditors: • Included £1,706,963 for which security had been given	documentation or fixed date of repayment)	

		Transactions with directors: • A further £40,214 leant to Stuart Garner, but he had repaid all but £3,834 during the year • No fixed repayment terms for the director's loan, but interest at 4% charged during the year on the overdrawn balance		
31 March 2013	Director: Stuart Garner Company secretary: Kay Johnson Balance sheet: • Debtors increased to £6,673,276 (from £1,225,992) • Profit and loss account £(1,149,350) • Share premium £7,746,962 (up from £1,778,878) Notes to the financial statements: Accounting policies: • The company was dormant during this financial year Investments: • investments include 100% shareholding in: ○ UK (Aggregate capital and reserves: £789,543; profit £629) ○ Racing (Aggregate capital and reserves: £(211,528); profit: £55,076) Creditors: • Amount for which security is given reduced to £0	Director: Stuart Garner Company secretary: Stephen Jeff Douce Balance sheet: • Creditors (amounts falling due after more than one year): £6,044,439 (up from £140,555 the previous year) Notes to the accounts: Fixed asset investments: • included 100% shareholding in Norton America LLC (aggregate capital and reserves £2,780,943) Creditors: • Secured debts down to £1,000,000 (from £1,706,963 the previous year) Called up share capital • 1 Ordinary share at £1. Transactions with directors: • A further loan of £40,599 made to Mr Garner (total outstanding £44,433, none having been repaid during the year)	Total net liabilities of £211,257 (minimal detail included in these accounts)	No accounts filed (incorporated on 10 July 2013)

	Called up share capital: • £8,000,000 Preference shares, at nominal value of 1p each, allotted, issued and fully paid during the year			
31 March 2014	Director: Stuart Garner Investments: • investments include 100% shareholding in: ○ UK (Aggregate capital and reserves: £821,698; profit £32,154) ○ Racing (Aggregate capital and reserves: £(211,528); (no figure given for profit) Share capital: • As for 31 March 2013 accounts Loan to Mr Garner of £1,118 still outstanding	Directors: Stuart Garner and Simon Peter Skinner Notes to accounts: Investments: • 100% shareholding in Norton America LLC (which had aggregate capital and reserves of £2,535,270) • 100% shareholding in Spondon Engineering Limited (aggregate capital and reserves £45,934) Creditors: • Secured debts of £1million • Additional £1,101,360 falling due in more than five years, payable otherwise than by instalments	Net liabilities of £211,257 (same as previous year)	Loss of £18,772. Amount due to creditors within one year: £2,369,322 Amount due to creditors in more than one year: £400,000. Accounts prepared on a going concern basis, with company being dependent on continued support from related businesses. No formal documentation exists for these loans.
31 March 2015	Director: Stuart Garner Blank Profit and Loss Account included Notes to the Financial Statements: Debtors: • £7,091,175 (see 'Related Party Disclosures' below) Investments:	Investments included: • Norton America LLC (100%): aggregate capital and reserves £2,535,270 • Spondon Engineering Limited (100%): Aggregate capital and reserves £69,696; profit: £23,762 • Spondon Developments Limited (50%): Aggregate capital and	Net liabilities of £211,257 (same as previous two years)	Debtors: £28,140 Amounts due to creditors within one year £2,878,698 Net liabilities / loss £80,373 Accounts prepared on a going concern basis as supported by loan finance from related businesses (no

	• Investments in companies included:
	  ○ UK
	  ▪ loss of £(16,004)
	  ○ Racing
	  ▪ aggregate capital and reserves stated as £(211,257) (no profit or loss stated)
	  ○ Estates
	  ▪ Aggregate capital and reserves £(80,373)
	  ▪ Loss £(61,602)
	Directors' advances, credits and guarantees
	• Loan to Stuart Garner still outstanding.
	Related party disclosures
	• £7,056,725 falling due after more than one year
	  ○ owed by Group undertakings – loan to UK interest free no fixed repayment date)
	• UK had repaid a short term loan of £666,232 during the year
	• Loan to Estates: £28,140, interest free no fixed repayment date
		reserves £452,548; profit: £247,130
		Creditors:
		• As for 2014
				formal documentation exists for those loans)

31 March 2016	Director: Stuart Garner Balance sheet shows profit and loss account as £(1,287,391) Share premium: £7,969,203, down from £8,136,346	Balance sheet shows "revaluation reserve" of £42,66. • Creditors: amounts falling due within one year: £2,005,271; amounts falling due after more than one year: £7,585,801 • Investments included:	Net liabilities reduced to £55,777	Debtors: £275,236 Amounts falling due to creditors within one year: £1,013,222 Amounts falling due to creditors after more than one year: £2,150,000

	Called up share capital: £107,619, down from £109,307 (reduction in Preference Shares compared with 2015)
	• Investments in companies included:
	  ○ UK
	  ▪ profit £354,388
	  ○ Racing
	  ▪ aggregate capital and reserves stated as £(55,777) profit £155,480
	  ○ Estates
	  ▪ Aggregate capital and reserves £(103,134)
	  ▪ Loss £(22,761)
	Loan to Mr Garner still outstanding in full (£1,118)
		○ Norton America LLC (100%): aggregate capital and reserves £2,535,270
		○ Spondon Engineering Limited (100%): Aggregate capital and reserves £63,911
		○ Spondon Developments Limited (50%): Aggregate capital and reserves £447,487 (loss of £4,961)
		Development costs:
		• "The Directors are of the opinion that in order to give a true and fair view of the company's financial position, all development costs need to be capitalised. This may constitute a departure from SSAP 13 which requires that certain costs should be written off in the year of expenditure. Aggregate development costs could be overstated if the future economic value of these assets is not fully realised."
				Net liabilities: £103,134
				Operating on a going concern basis as funded by related company loans which are not formally documented.

31 March 2017	Director: Stuart Garner Capital and reserves: • Called up share capital: £103,748 • Share premium: £7,625,131 • Retained earnings: (£1,186,329) • Total shareholders' funds: £6,542,550 Fixed asset investments: • Increased by £869,010 over the year • Total: £877,062	Directors: Stuart Garner and Simon Peter Skinner Balance sheet includes: • "capital contribution reserve": £705,328 • "Fair value reserve": £42,661 (this was described as a "Revaluation reserve" in the 2016 accounts) ○ the notes to "Fixed asset investments" describe this as "Valuation in 2015" Secured debts included within creditors: • Bank overdrafts: £738,846	Net liabilities: £56,880	Tangible assets have decreased from £2,769,670 at start of year to £8,449 New investment property £4,750,000 Net assets £1,431,849

	Debtors: Amounts falling due after more than one year: • Amounts owed by Group undertakings: £5,619,748 (had been £6,835,639 at the start of the year) Called up share capital: • Preference shares down from £106,303 to £102,432 Mr Garner still owed £1,118 (no change from previous year)	• Other secured loans: £403,359 Investments in Norton America LLC and the Spondon companies are not referred to in the notes The 2018 accounts refer back to a pre-tax loss of £201,842 at 31 March 2017 and net current liabilities of £1,098,772		
31 March 2018	(Consolidated accounts) Director: Stuart Garner Political donations and expenditure (assume this refers to UK's donations and expenditure): • North West Leicester Conservative Association: £2,500 • Other: £183 Auditors' disclaimer given for the same reasons as for UK Material uncertainty relating to going concern: Group's loss after tax was £13,182 and liabilities exceeded assets by £5,068,626 Shareholders' funds: • Consolidated balance sheet: £6,156,848 • Holdings' balance sheet: £5,564,460 Company's profit for the financial year stated as £87,884	Directors: Stuart Garner and Simon Peter Skinner Political donations and expenditure: • North West Leicester Conservative Association: £2,500 • Other: £183 Auditors were unable to express an opinion on the financial statements, as certain opening balances could not be audited: • Development costs (£3,718,992, representing 34.5% of the company's gross assets) included judgmental estimates and, therefore, uncertainty • Insufficient audit evidence re: the carrying amount of UK's investment in Norton America LLC (£1,511,063) • Insufficient evidence re: stock (£1,257,899) • Insufficient appropriate evidence re: trade debtors (£166,472)	Net liabilities of £60,164	Tangible assets of £1,400,293 and investment property of £3,275,862 Net assets: £1,219,944

	Basis of consolidation: • Holdings' subsidiaries: ○ UK ○ Racing ○ Estates • UK's subsidiaries: ○ Spondon Engineering Limited ○ Norton America LLC (excluded from the consolidated accounts as "inactive") Group strategic report, report of the director and consolidated financial statements, re: Holdings, for the year ended 31 March 2018 show: • No dividends to be distributed for this year • Auditors unable to express and opinion due to lack of evidence to support the unaudited financial statements for the year ended 31 March 2017 Material uncertainty re: Group's ability to continue as a going concern Directors' advances, credits and guarantees: • At year end, Mr Garner owed £160,773 to the Group	• Other debtors included £348,087 due from related parties, with insufficient evidence Also, regarding the year end 31 March 2018: • Failure to account for development expenditure in line with FRS 102 meant potentially insufficient amortisation of development costs per motorcycle • Failure to account properly for grant income meant that other income and net profit had been overstated by £1,054,888 and deferred income understated by the same amount • Insufficient evidence re: carrying amount of UK's investment in Norton America LLC Going concern: • Loss after tax of £1,537, together with liabilities exceeding assets by £3,384,200, together with other matters indicated material uncertainty, casting significant doubt about UK's ability to continue as a going concern Reduction in capital contribution of £80,138. • The opening balance suggests that, in the previous financial year, there had been a capital contribution of £163,682 Net assets / shareholders' funds £451,065 Fair value reserve still £42,661		

		Notes to financial statements: Going concern: • refers to a proposal for refinancing, “including the provision of further growth capital” Turnover: • £6,718,984 Exceptional items: • Loan from M SIPP (a pension scheme in which a shareholder of the ultimate parent company, Norton Motorcycle Holdings Limited, has an interest) written off over 3 years, as directors’ opinion was that this was very unlikely to ever become payable • Debt due from Lantern Seven Limited (previously Fireworks World Limited) (Stuart Garner was a director until he resigned on 29 June 2018 and is a shareholder) £324,002 deemed irrecoverable and written off in full during the year • Loan from Priest House Hotel Limited (SJ Garner is sole shareholder and director) £61,094 written off. £19,721 still outstanding at year end (listed in Related Party Disclosures) • Debtor balance of £22,052 from Greensward Ltd (S Garner sole shareholder and director) written off • Recognised an additional creditor, £14,005, to British Motorcycles Manufacturing Academy Limited		

		(S Garner is sole shareholder and director) • Intercompany balance of £58,182 from Norton America LLC written off (SJ Garner is a director) • Recognised impairment of Spondon Engineering Limited of £42,661 (a subsidiary) in light of its cessation and net assets position • Recognised impairment of Spondon Developments Limited, an associate company, amounting to £82,660 in light of its cessation and net assets position ○ Long term loan to Spondon Developments of £63,176 recognised at year end (interest free, unsecured, with no fixed repayment date) • Intercompany loan from Holdings during year ended 31 March 2017 – 5 year interest free loan £6,325,076, discounted using the market interest rate of 3% per annum Related party disclosures: • Greensward Limited (S Garner is a shareholder and a director): owed UK £63,728 at year end (down from £125,913 at 31 March 2017) (unsecured, interest free, no fixed repayment date). • Short term loan owed by UK to British Motorcycle Manufacturing Academy Limited (S Garner = sole director) (£165,565, down from £223,291) (interest free,		

		unsecured, no fixed repayment date • UK sold goods of £25,000 to British Motorcycle Manufacturing Academy Ltd during the year. Balance due at year end was £30,000 (had been £nil opening balance) • Plant and machinery purchased for £90,000 from AC Garner (S Garner's father) Directors' advances, credits and guarantees: • £223,556 advanced to Stuart Garner (opening balance had been £(2,257)), and £5,200 repaid, during the year • £216,099 closing balance Unsecured, interest of 2.5% per annum on overdrawn balances and no fixed repayment date		

Appendix 5

Timeline Regarding: Holdings' Shares

Date	Notes
Before 29 October 2009	3 Ordinary shares issued at nominal value of £1
29 October 2009	Issued shares subdivided into 300 shares at nominal value of £0.01 each Ordinary shares now classified as Ordinary A and Ordinary B shares (all of £0.01 each) A further 99,700 Ordinary A Shares allotted Nominal value: £0.01 Amount paid: £nil Statement of capital: 100,000 Ordinary A Shares: • Amount paid up on each share (including any share premium) £0.01 • Aggregate nominal value: £1,000
9 February 2010	12,500 Ordinary B Shares allotted: Nominal value of each share: £0.01 Amount paid (including share premium): £1,000,000 (£80 per share) Statement of capital: 100,000 Ordinary A Shares: • Amount paid up on each share (including any share premium) £0.01 • Aggregate nominal value: £1,000 12,500 Ordinary B Shares: • Amount paid up on each share (including any share premium) £80 • Aggregate nominal value: £125

	Total number of shares: 112,500 Total aggregate nominal value: £1,125
31 March 2010	550 Ordinary B shares allotted Amount paid: £100 per share Nominal value of each share: £0.01 Total number of Ordinary B shares: 12,500 (NB: this should be 13,050, so seems to have been stated incorrectly) Total number of shares: 112,500 Total aggregate nominal value: £1,125
28 September 2010	Annual return shows shareholders (as at 28 September 2010) as: • Argus Nominee Directors Limited: 0 shares (1 share transferred on 29 September 2009) • Stephen Murray: 12500 Ordinary B Shares • Stuart Garner: ○ 100,000 Ordinary A shares; ○ 11950 Ordinary B shares • Mike Glover: 550 Ordinary B Shares held as at 28 September 2010 Total shares: 125,000 (this figure seems to be incorrect, given the issue of 550 Ordinary B shares on 31 March 2010)
28 September 2011	Annual return shows: 100,000 Ordinary A shares allotted: • Aggregate nominal value: £1,000 • Amount paid per share: £0.01 25,000 Ordinary B shares allotted: • Aggregate nominal value: £250 • Amount paid per share: £0.01 (NB: this does not fit with earlier statements that £80 had been paid per share) Shareholders: • No change from 28 September 2010
27 September 2012	Resolutions passed so that all ordinary A and B shares rank equally re: voting rights, dividends and distributions on winding up Ordinary A and B shares all re-classified as “Ordinary” Directors’ resolution passed, giving directors authority to allot shares or grant rights to subscribe for or convert security into

	shares up to an aggregate nominal amount of “£64 28” and to disapply pre-emption rights
	
	Statement of capital shows:
	
	• New allotment of 6428 Ordinary shares
	  ○ Nominal value: £0.01
	  ○ Amount paid on each share: £6,428 (assume this should be the total amount paid, with £1 paid per share).
	• Total shares:
	  ○ 131,428 Ordinary shares
	  ○ £1 paid up on each share
	  ○ Aggregate nominal value: £131,428

28 September 2012	Annual return shows the following shareholdings: • 13,143 Ordinary shares Stephen Murray • 113,107 Ordinary shares Stuart Garner • 578 Ordinary shares Mike Glover • 4,600 Ordinary shares Thierry Stapts Total Ordinary shares: 131,428

20 October 2012	Directors authorised by resolution to allot preference shares up to an aggregate nominal amount of £12,000,000
	
	4,000,000 Preference shares allotted:
	
	• Nominal value: £0.01
	• Amount paid: £1
	
	Total shares:
	
	• 131,428 Ordinary Shares
	  ○ £1 paid up on each share
	  ○ Aggregate nominal value: £131,428
	• 4,000,000 Preference Shares
	  ○ £1 paid up on each share
	  ○ Aggregate nominal value: £4,000,000
	
	Prescribed particulars re: Preference shares refer to the right of preference shareholders to receive a preferential dividend at the rate of 5% per annum of the amount paid per share

30 October 2012	2,000,000 Preference Shares allotted:
	
	• Nominal value: £0.01
	• Amount paid per share: £1
	
	Total shares:
	
	• 131,428 Ordinary Shares
	  ○ £1 paid up on each share
	  ○ Aggregate nominal value: £131,428
	• 6,000,000 Preference Shares

	○ £1 paid up on each share ○ Aggregate nominal value: £6,000,000
4 December 2012 to 4 December 2013	2,667,661 Preference Shares allotted: • Nominal value: £1 • Amount paid: £1 Total preference shares: 10,667,661 (This statement of capital was filed on 12 May 2015 and does not fit with other statements of capital as at 28 September 2013 or 2014)
1 February 2013	2,000,000 Preference shares allotted: • Nominal value: £0.01 • Amount paid per share: £1 Total shares: • 131,428 Ordinary Shares ○ £1 paid up on each share ○ Aggregate nominal value: £131,428 • 8,000,000 Preference Shares ○ £1 paid up on each share ○ Aggregate nominal value: £8,000,000
28 September 2013	Annual return shows shareholders: • Stephen Murray: 13143 Ordinary Shares • Stuart Garner: 113107 Ordinary Shares • Mike Glover: 578 Ordinary Shares • Thierry Stapts: 4600 Ordinary Shares • Donington MC Fund: 4,000,000 Preference Shares • Dominator Fund: 2,000,000 Preference Shares • Commando Fund: 2,000,000 Preference Shares
28 September 2014	Annual return shows no change in shareholders since 28 September 2013
28 September 2015	131,428 Ordinary shares allotted • Amount paid per share: £1 • Aggregate nominal value: £131,428 8,000,000 Preference shares allotted: • Amount paid per share: £1 • Aggregate nominal value: £8,000,000 Shareholders listed as for 28 September 2013 and 2014

19 September 2016	40,779 Preference shares redeemed
	Statement of capital:
	• 131,428 ordinary shares
	  ○ aggregate nominal value: £1,314
	• 9,959,652 preference shares
	  ○ aggregate nominal value: £99,597

24 November 2016	55,910 Preference shares redeemed
	Statement of capital:
	• 131,428 ordinary shares
	  ○ aggregate nominal value: £1,314
	• 9,903,742 preference shares
	  ○ aggregate nominal value: £99,037

7 December 2016	72,934 Preference shares redeemed, nominal value £0.01 each
	Statement of capital:
	• 131,428 ordinary shares
	  ○ aggregate nominal value: £1,314
	• 9,830,808 preference shares
	  ○ aggregate nominal value: £98,308

5 January 2017	Resolution passed re: varying preference share rights or name Company's articles updated to enable preference shareholders to receive their 5% per annum dividend
5 January 2017 to 1 May 2018	Statements of capital re: Holdings, all filed on 5 April 2019, show share capital reducing as preference shares are redeemed Preference shares as at 1 May 2018: 9,020,985 with aggregate nominal value of £90,209