IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

No. HC-2016-002391

Rolls Building
Tuesday, 20th June 2017

Before:

MRS JUSTICE ASPLIN

IN THE MATTER OF: (1) THE LANCASTER PENSION SCHEME (2) CRANBORNE STAR PENSION SCHEME (3) GROSVENOR PARADE PENSION SCHEME (4) TALLTON PLACE PENSION SCHEME (5) WOODCROFT HOUSE PENSION SCHEME (6) THE PORTMAN PENSION SCHEME

B E T W E E N :

DALRIADA TRUSTEES LIMITED
(as trustee of the above named pension schemes) — Claimant

- and -

KIM ANNETTE GOLDSMITH
(as representative beneficiary) — Defendant

MR F. MOERAN QC (instructed by Pinsent Masons LLP) appeared on behalf of the Claimant.

MR K. BRYANT QC (instructed by Trowers & Hamlins LLP) appeared on behalf of the Defendant.

PROCEEDINGS

I N D E X

(NB: Mrs Justice Asplin's microphone fades in and out. Some inaudible speech due to this.)

Tuesday, 20th June, 2017

(12.00 p.m.)

(Please see separate transcripts for proceedings in private)

MR. MOERAN: My Lady, I am Fenner Moeran and I appear on behalf of the claimant, Dalriada Trustees Limited. I am instructed by Pinsent Masons LLP. My learned friend Mr Bryant QC appears for the defendant, Ms Goldsmith, and he is instructed by Trowers & Hamlins LLP.

This is the trial of a Part 8 claim seeking both Beddoe relief and various directions relating to the administration of six occupational pension schemes. It's listed for two days of court time but I am optimistic that we will finish well short of that and, quite possibly, within one day of court time.

MRS JUSTICE ASPLIN: Well, what an optimist, Mr Moeran. Yes, go on.

MR. MOERAN: On that optimistic front, before we get to the substantive matters I should just check some bookkeeping.

Your Ladyship should have six bundles consisting of volume 1, volumes 2A, B -- no, five bundles; A, B and C and volume 3. So, five bundles.

MRS JUSTICE ASPLIN: Yes. And then an authorities bundle.

MR. MOERAN: And an authorities bundle. Six bundles. Exactly.

MRS JUSTICE ASPLIN: Six.

MR. MOERAN: Six bundles. And then your Ladyship should also have two skeletons; one from myself and one from my learned friend.

MRS JUSTICE ASPLIN: I do. And now I apologise for the lighting, which Mr Ellis has done his very best to increase. Sometimes he can work his magic on the switch and sometimes it seems, not So, I can see you in the gloom, so that will do.

MR. MOERAN: I am grateful, my Lady.

MRS JUSTICE ASPLIN: As long as you can see what you are reading. I have read everything you have asked me to read. I'm aware, therefore, the background of the position of the claimant and the background of the schemes and the arrangements which took place----

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: -- in relation to them and the difficulties, therefore, which have arisen in relation to amounts which were purportedly loaned and also the tax consequences of both

the scheme and then, of course, the judgment of Mr Justice Bean, as he then was, which explains the status of those payments.

MR. MOERAN: Excellent.

MRS JUSTICE ASPLIN: And therefore I also understand, and I take it stage by stage, I also understand that as the trustee who exercised the powers, although Dalriada is not the sole trustee it has the sole ability to exercise the powers in relation to the six pension schemes, I understand that the first question, which is of many questions which are in the Part 8 proceedings relates to Beddoe relief in relation to liberty to seek to recover those sums paid purportedly by way of loans from a large number of the members of these various schemes. I think that's where we should start.

And before you begin there I also understand that this is not a situation in which the trustee is shedding itself of its discretion and asking me to exercise the trustees' discretion. What I am being asked to do is to consider the steps which are proposed and, in the light of that, to approve those steps, should the trustees wish to take them, and the purpose of that exercise is in order that at a later stage, if there were any argument about that, it could not be said that those -- the costs of taking those steps had been properly in any way been taken from the trust funds because those steps had been approved by the court.

So, that's where I am. If that's not correct, please tell me, Mr Moeran.

MR. MOERAN: Your Ladyship is absolutely accurate and on point on all of these issues.

MRS JUSTICE ASPLIN: I also understand the representation order, and I think that's where we should go next before we go onto the detail, which seems to be at least on the far end of the complex scale, I think, in relation to these matters, Mr Bryant. That was an order which was made, I think, by Chief Master Marsh.

MR BRYANT: My Lady, yes, in December.

MRS JUSTICE ASPLIN: Yes. And basically it is an issue-based----

MR BRYANT: Yes.

MRS JUSTICE ASPLIN: -- order and there is a table, a schedule of who was arguing what in relation to which element----

MR BRYANT: Yes.

MRS JUSTICE ASPLIN: -- of this complex matter and, in effect, the trustee is arguing in favour of those steps which are the least difficult and the least expensive and you are appointed on

behalf of Ms Goldsmith, Mrs Goldsmith, to argue those which would be in principle, at least, the most beneficial for the members, although that's rather difficult to pinpoint.

MR BRYANT: Yes.

MRS JUSTICE ASPLIN: And is a very inaccurate way of describing your position, I think, Mr Bryant.

MR BRYANT: I think, in fairness, Mr Moeran's position, as set out in his skeleton argument, certainly on some of the directions questions rather than the Beddoes questions, is that one simply cannot tell which outcome is in the best interests of----

MRS JUSTICE ASPLIN: No.

MR BRYANT: -- which particular tranche of members until after the event.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: But, yes, I think we are clear----

MR. MOERAN: Yes.

MR BRYANT: Certainly, I think I'm clear as to which arguments each side is running.

MRS JUSTICE ASPLIN: And I have looked at that schedule table and I see no reason in any way, I am sure you will be glad to know at this stage, I see no reason to vary it in any way and it seems to me to be entirely sensible. And so rather than having to make a representation order that hurdle has already been jumped and I am satisfied with it.

MR BRYANT: My Lady, thank you. Two matters, if I may, while I am on my feet. One is, and I am probably pre-empting what Mr Moeran may have been about to say, there is an outstanding application to amend the claim form.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: And there is a knock-on effect in terms of the detail of the representation order, and particularly the fine detail of the table that your Ladyship has just referred to.

MRS JUSTICE ASPLIN: Right.

MR BRYANT: We don't object to those matters, subject to any views to the contrary from your Ladyship.

MRS JUSTICE ASPLIN: Thank you very much. So, we should go there next, if that is all right, Mr Moeran?

MR BRYANT: My Lady, yes, a second point and really a matter of logistics for today, if nothing else. Your Ladyship may not have got as far in her reading as to pick this up. There was an announcement sent out to members on Friday. I know that some received it on Friday. It was sent in the ordinary post so I am not quite sure how that was engineered, but there we are. Others, I know, received it on Saturday. I can't speak for more than a couple of the members

that I've had access to this morning. I don't know whether others may have received it later, possibly yesterday. Quite properly, the announcement, albeit, one might say, a little late in the day, alerted members to this hearing and it gave them a time of two o'clock, which was the time that we had both been told would be the start time for today. I have no information to the effect that there is anyone who is likely to turn up at two o'clock and have any applications to make.

You may have seen there were "noises", if I can put it in that sense, at the last hearing, that there were various factions who were dissatisfied with the representation order that was made and, in particular, that only one representative beneficiary had been brought into the proceedings. Chief Master Marsh, I can take you to his order if it would help, envisaged that it may be that people may want to make applications, and I think the way he put it was any application should be made by 20th January, or thereabouts, but that didn't preclude anybody from making an application at a later date, albeit it might find less favour than if it were made sooner.

I simply raise it at this point because it would, obviously, be unfortunate if somebody did turn up at two o'clock, having received the notice that that was when the hearing was going to start, and had applications to make that may be something that perhaps treads on Mr Moeran's toes in terms of what he's going to say in the next 50 minutes or so.

MRS JUSTICE ASPLIN: Are you suggesting, therefore, that we don't proceed now?

MR BRYANT: Well, I think I'm suggesting we don't proceed to anything that is likely to be contentious as far as members are concerned. It might be said against me, "Well, that's----

MRS JUSTICE ASPLIN: That, for me, is a real problem. I understand where you are coming from, because it was two o'clock and I thought that it would assist if we began at 12. We can't win for losing.

MR BRYANT: Indeed.

MRS JUSTICE ASPLIN: But given the amount of material here and the detail which has to be got through, that's why I thought it was appropriate to begin at 12 o'clock and also why I have read and I've cut through all of that preliminary material that Mr Moeran might seek to entertain me with between now and one o'clock.

MR BRYANT: Indeed.

MRS JUSTICE ASPLIN: And I am ready to go to the first issue, which is really, perhaps, one of the central issues, which is what is to be done in relation to recovery of the sums, if any, and is bankruptcy the right route, et cetera, and I am proposing to begin now.

MR BRYANT: I have raised the point. There we are.

My Lady, certainly the application to amend, which I don't imagine will take very much of your time, I have no issue with that being dealt with before lunch. There are also, as is typical in these sorts of applications, matters which will be dealt with in private.

MRS JUSTICE ASPLIN: Mm hmm.

MR BRYANT: Which, even if members wished to turn up to have something to say, they wouldn't be able to say it in those bits of the hearing.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: Now, one possibility, and I put it forward on no stronger basis than that, would be for your Ladyship to deal with any such matters----

MRS JUSTICE ASPLIN: To use the time in that way.

MR BRYANT: It might be inappropriate if Mr Moeran needed to lead you through the material, but by the sound of it you're fully up to speed.

MRS JUSTICE ASPLIN: That's a very -- that's a very sensible suggestion, Mr Bryant, and I think that we should take that up. I shouldn't be taken to have meant by anything that I said that I was in any way seeking to preclude what any member might wish to say or application they might want to make at two o'clock or beforehand if they were to arrive before that or that what might transpire between now and then would in any way affect my attitude towards their application. But I do think that we ought to make use of the time----

MR BRYANT: Yes.

MRS JUSTICE ASPLIN: -- in the most sensible way.

MR BRYANT: And nor was anything you said taken in that way.

MRS JUSTICE ASPLIN: Thank you.

MR. MOERAN: I am very grateful to my learned friend for that and I'm very grateful to your Ladyship for that.

I will briefly go to the application to amend and take your Ladyship through it. What I propose doing is actually as follows: there are a number of background documents that your Ladyship will not have had sight of, at least directly. And what I intend to do is start with the background documents. For example, the deed and rules and the application, the membership

application form. They are not long. They should probably take us through to about one o'clock. With that in mind, it speeds up the next part of the hearing. I have no doubt that we still be dealing with the MPVA Beddoe application at two o'clock.

MRS JUSTICE ASPLIN: Oh, yes.

MR. MOERAN: So, I absolutely agree with what Mr Bryant has said, but I cannot see that there will be a prejudice to members, members of the public/members of the schemes, if they have some desperately important application to make, coming at two o'clock, because no determination could have been made before that stage. And your Ladyship will still be hearing submissions on it and therefore will still be open to the point.

MRS JUSTICE ASPLIN: But also not controversial submissions.

MR. MOERAN: Not controversial, exactly. Now, on that, I would then take your Ladyship to the application to amend. The simplest way of dealing with this is to take up file 1 and see the amendments that are proposed to be made. And it is file 1, tab A8.

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: There are two parts to the amendment. And this is at p.23 onwards you see the amended -- or proposed amended details of claim and the amendments relate to para.7 and 11(1). And para.7 is a clear point, it's on the initial MPVA Beddoe, as I am going to call it, at p.24, and I will be coming -- I will be coming back to this in detail when we get to the MPVA Beddoe application itself. But, essentially, what this is doing is seeking to deal with the fact that limitation periods have passed, arguably, and I do emphasise the "arguably", and as such we have been issuing either standstill agreements or issuing proceedings. So, it's just updating the position on that and to deal with the procedural ramifications of that. I cannot see that this is contentious in any way, because it's just dealing with a factual circumstance that has come to arise.

If your Ladyship turns on to p.25, you get to a slightly different sort of amendment. And p.25, at the bottom of the page you have question or para.11 of the details of claim. And para.11, as your Ladyship will have seen, is dealing with the allocation of costs between the six schemes and it breaks down a number of different types of costs. At 11(i) is the allocation of costs of recovery of the MPVAs, assuming, of course, that your Ladyship gives us Beddoe relief to pursue recovery of the MPVAs. But, assuming that does happen, and indeed to a certain degree there have been costs already incurred, but assuming that does happen what happened was in the December hearing before Chief Master Marsh he identified another potential basis of allocating costs. And specifically, if your Ladyship turns over to p.26, it is 11(i)(c) and it's -

- well, (i) is just apportioning equally between the schemes, 1(a) is apportioning between the schemes, (b) is apportioning *pro rata* by reference to value of assets, (c) was apportioning *pro rata* by reference to the respective amount of MPVAs made by each of the schemes. And then Chief Master Marsh said, "Well, how about apportioning equally by means of the amount of recoveries of MPVAs made?" So, we are simply adding that in as another option. Now, I will be coming back in that stage of the submissions to say that there are some significant practical difficulties with that, but it's a rational option so we thought we'd include it.

Now, those are the two applications for amendment. What I propose doing is highlighting those two -- those two parts of the application as and when they become relevant in the submissions so your Ladyship can see them in context. And then what I would propose to do is your Ladyship considers them and makes the determination at that stage rather than now, when they are slightly hanging in a limbo.

MRS JUSTICE ASPLIN: Yes. I can see that they are both illogical but they are stuck within context.

MR. MOERAN: It's easier to understand them, effectively. Now, that was the first of a couple of procedural points I wished to make just before we kick off with the documents.

The second is a couple of points on confidentiality and privacy. Now, as Mr Bryant pointed out, because of the nature of a Beddoe application, not the directions application but a Beddoe application, there is some evidence which is private and should not be either disclosed nor heard in open court. And this breaks down into two parts. You have the paper evidence and access to it and you have the oral hearing or the conduct of this hearing today. Now, on the paper evidence, as your Ladyship may have already noticed, there is actually an order from October last year before Chief Master Marsh, which provides that Mr Fairhead's second witness statement, and the exhibit to that, BAF4, cannot be disclosed to non-parties, and that's the witness statement and exhibit that deals with the tax appeals. And Mr Fairhead's third witness statement and exhibited to that, BAF5, cannot be disclosed to either non-parties or, indeed, the defendant. And the reason for that is that's the witness statement and confidential opinion that deals with the merits of the MPVA claim. But both of those points have already been dealt with historically and they are, I would suggest, entirely standard for this sort of application. The reason----

MRS JUSTICE ASPLIN: Where is the order?

MR. MOERAN: The order is at volume 1, tab A4, and it's para.1 and para.2 of that order at p.12 of the bundle.

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: Now, the tax Beddoe we have no difficulty disclosing to the defendant and her legal representatives because we are not against the defendant and her legal representatives in that matter. We do have a problem with disclosing it to non-parties because, A, that would include HMRC, who are the opposite----

MRS JUSTICE ASPLIN: And it contains private matters in relation to members of the scheme.

MR. MOERAN: Exactly. Thank you. The third witness, under BAF5, is the MPVA claims and, of course, we cannot disclose that to the defendant----

MRS JUSTICE ASPLIN: No.

MR. MOERAN: -- because it's against her and, indeed, against her class.

Now, this is the point I want to flag up. Out of an abundance of caution we, and your Ladyship will have seen this from the witness statements, where it is a confidential witness statement there is a box.

MRS JUSTICE ASPLIN: Oh, yes.

MR. MOERAN: There is a box. It is to help make sure that these things do not get disclosed accidentally. We did that also in relation to Mr Fairhead's fourth witness statement, which is in volume 1, tab B5. We didn't have an order for covering -- for sealing, to use the American term, and on reflection we've concluded that we don't need to seal it. So, that particular witness statement updates the court on various matters, in particular the standstill agreements and the progress of the----

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: -- HMRC litigation. There are some matters of strategy, there are some matters of how to deal with recalcitrant borrowers, so to speak, but we've concluded that in the context of this we want to be as open as possible and we're willing to go with this being an open witness statement.

MRS JUSTICE ASPLIN: Mr Moeran, presumably, all of these documents have been filed on CE-File?

MR. MOERAN: Yes. And they've got the right----

MRS JUSTICE ASPLIN: What's been done about -- no, no. What's been done about that to make sure that they're not available?

MR. MOERAN: Right. That will have had a tick box saying it's not available to non-parties.

MRS JUSTICE ASPLIN: I'm just thinking you should take care to check.

MR. MOERAN: And we will make sure that that is adjusted to make sure that it is available to anybody. To be honest, because it's available already, and that particular witness statement was available to the defendant in that particular case, because it's available to the defendant it's actually quite difficult to get access for non-parties, but we will ensure that that is checked.

MRS JUSTICE ASPLIN: I think you should.

MR. MOERAN: Yes. Now, with that in mind, those two procedural points dealt with, this is how I would propose that we deal with matters. First of all, we are going to take the Beddoe applications and what I would propose is we take both Beddoe applications, both in relation to the MPVAs and the tax appeals, together. And I would suggest that what happens is I go through the underlying documents of the case, and this will also deal with the directional matters. Then I get on to the Beddoe applications and I open on the Beddoe applications. I would suggest at that stage, after opening on both the MPVA recovery and the tax appeal Beddoes, we then go into private session, entirely private, so not including the defendant, briefly to deal with the MPVA matter. Then we bring Mrs Goldsmith and her legal representatives back into court and deal with the private matters on the tax appeals. Then we bring the court back into open session and deal with Mr Bryant's reply on both Beddoe cases. He then has an opportunity to take a confidential moment with your Ladyship with us out absent and then hypothetically there might be a moment of reply, but I would be very surprised if it's more than a couple of minutes.

MRS JUSTICE ASPLIN: That seems smooth and sensible to me. Are you content with that, Mr Bryant?

MR BRYANT: My Lady, yes.

MRS JUSTICE ASPLIN: Yes. And I ought to add that I am proposing to deal with each issues as it arises. So, once all of that has taken place I will then make a decision and tell you what it is.

MR. MOERAN: That is extremely helpful.

MRS JUSTICE ASPLIN: Of course, these matters are very complex and very important and therefore it is important to obviously consider them properly, as in all cases, and to be au fait with the detail. But it seems to me that these are practical matters which need to be dealt with as soon as possible and therefore that is why, at each juncture, at the end of each section, I intend to take a short amount of time and then give you my judgment on that issue and then we will move on.

MR. MOERAN: First of all, we are very grateful for that. Secondly, that actually simplifies the next stage, which is the directions.

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: Questions 11, 12 and 13 on the claim form are dealing with, effectively, administrative directions, so there is no need for any privacy whatsoever, it's just questions of law within the internal administration of the schemes.

Now, at that stage, what I propose again is that I deal with all three questions, 11, 12 and 13, and all their sub-parts before handing over to Mr Bryant for his response on all three questions. Essentially, the arguments are pretty identical for a lot of the questions. Question 13 is a little bit different, but questions 11 and 12 follow through.

MRS JUSTICE ASPLIN: I think the answer to that would be that it may be more accountable to deal with -- to hear what Mr Bryant has to say interposed, but we will see one after the other rather you dealing with 11, 12 and 13 all together, but we will see where we go.

MR. MOERAN: Very well.

MRS JUSTICE ASPLIN: I don't think either of you will mind in relation to that.

MR. MOERAN: No. Now, on that basis, what I intend to do is take your Ladyship through a few of the underlying documents. Your Ladyship has been very helpful in indicating that you have read all the matters that I have highlighted in our suggested reading list, but that was witness statements and skeletons and it is important that your Ladyship sees the underlying documents. It highlights the extremely, I hesitate to use hyperbolic, but the extremely sad story that this presents the court. This is----

MRS JUSTICE ASPLIN: I think it's a tragedy.

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: It's just terrible.

MR. MOERAN: It is abuse of innocent members of the public. It is abuse, in particular, of vulnerable, innocent members of the public and Dalriada is deeply concerned to do as best they can in an impossible situation. There is no perfect solution to this. And let's be quite clear about this, it's bad. And the only question is how can we mitigate the badness? Or at least I should emphasise, the only question for us at Dalriada assist in mitigating that badness concurrent with their obligations as a trustee.

MRS JUSTICE ASPLIN: I was going to say, they have to, obviously, abide by their obligations as trustee, but seek to do so in the way which is least damaging.

MR. MOERAN: Exactly. And that is entirely the approach that Dalriada has taken from the outset.

A

Now, what I'm going to do is take your Ladyship through the underlying documents, so if I can take your Ladyship to volume 2A. I am going to do this is a somewhat chronological order, as best one can in these circumstances. It's 2A, tab C1.

MRS JUSTICE ASPLIN: Yes.

B

MR. MOERAN: It's at page -- and the page numbering I will be referring to is the bottom right hand corner bold numbering, p.268. And that should be exhibit CMT1.

MRS JUSTICE ASPLIN: 268 is a chart?

MR. MOERAN: Ah, no. Bottom right hand right corner is 268, there should be exhibit CMT1.

C

MRS JUSTICE ASPLIN: Yes. CMT1 is 267 -- is the cover sheet, the next page is a chart.

MR. MOERAN: Yes. Okay. And so the bottom right hand number----

MRS JUSTICE ASPLIN: The bottom in the middle number.

MR. MOERAN: You don't have bottom right hand numbers? Oh----

D

MRS JUSTICE ASPLIN: I don't have right hand numbers, I have middle numbers.

MR. MOERAN: -- fiddlesticks. Okay.

MRS JUSTICE ASPLIN: That's 268.

MR. MOERAN: That's good to know. Okay, 268 middle number is a chart and what we see is the exhibit to Mr Tweedley's witness statement in the original Part 8 proceedings.

E

MRS JUSTICE ASPLIN: Okay. So, that is the right page.

MR. MOERAN: It is the right page.

MRS JUSTICE ASPLIN: Okay.

MR. MOERAN: Slightly different numbering, but it's to know that you don't have bottom right hand numbering. Okay.

F

So, Mr Tweedley was the architect of the ARK scheme so he presented to the court in proceedings before Mr Justice Bean in 2011, he presented a witness statement, which is back there, and with that he explained how he came about -- he came upon the concept of a

G

reciprocal pensions arrangement. And at p.268 you have the PRP concept in chart form and you see Member A, the funds being used to make a loan to Member B, effectively. Now, that's in simple terms. Your Ladyship has seen that in the skeleton. The important point is if your Ladyship turns over to p.269 you get the PRP concept described, and this is still an

H

exhibit to Mr Tweedley's witness statement and he refers to it in his witness statement. This is his summary of it. Paragraphs 1 and 2 and the crucial parts:

> "Member A is unable to access cash in existing arrangement due to Finance Act 2004 restrictions. Member A is motivated to make transfer (as advised by the introducer) to enjoy access to equivalent reciprocal sum from Member B MPVA. Same considerations apply to Member B. 2. This is the reciprocal MPVA which, in effect, bypasses the Finance Act 2004."

And the point here, bypasses Finance Act 2004 restriction, blah, blah, blah, HMRC unlikely to be grateful for the privilege of seeing the Finance Act 2004 restriction rendered impotent but there's no invalidity by bypassing restriction regulations, per se.

Now, the point here is that this is the beginning of representations and a statement that the intention of this PRP structure was to avoid tax.

MRS JUSTICE ASPLIN: It was to unlock amounts of money from people's benefits which had been accrued in the schemes in a way which was otherwise not tax approved.

MR. MOERAN: Exactly. And the crucial thing that I am emphasising is that it was supposed to do so without incurring a tax charge.

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: Absolutely. For the record, you also have Mr Tweedley's witness statement at p.256 at para.9 to para.13, explaining how he came upon it. Now, I don't need to take your Ladyship through it, it's quite clear what the intention was. And you can see that because it is made immediately apparent in what I'm going to call the "sales documentation". Now, if your Ladyship turns back to 224 what your Ladyship has there is something in enormous, big letters, "maximising pension value, planning your future whilst benefitting today". And I call it the sales documentation and I should note it's example sales documentation. There are some variations to it available but this is by way of background so it should be sufficient to make the point. And on the opening page you have, under the "About ARK":

> "ARK is a specialist entity that identifies master pension schemes that are willing to accept new members."

Well, that is slightly misleading; they created master pension schemes. "The Objective":

"ARK's objective is to ensure that the MPS has features that are not traditionally available. In order to provide potential new members with retirement benefits ARK introduced them to the MPS, allowing the transfer of benefits from one or more of their existing pension schemes."

A

And then this is the crucial part:

B

"These funds are held in a tax efficient way in accordance with HM Revenue & Customs (HMRC) requirements."

C

And it's that that is highlighting -- and this is the basic documentation going out to members and your Ladyship will have seen it, both by the evidence of Mrs Goldsmith----

MRS JUSTICE ASPLIN: Mr Moeran, this was a scheme which was sold to people on the basis that they personally would be realise sums out of their pension pots, to put it colloquially, with no strings attached. In effect, they would be getting, therefore, a loan when they wanted and needed capital and unfortunately that was not the case.

D

MR. MOERAN: Exactly. And then you have a slightly more detailed or nuanced point, which is at p.226. You have the trustee investment approach, at the bottom of that page.

E

"The trustees of the MPS [that's the ARK schemes] will adopt an investment strategy which will take into account a number of factors, including the MPVA period. HMRC allows pension schemes the flexibility to decide on the investment of scheme funds subject to certain restrictions. The MPS will comply with HMRC restrictions. All investment decisions relating to the MPS are taken by the trustees. As part of the investment strategy the trustees of the MPS were able to invest in the [note the definitive article] Entrepreneurs Property Fund (EFP), which is a specialist investment portfolio of property and other asset backed investments. The EPF is not available to other pension schemes."

F

G

And then it goes on to say, "We are not advising you, by the way." Now, I am going to be coming back to that. In fact, there was no investment made in the EPF, or, indeed, in an EPF, and I will come back to explain how that works.

H

So, we have the sales documentation. You then get the membership application form, and this is about the only formal, signed documentation from a member, unsurprisingly, in a transfer to an OPS. This is at p.228 of that bundle. Now, it's entitled a "Membership Consideration Form Pension Reciprocation Plan". Pages 228 and 229 are basically data about the individual in question. No need to deal with those in particular. Then at p.230 we get to the member declaration, and this is worth -- a few points are worth flagging up. I would highlight three particular paragraphs. Sixth paragraph down, starting, "I agree to the payment."

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN:

"I agree to the payment that introduces remuneration…"

Now, that's -- the transfer fee we'll be coming back to this afternoon.

MRS JUSTICE ASPLIN: That's the five per cent?

MR. MOERAN: That's the five per cent.

"… and understand this is to be taken from the initial charge. I understand there are no separate fees to be paid, other than possibly to obtain electronic identification clarification, to which I will be informed of the amount prior to this being the case."

I highlight that for this afternoon's purposes. So, that's para.6. Paragraph 10, starting, "I understand…"

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN:

"I understand there is no entitlement under the MPS to unauthorised payments, as defined by the Finance Act 2004. I will not knowingly carry out any action which could lead to unauthorised payments."

It's a pretty banal statement but I felt it was worth highlighting. I think it comes----

MRS JUSTICE ASPLIN: It is a curious statement. How is it that the member is going to cause an unauthorised payment to be made?

MR. MOERAN: Yes. I mean, it's also curious because, frankly, how is a member ever going to know that, realistically?

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: And then the last paragraph on the page:

> "I fully understand and agree that the trustees of the scheme are solely responsible for all decisions relating to purchase, retention and sale of the investments forming part of my membership. These will also be determined by the…"

And then your Ladyship has to turn onto p.233 because -- I'm not quite sure why, but it's slightly jumping around.

> "These will also be determined by the term and investment profiles that I choose. Furthermore, I agree to hold the appointed trustees fully indemnified against any claim in respect of such decision."

So, that's saying, "You're all responsible for this, but at the same time I'm going to hold you indemnified for those decisions."

Now, at p.231 there's a term and investment profile page, but I will be coming back to that after I've taken your Ladyship first to the deed and rules, because that puts this particular page in context. Now, I should pause there and say we've got most, in fact, almost all, of the members' documentation, almost all of the members we have signed membership or membership consideration forms or membership application forms. We haven't got absolutely 100 per cent, but it's pretty clear that we've got, effectively, as many as we're ever going to get.

With that in mind, we then turn to the Deed and Rules, which is at the beginning of this bundle. At numbered p.1, middle numbering, we have the deed relating to the Woodcroft House Pension Scheme. They are all in identical terms, so this is fine to use for a standard template. And if we turn over to p.3 we have the first page, substantive page of the Deed and the opening provisions and I will highlight recital A, which is identifying that the employer, Woodcroft House Limited, has decided to establish and is the principal sponsor of a pension scheme within the meaning of s.150 of the Finance Act, 2004 that is, to be known as the "Woodcroft House Pension Scheme". The scheme is a registered pension scheme for the purposes of Chapter 2 of the 2004 Act. That should be Chapter 4. The scheme is an occupational pension scheme within the meaning of s.150(5) of the 2004 Act. And then you

get down to the operative provisions and I'm going to highlight a number of different parts through this deed, jumping through them relatively quickly. Paragraph 1.2:

> "Minerva Pension Schemes Limited agrees to be and is appointed as the trustee of the scheme with effect on and from the commencement date."

So, Minerva pension schemes was a company, and I will come back to this, it was a company that was owned by Mr Tweedley and which originally Mr Tweedley was the sole director of. Before the MPVAs were made Mr Tweedley handed over directorship to, effectively, a man of straw, who then went on and made the MPVAs and actually also me the, frankly, hopeless investments that the scheme did. Now, that's Minerva. There's one other -- so, between the three schemes there are two different trustees; there's Minerva and there's Athena but they're interchangeable and I'll come back to those. And then it goes on:

> "The trustee will the fund on the irrevocable trust set out in this Deed and the Rules, as amended from time to time. No person has any right to any particular assets of the scheme."

And this is a straightforward term which will be familiar to the court in almost all pension schemes. Jumping down to cl.1.4----

MRS JUSTICE ASPLIN: It is unsegregated.

MR. MOERAN: It's unsegregated.

MRS JUSTICE ASPLIN: And to the extent that there are pension pots they are notional.

MR. MOERAN: Exactly. And that's it. The alternative would be hysterically bad. You would have to identify specific assets to specific members and as and when someone came up with a pension right you'd have to realise that tiny little fraction of the asset. But what if it was -- I mean, it's just unworkable.

MRS JUSTICE ASPLIN: It would be as if you were running a whole series of SIPS.

MR. MOERAN: Exactly. And it would be a disaster.

MRS JUSTICE ASPLIN: Mmm.

MR. MOERAN: Now, para.1.4 then moves on:

"This Deed and Rules is the governing document of the scheme. The scheme will be administered … the Rules and any schedules, appendices and any documents annexed to the Rules with the approval of the principal sponsor will form part of the scheme."

A

I only highlight that because it means that we can apply the definitions in the Rules back here and I will take your Ladyship to that in a moment. And then para.1.5:

B

"Any provision of the scheme, including any power, right, duty or discretion or any benefit on the terms on which it is paid shall be read and administered as if there is an overriding requirement for this, subject to the same being consistent with scheme status…"

C

And that basically means registered status.

"… and subject to compliance with any applicable statutory or regulatory provisions and also to any requirements of the pensions authorities. Nothing in the scheme entitles any person to an unauthorised payment."

D

The irony of that will not be lost on the court, is suspect.

E

Swiftly moving on to p.5 and cl.6, I briefly highlight the standard cl.6.1 exoneration terms:

"No trustee, as trustee of the scheme or in respect of the exercise of his rights or powers of the scheme, shall incur any personal financial liability or be liable for anything whatsoever, except for breach of trust knowingly and intentionally committed by him."

F

Now, of course, we have lots of authority that says there is a limit to how much that can work, you have reckless and fraudulent doesn't work either, but that's effectively a standard exoneration clause.

G

"And the trustees shall be entitled to any indemnities provided by law."

H

Pretty obvious. Now, turning over the page, we get cl.8 and cl.10. Now, cl.8 is about assets and investment. 8.1 is relatively banal, it's basically saying that trustees have power to invest as if they were beneficially entitled. That's straightforward. 8.2 is the interesting one:

> "The trustees may select and notify members of any investment facilities."

I'll be coming back to definition.

> "The trustees may add to, vary or withdraw any investment facilities."

So, it's quite clear that we can do investment facilities. And then cl.10, and this is really to do with question 12(2), "Scheme Expenses":

> "Any costs liability and expenses properly incurred by the trustees in connection with the scheme shall be met out of the fund."

So, *prima facie* straight out of all assets held. I will be coming back to this, but we would say *prima facie* that means on a *pro rata* by reference to assets held.

> "The trustees may decide that specific costs arrangements should apply to any transaction that applies to a member's account."

So, there is a broad discretion if you can see that it applies to a particular member you can allocate it on that basis. And that, my Lady, is your standard assets, cl.8, and costs, cl.10, provision. And then finally on the Deed, at p.9, you have cl.18, "transfers", and it's cl.18.2 that I would highlight 18.1 is transfers in, 18.2 is transfers out. 18.2:

> "If a member is entitled by law to a transfer of assets from the scheme or in any case where the member does not have such a right, if the trustees, at their discretion, permit the member to transfers assets from the scheme he may exercise that right or concession. If it is concession [and it should be if by concession] then any transfer is subject to any terms that the trustees impose."

I will be coming back to that in relation to question 13. So, that's the Deed. And then your Ladyship turns onto p.11 for the Rules. Definitions under Rule 2, I'm going to highlight a few of them. "Investment facilities" is the first one, means the investment facilities if any specified in cl.8.2, already highlighted, and Rule 6, I'll come back to that. Then "members account". This is quite important, if relatively straightforward.

> "An account under the scheme referable to the member which account may comprise of or include any contributions, payments or transferred in amounts [rather than assets] and any investment profit or loss."

And we will be saying that that basically says you get a nominal account, you chip in and at that point there is no segregation of assets because all it is doing is it's saying, "This is the amount paid in," and then you get a share of any investment profits or loss. Now, in addition to the non-segregation clause at 1.2 there's that, and I will come back to Rule 6. However, going further down the definitions you have "registered pension scheme", meaning under s.152 of the 2004 Act, "scheme status", at the bottom of p.11, any registered pension scheme status for the purpose of Chapter 2 of Part 4 of the 2004, that's more like it, it also includes any conditions attaching to scheme status. And then over the page, p.12, 2004 Act is the Finance Act 2004. So, very straightforward. It's not a great set of Deed and Rules, but it does its job. It's sufficient to not be void for uncertainty, unlike some of the variations that were circulating at the time.

And then para.5, "benefits".

> "The benefits payable under the scheme shall be those benefits that are provided by application of the member's account under the scheme. The member's account shall be applied in accordance with the benefit provision arrangement."

That's what saves it from uncertainty, but it's a money purchase scheme. And then Rule 6 is the investment facilities and in a nutshell what this says is that the trustees may, but are not obliged to, make available investment facilities for the investment of a member's account. They notify people and the trustees can give different investment facilities and the member can choose investment facilities and in default of choosing investment facilities they would fall

into the default investment option, which is not defined but is apparently there. At the bottom, at Rule 6.6:

> "The charge is referable to the operation of anything relating to the investment facilities, including but not limited to fund charges, allocation charges, switching charges or otherwise shall be borne by the member's account for which purpose the trustees may deduct the appropriate amount of such charges."

Now, I emphasise it is "may" not "must" because, in fact, it didn't happen. And I'll come back to that in a moment. And finally, just for completeness sake, I would jump forward to p.15 and Appendix 1. This is -- it's sort of like the old approved exempt revenue maxima provisions of a pension scheme, now it's a registered pension scheme requirement and I just highlight over the page, at p.16D, "overriding provisions":

> "… 2004 Act, to the extent that the provisions of the appendix contradict or are otherwise inconsistent with the 2004 Act and/or any regulations issued thereunder Act and/or regulations shall apply. All bonus and tax charges which become due under the rules of the scheme shall be calculated and paid in accordance with the 2004 Act."

So, it's a sort of standard catch-all provision. Now, with that in mind, in particular with Rule 6, the investment facilities, I want to take your Ladyship back to the provisions in the sales or the membership application form on investment profiles, which is at p.221. Yes, 231. So, this is, oddly enough, part of the membership application form but it doesn't have anywhere to tick any boxes. You start at the top in "term and investment profile". It talks about the normal retirement age is set to 77, however, as with any UK registered pension scheme benefits can be taken from age 55. The use of the word "terms" in this context refers to the period of time the MPVA is set to, a full explanation of the MPVA is found in the overview brief and the full brochure. Now, to my knowledge, I'm not quite sure what that's referring to, but I think it's referring to documents like at p.224, which I've already taken your Ladyship to. There are four possible terms of the MPVA, 10, 15, 20 and 25 years. And then it goes on to profile definitions. And the profile definitions:

> "The following definitions offer you a guide to the choices available. The category is defined by the trustee approach chosen."

Jump on two paragraphs.

> "The choices below are designed for pension transfer or lump sum contribution should you wish to make regular premium contributions to one of the MPSs then regular contributions automatically default to the EPS 75 option."

Now, you then get three options; the guaranteed fund option, the general fund option, the specialist circumstance fund option which hold within them five different, effectively, investment profiles. I'll go through them quickly. The guaranteed fund option:

> "The following funds are guaranteed funds and are only available in set tranches, generally for a specific amount, and the guaranteed return is underwritten by one of the major reinsurers."

And I'm going to highlight that because it doesn't say which major reinsurer, although it does say it's underwritten by somebody. And also "reinsurers", in that context, rather than "insurers", is just rubbish. Because a reinsurer reinsures insurance companies. So, in reality, that should have been underwritten by one of the major insurers but, as I will come back in a few minutes to point out, there were no insurers or reinsurers involved in any of the investments made by the schemes. Now, with that in mind, this guaranteed fund option, you get the GAR, there's a phrase familiar to people familiar with pensions, GAR10 and the GAR15 and it basically says if you've got ten years you get a five per cent guarantee, if you go 15 you get a seven per cent guarantee. There are no such investments.

Then under that you get the guarantee -- sorry, the general fund option.

> "The following funds are not guaranteed funds and, thus, the value of any membership may fluctuate. The numeric description denotes the percentage of the fund that will be applied to an entrepreneur's property fund [note the indefinite article at that particular point]. In EPF90, we will invest a minimum of 90 per cent of its whole entity in trophy property opportunities (TPO) [whatever that means]. Full details can be found within the overview brief and brochure, the balance being held in cash or across a spread of managed funds. In EPF75, 75 per cent in trophy property

opportunities. Full details can be found within the overview brief and brochure. Spread across managed funds. The trustees regard this as more volatile than the EPF90."

A

And then finally you get the specialist circumstance -- and by the way, I'm going to come back and point out that there was no EPF. Finally, you get the specialist circumstance fund option.

B

"This option is only available to members whose fund membership is in excess of £250,000 and enables the member to choose a split term and fund option by utilising savings of other members."

C

But effectively what it says is you can divide it up between the above and/or other things.

Now, there are two problems with all of this. First of all, it isn't really an investment facility at all, because it doesn't actually identify what assets are going to be invested or what the assets are going to be invested in. It just says a general, generic description of the style. Secondly, even if that did, potentially, meet the investment facilities' definition, there's no evidence that it was put into place. In fact, the evidence is entirely contradictory to that.

D

So, I can take your Ladyship, then, to the evidence on what the investments actually made were, which is in Mr Fairhead's first witness statement. Now, your Ladyship will have seen this, but I'm going to quickly highlight it. This is in volume 1, tab B1. Now, it's at para.59 of his first witness statement that he deals with the actual investments of the schemes. Middle page ranking, it should be p.13. In fact, bottom right as well, p.13, so----

E

MRS JUSTICE ASPLIN: I do have bottom rights in this one.

F

MR. MOERAN: Excellent. Action taken by the claimant in respect of investments (inaudible) and then effectively what it says is after you've dealt with the MPVAs and transfer fees the original trustees paid out further sums by way of five main investments, and I'll go through them very quickly. We have South Horizon Trading Limited, where there was £4 million paid to a Cypriot company for an option to buy shares in another company that owned a plot of land with planning permission near Larnaca. And if your Ladyship turns over the page your Ladyship will be delighted to know that in January 2003 agreement was reached to cancel the investment and the £4 million was returned, together with interest of £325,000. I may -- if your Ladyship is at all interested, we can deal with that in confidential private hearing, but it

G

H

was subject to a confidential settlement agreement. So, that's nothing to do with any sort of entrepreneur's property fund.

You then have the Entrepreneur's Capital Holding's Limited, which is about as close as you get to an EPF, but it's not even that particularly close because this is £1 million between four of the schemes - you'll notice that the first one was all six schemes, the second one was four of the schemes - to purchase shares in ECH, a BVI company. After some slogging the claimant established that the monies had been (1) loaned for a property development transaction, albeit without any details provided; (2) there's a non-disclosure agreement; (3) the loan was £1 million, paying interest at 5.5 per cent. Effectively, it's not exactly what you would call an investment portfolio of property and other asset-backed investments. It's shares in a company that then makes a loan to a property deal and it's only £1 million out of a total of £27 million transferred in and it's only in relation to four of the schemes rather than all six of the schemes. And I highlight that because that is as close to an EPF, as described in the literature, the scheme's literature, as I could find.

MRS JUSTICE ASPLIN: Has Mr Tweedley been the subject of any proceedings?

MR. MOERAN: Mr Tweedley has, in fact, been sued, but I have to say that that particular investment was made by the men of straw that were put in place. Indeed, so was the South Horizon, Hyper Active No. 1 and, I think, Freedom Bay and, I think, the Air Parade as well. So, what he did was he took his money by way of these five per cent fees and after that he left a couple of, and I use the vernacular term, "muppets" in control of the £27 million to make the MPVA and purportedly make these investments. Now, the sad, one of the many sad points is that these people, it was a Mr Hields and a Mr Hanson, and I'll come back to those shortly, being involved in this pensions liberation structure proved to singularly vulnerable to, well, in some cases, fraudulent con artists, and in other cases simply really bad investment purveyors. And Mr Hields and Mr Hanson, this isn't relevant to this particular application, Mr Hields and Mr Hanson were investigated by Dalriada for the economic reality of pursuing them for any of this. It's not worth it, because they are men of straw. Mr Tweedley was or released his entities that received the sums and, to a degree, it was considered as to whether or not to pursue him on a personal knowing receipt basis, was also pursued. We got a little bit of money, £20,000, in the end, and we got rid of any -- a claim for a further £350,000 from the schemes but the entity through Mr Tweedley operated, which were LLPs but effectively corporate entities, turned out to have next to no funds and it was effectively concluded that although there were cases to answer it wasn't economically viable to pursue him further, particularly since the money -- you

will be going, almost certainly, on a five per cent knowing receipt basis and the money that it was worth pursuing was not sufficient to argue a dishonest assistance or knowing receipt case. It just wasn't viable.

MRS JUSTICE ASPLIN: I am sorry to have----

MR. MOERAN: No, no, no, I mean, that's actually an important point, I think, for the members as well, of whom a number are sitting in the back of court. We did look at this and we have tried this. We got freezing orders against the ARK LLPs. We did pursue it. We did issue proceedings. We did claim it. There has been consideration of pursuing Mr Tweedley on a personal basis. He is, in fact, particularly ill at the moment, but it was an economically unviable transaction to pursue it----

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: --- anyway, in those circumstances. We then carry on with the other assets. We have done the ECH. Hyper Active No. 1, it doesn't say there but when we update with the fourth witness statement of Mr Fairhead for our £1 million-odd intervention we actually got, I think, about £1.15 million back. So, we actually got a return on that after some strident negotiation. That, indeed, was supposedly an investment in a Jersey unit trust, but we actually ended up with shares in a Guernsey-based company, again, nothing like an ECF.

Then finally, flicking through the last couple of investments, you have Freedom Bay, St. Lucia, which has paid a little bit of interest but is an investment in a property development in the BVI -- sorry, in St. Lucia, in St. Lucia.

MRS JUSTICE ASPLIN: And it's -- I think it's gone into----

MR. MOERAN: It's gone into liquidation. That is absolutely right. Is it liquidation or is it -- administration, I think is the technical -- yes.

MRS JUSTICE ASPLIN: In any event, it is not very----

MR. MOERAN: It's not great. We've got a little bit, but we're not getting an enormous amount. Then Air Parade was just a loan to a travel agent which we actually did get back with a tiny amount of interest. Now, the point I wanted to make here, well, there are two points, but the slightly self-burnishing of our halo is Dalriada has actually recovered a surprisingly large amount of money in the circumstances of this sort of case. Normally when one sees a pensions liberation case like this one would expect to effectively wave goodbye to any assets that are still held after the pensions liberation has taken place and Dalriada has managed to recover effectively almost everything other than the MPVAs, which is, we would respectfully submit, a remarkably good recovery rate, remarkably good.

MRS JUSTICE ASPLIN: You've recovered about £9 million.

MR. MOERAN: Yeah.

MRS JUSTICE ASPLIN: There was, originally, a fund of £27 million.

MR. MOERAN: Yes, £27 million.

MRS JUSTICE ASPLIN: The remainder is not all MPVA.

MR. MOERAN: No, about £9 million went on MPVAs. We had about £9 million in cash, because we caught it before it had disappeared out.

MRS JUSTICE ASPLIN: Okay. And then----

MR. MOERAN: And then we recovered the £9 million. So, there was a chunk of cash already in there, but we've got about one-third of the assets still outstanding on the MPVA. So, this is not, and I will be coming back to this after lunch, this is not a case where people are kissing goodbye to everything else. They have not lost all their pensions. There are significant questions as to what, precisely, their pensions are worth and how you divide up the, you know, the eight-figure sum between the members, but it is not as though it is all gone. And that is important as initially a lot of the members thought that this was -- they had lost everything else other than the MPVAs. I will come back to that.

But the second point that I -- and this is the real point for highlighting, this. It's all very nice for us to burnish our halo, but actually the really important point is that none of the investments meet any sort of possible description in the sales documentation or the membership application form in terms of the Investments Facilities, with a capital I and capital F. Now, that's the investments after the MPVAs are made.

What I suggest, my Lady, is that we turn to the MPVA documentation quite swiftly after the short adjournment, and then we can deal with that. There's a couple of other documents I want to take your Ladyship through, a little bit of data about the MPVA, and then after I've gone through the MPVAs, which won't take very long, I do want to take your Ladyship through some of the communication we've received from the members so the court can see the level of distress and upset that this has been causing and concern that this has been causing to members.

MRS JUSTICE ASPLIN: Before I rise I think also it's important that I get a sense of the timetable.

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: I cannot sit, as I think you know, tomorrow morning. You are listed for not before two tomorrow, but there may be some delay. It may be more like 2.15 p.m. that we actually start. So, we might have to sit a little late tomorrow, so I just wanted to warn everybody before we go any further forwards. So, that means that, in fact, by close of business tomorrow you'll have had a day's worth of court hearing plus this hour this morning and then you have all day on Thursday. Not only is it not within your time estimate, but also, and in any event, I could not sit on Friday. So, we have to accomplish the entirety of this before close of business on Thursday and that also, as I say, has to include, it seems to me, my *ex tempore* conclusions in relation to each of the issues as they arise, because I think that that is the fairest, most proportionate and proper way of dealing with this matter. And so over the short adjournment, to the extent that you need expressly to carve up time between you, I think that that's what you ought to do and ought to tell me at two o'clock how it's going to pan out, so that we don't find that we're all in a bit of a mess come about three o'clock on Thursday. So, if you'd be kind enough to do that I would be grateful.

MR. MOERAN: Not at all, my Lady.

MRS JUSTICE ASPLIN: Two o'clock.

(1.00 p.m.)

(A short adjournment)

(1.59 p.m.)

MRS JUSTICE ASPLIN: Mr Moeran?

MR. MOERAN: My Lady. Before the short adjournment your Ladyship was asking about timetables.

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: Having had a word with my opposite number, we are very confident that we will finish the Beddoe-type part of the application at the very latest by tomorrow, say, 3.00 p.m.. I would actually be optimistic that we might finish submissions today. If we can do that, that would give your Ladyship the opportunity of overnight consideration and then possibly a late start in the afternoon before judgment on that particular issue. We will definitely finish before the end of Thursday, before the end of lunchtime Thursday, I would be optimistic.

MRS JUSTICE ASPLIN: Yes. Let's get on, then.

MR. MOERAN: Right. I was taking your Ladyship through a series of documents and I now turn to the actual MPVA and it's going to be quite quick. It's in Volume 2A and it's at your p.247, middle of the page.

MRS JUSTICE ASPLIN: Mm hmm.

MR. MOERAN: And all the MPVAs follow this basic structure. There are some minor variations, but none of significance. The only real significance is some earlier versions didn't specify the amount to be repaid, they gave an interest, percentage interest rate, but that's it, but this will suffice for present purposes. If your Ladyship turns onto p.249 your Ladyship will see that at the top the MPV agreement is made between, and this particular one is Minerva Pension Services simply because they are the trustees of the relevant particular scheme that was making the loan, and a blanked-out member who is the MPVA participant. You have the background, or recitals, Minerva Pension Schemes, trustee of an occupational pension scheme. This is the Portman Pension Scheme. The MPVA participant is not now, nor has ever been a member of the scheme and the MPVA participant has requested the trustees of the scheme to extend to the MPVA participant the MPVA amount. The trustee of the scheme has agreed to do that -- to that request on and subject to the terms of this agreement. And then you have definitions, MPVA amount, MPVA discharge amount and maturity date, which in this particular case is a £25,000 loan and a repayment sum or discharge amount of £43,750 on a maturity date of not -- at least 25 calendar years. The calculation is this: £43,750 over 25 years is a three per cent per annum simple interest rate.

MRS JUSTICE ASPLIN: Mm hmm.

MR. MOERAN: If your Ladyship turns over the page the only really interesting part of all of this, I mean, there's a repayment and prepayment. At 4.2 there's an opportunity to pay back early if the MPVA participant (the borrower) tries to do so with the agreement of the lender. And then -- but the only really interesting part is cl.6, representation and warrantees. Now, I will just highlight this is the MPVA participant represents and warrants to the trustee and it's all the representations are made by the borrower rather than the lender. It's a rather crude exercise in making sure that there's no representations by the lender, but it is an effective one.

Now, I highlighted that the lenders in this particular case were Minerva Pension Services and, as I mentioned earlier this morning, all the lenders are, of course, trustees of the two schemes and that's either Minerva or Athena pension trustees. And if I can take your Ladyship to Mr Fairhead's first witness statement to put that in context. This is B1, tab B1 at para.28, which is

p.7. In summary, what this identifies is that Athena and Minerva are the original trustees and then para.29, they were also trustees of another scheme, don't worry about that. Paragraph 30, we've been given exclusive powers. And then turning over the page to p.8, at para.31, the sole director of the original trustees, don't worry about Oracle, was originally Mr Tweedley. Mr Tweedley's directorship of all three companies was terminated in July 2011, so that's -- actually, that's -- I've got to confess, that's very slightly after some of the MPVAs were made, after which their sole directors were Andrew Hields, Athena, and Carl Hanson, Minerva and Oracle. Sorry, I'd got that round the wrong way in my head. Mr Hields and Mr Hanson were the directors at the time of the claimant's appointment. On 23rd November 2011, directorships were terminated. But the investments, as I said this morning, the investments were broadly made by Mr Hields and Mr Hanson, so all the Cyprus and the Hyper and so on and so forth were made by Mr Hields and Mr Hanson.

Now, that's the trustees, this is -- that's the MPVA terms. I want to show your Ladyship a little bit of data about the MPVAs actually made. And this is relatively easy to see, because it's in volume 2A and there are some tables that summarise it. And it starts at p.357. Basically, back towards the end of the volume there are some A2 pages that are folded up. Now, this is a spreadsheet that shows MPVA payments made. And to explain it, going through the columns, on the left-hand side you have an ID number and the ID number is in relation to basically in what order someone transferred in their assets. There were 400 plus members of the schemes. So, ID number 1 is the first person to transfer in their scheme and it goes into scheme (inaudible), Portman, and transfers in £15,535. And then you get MPVA 1 paying scheme and date of MPVA 1 paid and MPVA 1 amount. And in ID number 1's case there is only one MPVA made but, as you can see down the page, in quite a few cases there were multiple MPVAs made, and that's because they took out a -- they borrowed a certain amount and then they borrowed shortly thereafter and so on, and they went up to four MPVAs in a couple of cases.

Now, it's not wildly complicated, but I can identify a couple of particularly relevant points. If your Ladyship shifts down to ID number 57 you have somebody who joined the Lancaster scheme with £46,270. Rather oddly, you get the MPVA1 paying scheme Lancaster, I do not understand how that worked because it shouldn't have been from the same scheme. But you then MPVA2 paying scheme Tallton. And you get a number of these different schemes where you get shifts or where you have multiple lenders. It's not universal, but a number of these

different items where the MPVA amounts are from different schemes. So, if you turn on two pages, to p.359, you get to, and I'm going to highlight ID 303, I think it's 303, hang on.

MRS JUSTICE ASPLIN: That's Tallton.

MR. MOERAN: I think that's right, yes, £132,000. The first MPVAs from Cranborne----

MRS JUSTICE ASPLIN: Oh, no, that's 302.

MR. MOERAN: Sorry, 302, my apologies. Yes, it is. Tallton, 132. The first MPVA from Cranborne of £14,975, the second MPVA from Grosvenor and then the third MPVA from Lancaster. So, the MPVAs weren't actually all made from one particular scheme. And I am highlighting that because it is the perfect answer to the suggestion that there is some sort of absolute money comes in, it's made in one MPVA and it generates an MPVA back. In many cases, that may appear to be the case, but that certainly isn't necessarily the way the schemes worked. So, that's the first thing. First of all, the MPVA amounts come not necessarily from the same situations.

And you will also see, if you turn onto the -- and the easiest page to see this is p.359 again, you will also see that this is a list of the people who -- or the members who received MPVAs and if you turn to p.359, at the top of the page, and you look through the ID numbers, you start with ID 200 and then it goes 202, 203, 205, 206, 208, 209, 2010 and so on. And what that is highlighting is that not all the members received MPVAs.

Your Ladyship will see in my skeleton and the evidence that actually there were about 20 per cent of the members overall of the schemes did not receive MPVAs. And the difficulty is that it breaks down very variedly, depending on the schemes in question. And if your Ladyship turns on, and there are a series of tables from p.361 onwards, probably the easiest page to see this is at p.363. And this is -- p.363 is a table entitled "Summary of MPVAs by Scheme". And it goes through the six schemes and on the top row it's got the name of the scheme, ultimately (inaudible) in total, and then you've got the number of members and you have the total transfers in. So, for example, Lancaster has £5.5 million, Grosvenor Parade has £3.17 million and so on. You then have the number of MPVAs entered into and you'll see there's 127 -- for Lancaster it's 127 versus 92 and the reason for that is, of course, you can have more MPVAs than members because some members have multiples MPVAs. But then you see, under the row below that, number of individuals receiving MPVA payments. So, in Lancaster's case there are 92 members and 91 receive MPVAs. So, about one per cent don't receive MPVAs. But in Grosvenor Parade there are 59 members and only 22 of them receive

MPVAs, which means that there's - and this is the calculation I've done - about 63 per cent of the Grosvenor Parade members did not receive MPVAs. And this goes on through all of the different schemes and I'm highlighting Lancaster and Grosvenor Parade because they're the most extreme examples on either end of the spectrum.

There are a number of MPVA payments made without evidence of an MPVA; that means that we haven't got the documentation to back it up. And then down at the last two rows you have total amount paid as MPVAs and, again, Lancaster is the largest payer-out, £2.7 million, and Grosvenor Parade is the smallest payer, at £475,000. And this, that last row, is proportion of total transfers in paid. And with Grosvenor Parade it's -- basically it's about 50 per cent. Sorry, with Lancaster it's about 50 per cent, but with Grosvenor Parade it's about 15 per cent. So, your Ladyship will see the massive divergence between the schemes as to how they dealt with MPVAs in quantum. Now, I'm going to come back to that when it comes to the issues of reasonableness of pursuing MPVA recovery.

The last thing that I want to take your Ladyship to before I turn to the actual Beddoe application is the member communication. I mentioned this before the short adjournment, which is the -- and this is the communication received from members and these are sample communications, sample correspondence that Dalriada received, originally back in 2011 when things were beginning to kick off. In fact, before Mr Justice Bean's -- the hearing before Mr Justice Bean and the judgment. Now, if your Ladyship takes -- and it's still the same volume, but it's at p.341, and the documents I'm very quickly going to -- well, carefully take your Ladyship through are referred to in Mr Fairhead's first witness statement at para.120, but we felt that it was important that your Ladyship should see these specifically to understand the distress and impact that basically what we're proposing doing could have on these people.

Now, what it's been broken down to is correspondence with Members A through Member E anonymised members and it starts with Member A. This is 15th June email from Member A to Suzanne Wilson of Dalriada and:

> "Suzanne, please read this carefully as I've been in tears for several hours and I'm getting suicidal after receiving your letter. I've been paying into my pension for 30 years and had £71,000 in it. All my life paying into my pension. Last year I was approached by ARK who arranged an MPVA and told me everything was within

HMRC guidelines. I was quite close to obtaining a cash lump sum at 55. Thought I'd go ahead with the MPVA to repay debts and other things so I transferred my pension to them. Received a payment of £35,000..."

So, this is an MPVA of about 50 per cent, it's the maximum you could get, although some took less.

"… and have used a large proportion of this amount since last September. I'm so worried now I'm close to suicide, can't stop crying. Not only have I lost all my pension and probably lost all my pension…"

I would emphasise she hasn't. Of the 50 per cent that remained in the scheme, or indeed of the 100 per cent of her sum that remained in the scheme, whatever was lent out in MPVAs to other people, there is a substantial amount of recovery. So, we would emphasise that this is not as bad as members felt at the time.

"Not only have I probably lost all my pension, but I am now unable to pay back all the MPVA payment."

This -- this is something I want to emphasise to your Ladyship. Part of the basis behind the MPVA arrangements was you would -- and it's a poorly thought out structure, but part of the idea was that you would use your tax-free cash lump sum----

MRS JUSTICE ASPLIN: Yes, to repay the loan.

MR. MOERAN: -- to repay the MPVA.

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: Which is okay but, of course, the problem for the schemes, and there were two problems for the schemes, number one, there was no provision for repayment on death and, number two, there was no actual provision for repayment when you took your cash-free cash -- tax-free cash lump sum. So, in the case of Member A, she is 48 when she takes out an MPVA. Let's assume it's a 50 per cent, so she'd almost certainly be a 25-year MPVA. Seven years later she gets her tax-free cash lump sum and, for whatever reason, she decides to not repay the MPVA and 18 years later the MPVA, on its terms, falls due, assuming that Member A is still alive, whether or not she will be capable of repaying it at that stage. Now, the principle was you get your tax-free cash lump sum, you then repay and, of course, you have the opportunity

to repay earlier, assuming the trustees take it, which they almost inevitably would, then that works out. But in this particular case she is saying:

> "I've lost all my pension. I'm now unable to pay back the MPVA payment. What will happen to me?"

Again, if you're taking it -- if you're having to repay the MPVA amount purportedly lent before your tax-free cash lump sum moment, there are obviously going to be significant difficulties on what was effectively sold to the member. I would, however, emphasise that, and I haven't got the immediate paragraph reference, but the average age of membership is now, I think, 53. The vast majority of members are either entitled to a tax-free cash lump sum or will be entitled within a very short period of time. So, to a degree that's mitigated by the actual circumstances of this particular case. However, we carry on.

> "What will happen to me? I'm quite prepared to forfeit my pension in order to stop me committing suicide----

MRS JUSTICE ASPLIN: I've read the rest of it, Mr Moeran.

MR. MOERAN: Now, okay, so -- and it goes on like that and if your Ladyship turns over to p.342 there's an update, which I don't think adds anything other than to emphasise what has been said before. And then I am going to highlight these particular letters. At p.343 you have a Member B letter.

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: This highlights that it was really to do with mortgages and so on, wits end. Page 344 you have a Member C letter.

MRS JUSTICE ASPLIN: Just looking at Member B and the difficulties with the Woolwich Building Society.

MR. MOERAN: Yes. Yes.

MRS JUSTICE ASPLIN: And then in the middle or so, again, I quite understand that, of course, of "others in bad situations but I'm at my wits end at the moment----

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: -- and if it wasn't for my daughter I think both my wife and I would consider ending it all."

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: Yes, exactly. There's a slightly different tenor of letter from Member C, who was really looking quite expressly to unlock their pension, now asking for a transfer request to move onto some other unlocking environment.

Member D, at p.346, is a very specific and particularly unhappy situation, somebody who was diagnosed with terminal cancer. And all that this particular member wanted was a "documentary guarantee that my pension will be repaid to my family when I die". Now, in fact, tragically, this particular member has died since that letter, and that can be found in Mr Fairhead's first witness statement at para.120.4. We are now faced, as trustees, with the unenviable situation of, in principle, there's a pension pot that can be used to provide benefits for the survivors. The difficulty is that the scheme has had to make a claim for, and you can categorise it as either repayment of the MPVA lent amount under mistake, or you can categorise it as a repayment of the MPVA amount under the MPVA agreement itself. One way or t'other there may be an amount going to the estate and/or survivors and dependants, versus a claim against the estate in favour of the schemes, neither of which can be finally determined until we know what's going on.

And then finally, at p.347, you have Member E, which is again exactly the sort of things which we've seen before and it's the third paragraph from the end, having gone through, effectively, the same sort of details about what it's been doing, "I didn't think it could get any worse, but it has. Quite frankly, I feel I could put my head in the oven, so please don't tell me I have to pay this money back. Surely if the company has acted illegally then it needs to pay."

MRS JUSTICE ASPLIN: The second paragraph, right hand side, "There is no money left."

MR. MOERAN: Yes. Absolutely. There is no money left. Now, we felt that it was particularly important to highlight those documents to your Ladyship for two reasons. First of all, it is just fundamentally deeply unpleasant, what we're having to do. And secondly, there is the significant economic reality that a number of members will face serious problems in repaying the MPVAs. In fact, we fully acknowledge that quite possibly some of them will find it impossible to do so. We are not disputing that. And that is a point that your Ladyship will need to take into account when determining whether or not to grant the relief sought. But, as I will come back to, we say that the relief sought is the least bad option in the circumstances and as we obtain financial information and make assessments as to economic viability of particular claims, we will be able to deal with that in a staged and measured approach.

Those are the background documents. I now turn to the Beddoe applications. I will deal first with a little bit of background or fundamental submissions on Beddoe applications and then turn to, first of all, the MPVA Beddoe and then the tax appeal Beddoe. I would emphasise I am more than aware that this court is fully familiar with the law on Beddoe applications and, indeed, trustees' directions, but in the circumstances of this sort of application we felt it was appropriate to go through it in open court. The starting point for any application by trustees to court for directions is that the trustee is entitled, as of right, and as part of the court's inherent jurisdiction of exercising its equitable jurisdiction, to seek the guidance of the court on a proposed action.

Now, these applications, as your Ladyship is aware, fall into what is usually described as four broad categories and they are usually referred to in the leading case of Public Trustee v Cooper, where Mr Justice Hart actually quoted from an earlier judgment of Mr Justice Robert Walker, as he then was, and this is set out in my skeleton and there are four categories, I won't read it out. It's in the authorities bundle at tab 7.

But, in broad categories, the first category was category number 1, "Do we have the power to do something?" It's a question of construction of the deed and, indeed, statutory powers. "Do we have the power to do something?" And that is a question before the court, it's "yes/no", can we do it?

Category 2, and I will just quote here:

> "… is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them because the decision but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers… In such circumstances … they think it is prudent and the court will give them their costs of doing so to obtain the court's blessing on a momentous decision."

Categories 1 and 2 are standard directions applications. Category 1, "Can we do it?" Category 2, "We want to do it and will we get blessing?" And it's exactly what your Ladyship described this morning. Category 3 is a surrender of discretion where the trustees go, "We don't know what to do. We're either in deadlock or we're hopeless." Category 4 is actually a dispute as to whether what they have done already was valid.

This is not category 3 or category 4. This is distinctly categories 1 and 2. Now, category -- most of the directions applications, there is one small exception, but most of the directions applications is a question of -- sorry, two small exceptions, I should say -- are category 2. We want to do something, in this particular case we are representing a particular argument, but we know that we've got power to.

The Beddoe application is a very special sort of category 2 application. It's an application for directions. A trustee had permission, and the old phrase was to "be at liberty", but it's permission to pursue or defend, or continue to pursue or continue to defend, litigation. Now, in some cases, in some Beddoe applications, trustees are, in fact, neutral on this particular approach. It's rare, but it is possible. Somebody, however, has to put forward a positive case. As Mr Justice Robert Walker indicated----

MRS JUSTICE ASPLIN: Well, you could have had another party.

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: You could have had another representative defendant to argue what you're going to argue.

MR. MOERAN: Exactly.

MRS JUSTICE ASPLIN: That is the way in the past it has been done.

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: And you are taking on that mantle and arguing the positive. Although I say that glibly, it's not always the positive, but let's call it that.

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: And Mr Bryant, for want of a better word, mostly arguing the negative side.

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: The other side of each coin, put it that way.

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: And you could have done it that way, but there is precedent in the modern world for the trustee to put one side of the coin, not because they have ceased to be trustees and to take their obligations seriously, but in order, really, to save money.

MR. MOERAN: That's exactly it. But the crucial -- that is exactly it and the crucial point is somebody would be arguing this side.

MRS JUSTICE ASPLIN: Oh, it would have to be argued. It's just that you are doing it.

MR. MOERAN: Exactly. It is not a surrender of discretion. And that is the point we're making.

MRS JUSTICE ASPLIN: No. That's fine.

MR. MOERAN: And we have that representation order. Now, and the whole of a Beddoe application is costs and so on.

MRS JUSTICE ASPLIN: And it's particularly sensitive, I ought to say this, in this case that money ought to be saved.

MR. MOERAN: Yes. Absolutely. Money ought to be saved.

MRS JUSTICE ASPLIN: Therefore, it's entirely appropriate that you are putting the arguments instead of there being another party to do so.

MR. MOERAN: And we are grateful, we're very grateful for that indication. And the other point is this: this is not just a standard Beddoe application. This is a Beddoe application where trustees are proposing to sue their own beneficiaries.

MRS JUSTICE ASPLIN: And therefore I can quite see that you want to come before the court in order to gain the court's blessing for what is a momentous thing to do.

MR. MOERAN: Exactly. The "momentous" -- the "momentous" term being used. Now, we therefore say that what this is a determination of whether or not the proposed course of action is within the capacity and the reasonable execution of a discretionary power. The discretionary power is undoubted, it's the power to sue. The question on a Beddoe application is not whether the court would sue, it's whether or not it is reasonable for the trustees to do so.

MRS JUSTICE ASPLIN: Yes. And it's not just about power to litigate, it's an obligation on trustees to recover trust monies.

MR. MOERAN: Yes. It is after actually determining what the terms of the trust are it is probably the most fundamental obligation of a trustee to get in and preserve assets. And I will come back to that shortly in the third aspect of the factors that your Ladyship should be taking into account and I have highlighted these in my skeleton.

We would say that whether or not to grant Beddoe relief is determined by three questions. First of all, merits of the claim that's being brought. So, chances of success. Secondly, a costs

benefit analysis, partly in the light of the merits of the claim, partly in the light of just pure economics. Thirdly, the consequences of not bringing the claim, and that's where that last point comes in. Now----

MRS JUSTICE ASPLIN: Well, in this case it's the consequences of not doing and the consequences of doing.

MR. MOERAN: Yes. Yes. That's fair, yes.

MRS JUSTICE ASPLIN: You could put it -- you could roll it up in a different way, but----

MR. MOERAN: Yes. Yes, exactly. Yes. You can roll it up in that way. Now, this is, as I flagged up earlier this morning, this is one of the two situations where we're asking for an amendment to the claim form. Now, if I can take your Ladyship to the claim form to show exactly the relief that was being sought and is being sought. It's volume 1, tab A8.

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: And the relevant paragraph is para.7 at p.24.

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: Now, what was originally sought for, and there's only slight variations in the detail, but was originally sought for is what might be termed preliminary staggered Beddoe relief.

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: Or staged Beddoe relief. And it was -- we wanted originally to take preliminary stages up to and including pre-action protocol letters, statutory demands and, where not contested statutory demands, bankruptcy proceedings. And then if you look at 7.2, thereafter, permission to apply back to the master on paper in the first instance for further Beddoe directions to win suit and/or continue to -- institute and in that case prosecute claims to MPVAs. Now, the reasoning behind that was very simple. We don't know at the moment whether any particular individual members have personal defences, or indeed just generally defences full stop, which are dependent on representations made to them.

MRS JUSTICE ASPLIN: Yes. And then you have to determine what the actual (inaudible).

MR. MOERAN: And point two, we don't know what their financial position is.

MRS JUSTICE ASPLIN: No.

MR. MOERAN: And once we have----

MRS JUSTICE ASPLIN: Yes. Therefore, it's worth progressing (inaudible).

MR. MOERAN: Exactly. And once you've taken the initial steps and seen the response we can form a better view of that. And that's why we were doing it on a staggered basis. It's not wildly unusual to do it on a staggered basis. Most Beddoe applications, as your Ladyship will

be very aware, take -- give you better relief up to a certain stage, say, the close of pleadings or the exchange of witness statements. In this particular case, it was much earlier than would usually be the case for that particular reason. It's really the financial point.

MRS JUSTICE ASPLIN: I can see also that is normal in order to try to save to costs to say that you'll come back at the second stage on paper----

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: -- at first instance. I think it's relatively unusual to say that you'll do so to the master on paper. I'm sure we'll get to this, because we haven't got this far, Mr Moeran.

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: But I am concerned in this case where it's very complex and there are many different actions which----

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: -- or sets of proceedings of one kind or another which would have to be proceeded with that that might be a complex and difficult process on paper and might not be fair to the master.

MR. MOERAN: We haven't got a problem with that. The reason we are -- we are completely open to coming back before the judge, if that is appropriate. The reason that we did it that way, if I can explain this in simple terms, is you now have the Practice Direction Part 64 saying on the whole Beddoe applications should be before the master. For blindingly obvious reasons, this Beddoe application should be before the judge. Once, however, one has got over the initial hurdle of whether or not to sue in principle, the detailed analysis of whether to carry on suing an individual member is likely to come down to, in most cases, a pounds, shillings and pence analysis. That's going to be a matter of spreadsheets. It might be complicated and detailed, but it's the sort of accounting exercise that the master would be comfortable with.

MRS JUSTICE ASPLIN: I am not, in any way, trying to denigrate the master.

MR. MOERAN: No, no.

MRS JUSTICE ASPLIN: But I am concerned also that there may be a variety of defences----

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: -- and those have to be evaluated.

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: But in any event, let's not run before we can walk.

MR. MOERAN: Exactly.

MRS JUSTICE ASPLIN: We're in question 7 at (i).

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: And (i)(a) is concerned and is trying to bring in the fact that you've had to take steps because of the expiration of limitation periods.

MR. MOERAN: Yes. Absolutely. Now, certainly, time has somewhat overtaken us and because of the possible expiration of limitation periods we've had to enter into standstill agreements and/or -- or where standstill agreements have not been possible we've had to issue proceedings. All that amendment does to 7(i)(a), and briefly to 7(i)(b) and 7(ii), is to deal with the fact that we have now moved to standstill agreements and/or issuing proceedings.

Now, I would emphasise limitation periods have possibly begun or expired. And I emphasise that. It's not wildly relevant for today, but we would say that because, as I will explain shortly, it's a claim in mistake, the mistake could only be made known of or reasonably aware of upon the decision by Mr Justice Bean in the original judgment, which means that under s.32 of the Limitation Act limitation periods only start running from when it was reasonable to know that there was a mistake, which would be December (inaudible).

MRS JUSTICE ASPLIN: But that is a very grey area and----

MR. MOERAN: Yes. Exactly, so we can't trust on it.

MRS JUSTICE ASPLIN: -- it's not something that the trustees should leave to chance.

MR. MOERAN: Exactly. So, out of quite -- absolutely standard caution, we've had to do standstill agreements or issue proceedings.

MRS JUSTICE ASPLIN: I have seen the numbers. There are something like 158 or 128 sets of proceedings----

MR. MOERAN: That's right.

MRS JUSTICE ASPLIN: -- I think, commenced.

MR. MOERAN: There's about 144, slightly over, standstills, and about 150 something proceedings.

MRS JUSTICE ASPLIN: And there's an issue which has arisen and it's a witness statement which was put in my bundle this morning----

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: -- which is in relation to the formal standstill agreements.

MR. MOERAN: And I will be coming back to that shortly.

MRS JUSTICE ASPLIN: But before we get there, 7(i)(a) is intended to cover that situation.

MR. MOERAN: It's----

MRS JUSTICE ASPLIN: It's the reality (inaudible).

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: And what's being said there is that you should have permission to pursue that litigation to stage of defences or stays, actual discretion.

MR. MOERAN: Mm hmm.

MRS JUSTICE ASPLIN: There is no analysis, inevitably, that goes behind that as to -- all that is is a completely vague and open door. There is no analysis as to which cases might be worth progressing to a defence and which might not be to the extent that you haven't managed to agree stays or stays aren't long enough.

MR. MOERAN: Exactly. I mean, in principle, if someone's going to agree to a stay, we'll take a stay. If somebody refuses to agree to a stay or fails to agree to a stay, we will proceed to the -- proceed to the situation of defences. We are not planning----

MRS JUSTICE ASPLIN: In relation to that, how does that fit as a piece of the jigsaw with the next stage, which is at (ii), which is going to the master? That is not tied directly, is it, or is it, with (ii) as to whether further to prosecute, if you see what I mean?

MR. MOERAN: It's not specifically tied but it does allow and you will see that the institute and/or prosecute and/or continue to prosecute and that's the point for that particular amendment.

MRS JUSTICE ASPLIN: Yes. There's no cut-off point. You don't know whether you remain in (a) or when you fall into (ii), do you?

MR. MOERAN: Well, you would have to fall into (ii) once you had got to the point of either a stay or defences.

MRS JUSTICE ASPLIN: No, no. Let's assume you hadn't(?) got a stay, for example.

MR. MOERAN: Well----

MRS JUSTICE ASPLIN: And you have to, under (a), you have to get to the stage of receipt of defences.

MR. MOERAN: When you get to the receipt of defences you look at it and then you have to apply back for further Beddoe relief.

MRS JUSTICE ASPLIN: Well, that's not what it says, is it? Or is it?

MR. MOERAN: Well, no, I think it is actually what it says.

MRS JUSTICE ASPLIN: Is it----

MR. MOERAN: The claimant has permission to pursue the litigation to the stage of defences being entered.

MRS JUSTICE ASPLIN: Yes. Okay.

MR. MOERAN: And then (ii)----

MRS JUSTICE ASPLIN: And then it would run out and then you would be in----

MR. MOERAN: -- thereafter, permission to apply to master.

MRS JUSTICE ASPLIN: -- then you would be in (ii).

A

MR. MOERAN: Exactly.

MRS JUSTICE ASPLIN: Okay. yes.

MR. MOERAN: I suppose there is one hypothetical lacuna I should highlight, which is you can pursue it to the point of defences being entered. If somebody doesn't enter a defence----

B

MRS JUSTICE ASPLIN: And there was no stay.

MR. MOERAN: -- and there is no stay, you would, because it's to the stage of defences being entered rather than defences actually being entered, I think you would fall into (ii). It's not great. I fully acknowledge on looking at this this is something that I could probably tighten up.

C

MRS JUSTICE ASPLIN: Well, I think you do need to tidy it up.

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: I rather than "past" it should be "expired". But that's pedantry.

MR. MOERAN: Yes. No, I----

D

MRS JUSTICE ASPLIN: Where limitation periods have expired or the expiry is approaching and what that means, I think Mr Bryant might be interested to know, all expiry of all limitations are approaching----

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: -- in the same way as we are all going to die, but the question is when.

E

MR. MOERAN: No, I see that. That is actually a fair point. I can see the clarification of that. I think, in reality, since we have now got to the point of we have either got standstills or we've got litigation on foot for 99.9 per cent of the membership, I think a couple of them, because they have basically disappeared off and one person's in prison, we have lost them, effectively, that's done. But subject to that we can effectively delete where limitation periods have passed and/or are approaching. It is simply enter into.

F

MRS JUSTICE ASPLIN: Because you've done that.

MR. MOERAN: Now, I do want to highlight this is, to a degree, retrospective.

MRS JUSTICE ASPLIN: Yes. Yes. I understand that you've had to do this and that you've contacted everyone as a part of all of this.

G

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: So, then, where does (b) clock in, in the sense that, as you've already contacted everyone and you've either got a stay -- I'm sorry, you've either got a standstill

H

agreement or hoped to agree a stay or you haven't and you've issued and served a claim, why do you need (b)?

MR. MOERAN: In parallel. If you've got a standstill agreement you can still do the pre-action protocol letters and you can still do statutory demands in theory. In theory, you -- I know this is odd.

MRS JUSTICE ASPLIN: I am going to be Chief Master Marsh, in that respect. If you've already gone down this road and therefore those monies have already been expended, in effect, go back and then tidying to serve a statutory demand would be another layer of cost and also, putting on my Master Marsh had, we have a whole issue -- I know I'm running ahead of everything you wanted to say.

MR. MOERAN: No, no. No.

MRS JUSTICE ASPLIN: But we have a whole issue of bankruptcy petitions and not only the kind of stress and emotional disruption caused by those sorts of proceedings and their consequence, but also from the other side of the coin, from the trustees' perspective, as Master Marsh pointed out, what happens? You fall into a pot with the Revenue.

MR. MOERAN: With everybody else. With the Revenue.

MRS JUSTICE ASPLIN: And with other people, but with the Revenue.

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: So, what are you going to get out of it?

MR. MOERAN: The starting point on this is if you have a stay -- sorry, standstill agreement, proceeding -- you haven't issued the proceedings.

MRS JUSTICE ASPLIN: No.

MR. MOERAN: So, proceeding through the pre-action protocol letter and then, if appropriate, statutory demand is an entirely appropriate and sensible way to deal with it. I'll come back to the bankruptcy hearings.

MRS JUSTICE ASPLIN: Yes. But (b) is still open to you in the circumstances where you have a standstill agreement.

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: But you have, in a large number of cases, already issued claims.

MR. MOERAN: Yes. Now, in relation to the pre-action protocol, because we've had to issue we want to dot i's and cross t's and make sure that we're not caught with that horrible, "You didn't do pre-action protocol correspondence," and the missive from CPR that you should do something equivalent to it as soon as possible thereafter. And that, the amendment, or an equivalent letter where an action has been commenced.

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: I do acknowledge that in most cases statutory demands, given the fact that we have already issued a claim, is going to be unlikely to be appropriate. You're either going to get a defence in, in which case it's disputed, or you're not going to get a defence in, in which case you're going to sit there going, "Well, I may as well proceed to judgment in default anyway."

MRS JUSTICE ASPLIN: "Because I have already spent the money."

MR. MOERAN: Well, "Because I need to spend extra money to get some of the £100 application fee," or whatever the application fee is.

MRS JUSTICE ASPLIN: Exactly.

MR. MOERAN: I do accept that. And it could be made clear that in reality we would expect that to apply to the standstill agreement situation rather than the litigation agreement situation -- litigation agreement.

MRS JUSTICE ASPLIN: It seems to be one way or another and we are completely running ahead of ourselves about whether this is an appropriate thing to do in any event. We do need----

MR. MOERAN: They need (inaudible). Yes. And we are very -- and we are very happy to do this. We came into this very much on the basis of -- since we are trying to take as careful and as staged approach the better, any suggestions as to ways to improve this process are more than welcome.

MRS JUSTICE ASPLIN: Anyway, I see what that's all getting at.

MR. MOERAN: Exactly. And I would suggest that with -- as and when your Ladyship determines as to whether or not it's appropriate to issue the things, with a little bit of guidance we'll make sure that that actually does follow through.

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: Now, that's the amendment application and in terms of amending the claim form we would suggest that this is straightforward, it's not opposed, it's obviously sensible just to deal with the matters put forward and, of course----

MRS JUSTICE ASPLIN: In principle, I didn't say anything before the short adjournment, in principle I can see no reason why you should not have to permission to amend, albeit that, as I've said----

MR. MOERAN: Yeah.

MRS JUSTICE ASPLIN: -- it may be necessary to tighten up the wording.

MR. MOERAN: Exactly so. And that was simply the question asked and, of course, the court has jurisdiction to grant the relief in whatever terms the court sees fit.

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Now, one then turns to the merits of this particular claim. I am going to deal with the merits of the claim for the recovery of the MPVA. This has been set out in detail in my skeleton argument and your Ladyship will have seen the confidential opinion, which we will not refer to in open court, setting out a confidential view of the merits. But in broad terms I'm going to set

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out the argument for it in open court for the benefit, really, of the members sitting behind.

The starting point for any claim against -- or for recovery of the MPVAs is the judgment of Mr Justice Bean in *Dalriada Trustees Limited v Faulds & Ors* [2011] EWHC 339 (Ch). And in

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that case there were representation orders made, which means that that decision is binding on all the members of the schemes. And that decision made certain and now indisputable and binding findings, it is well past the time for appeals, various points, including, number 1, the MPVAs were unauthorised member payments. Number 2, that means that they were expressly prohibited by the terms of Schemes Trusts Deeds and Rules. They were outside the powers of

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the scheme's trustees and they were void in equity.

Pausing there, I'd suggest that this is not particularly surprising to any pensions or tax lawyer, given the terms of the schemes and deeds and rules that I took your Ladyship to earlier.

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MRS JUSTICE ASPLIN: Unfortunately not, no.

MR. MOERAN: No. The second broad category of findings was that the MPVAs were not investments within the meaning of the scheme's trust deeds and that means they were outside the scope of the trustee's powers. That's the judgment at para.58 to 64. And, again, not

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surprising to any trust lawyer who looked at the deeds and rules and looked at the background to the PRP regime, the pensions reciprocal plan. The MPVAs just -- they weren't real investments, they were done for the purpose of getting money to the members. Everybody accepted that.

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Number 3, the MPVAs therefore constituted, and I'm going to be very careful with this, it's a legal phrase, "a fraud of the power of investment". That's not to suggest that there's dishonesty involved. It's a technical term your Ladyship is familiar with. It's really saying that they were exercising, purportedly exercising, a power of investment but for a purpose that

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it was not actually intended for. Again, that means that the payments, the MPVA payments, were void in equity. Beneficial title did not pass to those sums.

Now, we therefore have trustees making payments they were simply not authorised to make, that were *ultra vires* their ability, that were going to trigger a tax charge, both on the members and on the schemes, and where the beneficial title would not be passing.

Now, the reason for my taking your Ladyship through that and through the background documentation was to make good the next point, which is this. It must, in those circumstances, realistically be accepted that the parties to the MPVAs entered into them under a shared mistaken belief, or shared mistaken beliefs that, and there are four of them: (a) the trustees had power to make the loans; (b) the loans were capable of being made validly under the terms of the scheme; (c) trustees could transfer beneficial ownership of those monies and (d) the loans were not unauthorised member payments, or to put it another way these MPVAs wouldn't trigger a tax charge. And that -- that's really why I was taking your Ladyship through it this morning, through all the documentation, and it was overwhelmingly obvious and it's quite clear from the members' own evidence that everybody thought these were not going to trigger tax charges. That's the point of these things.

MRS JUSTICE ASPLIN: Well, that's what the documentation says. Do you have to go to the depth of the understanding of the trustees, as they were, as to whether they actually knew they (inaudible), if you see what I mean.

MR. MOERAN: Given the documentation we would say----

MRS JUSTICE ASPLIN: That's what the documentation says.

MR. MOERAN: Yes. That is what the documentation says but that is what the members themselves say. That is, indeed, Mrs Goldsmith's----

MRS JUSTICE ASPLIN: Well, I'm not suggestion -- I'm not suggesting that any of the members did not believe the documentation and believed that this was an excellent thing which would spring part of the value of their pensions at a time that they needed to and would have no tax consequences. What I'm questioning or doubting or wondering whether we have to delve into is whether, in fact, Mr Tweedley and his fellow compatriots knew or cared and/or whether they actually probably have maybe realised that this was----

MR. MOERAN: Interestingly, I mean----

MRS JUSTICE ASPLIN: -- close to the wind and beyond the wind.

MR. MOERAN: -- I can take your Ladyship to this. Oddly enough, the evidence from Mr Tweedley back in the Part 8 claim in 2011 was that he genuinely believed that this was all fantastically clever. And this evidence comes out, and I can give your Ladyship the reference for future consideration, the evidence comes out in his own witness statement. And it's in volume 2A, tab C1 and it's really para.9 onwards of his witness statement. This is at p.256 of bundle 2A. And what happens is that----

MRS JUSTICE ASPLIN: I am sorry, paragraph----

MR. MOERAN: Paragraph 9 onwards.

MRS JUSTICE ASPLIN: Thank you.

MR. MOERAN: So, it is under the heading "KJK Scheme" and what happens is he's talking to Julian Hanson, who's an IFA who's got a connection with the KJ case and he mentions the scheme and what the KJK Scheme does is layering. It makes a loan to a company that then makes a loan onwards. And at para.11 Mr Tweedley says:

> "I recall Julian asked me what I thought of the set-up of the scheme. My reaction was that I didn't like it as I didn't think it worked. The problem as I saw it was that the way that KJK Scheme was set up meant that the amount lent to the member by G Loans came from the pension funds of that member which have been invested into the KJK scheme, therefore, anyone looking at the KJK Scheme would argue that the member had received an unauthorised payment from his or her own pension fund."

Absolutely accurate. Flip over the page, p.257, 12:

> "However, on the back of the discussion Julian asked me to think about whether it was possible to devise a scheme which would enable pension scheme members to have early access to the payment in a way that complied with the rules."

Then at para.13 you have his explanation of how he came up with this idea, the PRP regime.

> "After a lot thought over weeks and weeks I came up with the overall concept, which is known as the Pension Reciprocation Plan, in or around February 2010. The idea was that members would invest their pension fund into a master pension scheme, the trustees of the MPS would then enter a maximum pension valuation with a separate MPS and receive a cash sum from the funds held by that separate MPS. In this way,

> the member would have access to cash but, crucially, this cash was not taken from their own pension fund but was a person or entity not a member of that scheme."

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Now, in the rest of the witness statement, and I don't have an immediate reference to this, but it does actually emphasise they actually went to counsel to take advice on this. They actually went to Amanda Hardy QC of Counsel. The problem is they went and asked a really daft set of questions that didn't really cover the issue. Now, Ms Hardy's advice covers the issues that they asked, but didn't really get at the crux of the point, which was is this an unauthorised member payment. And I would emphasise, you know, we're not making a criticism of Ms Hardy, she was just asked the wrong questions. But they were trying. And on the evidence we have it is possible, I fully accept it's possible, that Mr Tweedley is a complete liar. But----

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MRS JUSTICE ASPLIN: As is the evidence, yes.

MR. MOERAN: Well, that's what his evidence is. And that's what the documentation is. (inaudible), they said he tried to do it this way.

MRS JUSTICE ASPLIN: Actually, I am just looking (inaudible) at p.261, para.27, it says:

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> "I do recall considering whether we should take advice from Amanda Hardy at Tax Chambers, but I decided against this at the time."

MR. MOERAN: At that time. They came back to it later.

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MRS JUSTICE ASPLIN: They came back to it later.

MR. MOERAN: That's right.

MR BRYANT: It's in para.49 of the same statement.

MRS JUSTICE ASPLIN: I am very grateful.

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MR BRYANT: Apparently, I think it's after they had set up the schemes and started making the loans----

MR. MOERAN: They did, yeah. That's right. But four of them had been made----

MR BRYANT: -- they took some retrospective advice.

MR. MOERAN: When some of them had been made.

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MRS JUSTICE ASPLIN: Thank you.

MR. MOERAN: So, we have a situation where the evidence of Mr Tweedley, who may not be the finest of witnesses, is that this was what was intended and what was understood to be the case.

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MRS JUSTICE ASPLIN: Mm hmm.

MR. MOERAN: And I highlighted the cl.6 of the MPVAs, I think it was, because of the representations being made by the member, the borrow, to the trustee and highlighting that the trustees hadn't given any advice or the like. And that's because -- I highlighted that because it means that there's no -- there's no term, express or implied, that one side or another would adopt the risk of those particular beliefs I've identified, in particular the no unauthorised member payment being made or trustees had power to make the loans, nobody was taking responsibility for that belief. And neither party was responsible for or should have -- that's the hazy bit, or should have known of the true state of affairs. Now, if those points are correct then we have a claim for avoiding the MPVAs on the basis of mistake.

Now, if that is the case, we have a claim for avoiding and we get to recover the money on a basis of restitution, money having -- sorry, unjust enrichment. And with that, also, if you have avoided the contract, we also have a standard proprietary claim, there wasn't a beneficial transfer of ownership, you therefore don't have equities (inaudible). You don't have a *bona fide* purchase of the value -- for value without notice and in those consequences we can just make a proprietary claim as well. We can't do that without the MPVA going there.

MRS JUSTICE ASPLIN: And simply those monies, because the MPVAs were outside the four corners of the powers of the trustees throughout, remained trust monies.

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: So, they (inaudible) trust----

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: -- and the beneficial interests having never transpired?

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: And so, therefore, that, once again, is restitution.

MR. MOERAN: It would actually be an equitable proprietary claim, pretty effectively so, yes.

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: We do have to get rid of, and I would acknowledge this, we do have to get rid of the MPVA though, because otherwise you have a *bona fide* purchase of a value without notice and I could -- we could diverge for another hour into the discussion of what "without notice" means in the commercial situation versus the old 19th century conveyancing authorities, but in reality these lay persons are going to be without notice. It's the value that's important there. If they haven't got a loan agreement they aren't giving good value, so they aren't *bona fide* purchasers for value without notice. But we do have to get rid of the MPVA agreement before we get the standard -- well, before we can trace through is the crucial thing.

MRS JUSTICE ASPLIN: What happens to the transfer fee, five per cent.

MR. MOERAN: That just----

MRS JUSTICE ASPLIN: Because that's there -- because that's their value also, or could have been their value that they gave.

MR. MOERAN: They didn't -- they didn't give it.

MRS JUSTICE ASPLIN: Okay. But they agreed that it should be given and it was given by the trust fund. Okay?

MR. MOERAN: Yeah.

MRS JUSTICE ASPLIN: But was it?

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: If they agreed to pay the five per cent----

MR. MOERAN: No, they agreed to us paying.

MRS JUSTICE ASPLIN: Okay, to five per cent being paid----

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: -- from their transfer----

MR. MOERAN: And it wasn't there and it wasn't in their gift to agree it. That's the problem.

MRS JUSTICE ASPLIN: No.

MR. MOERAN: That's why we were suing for recovery of the five per cent.

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: So, we have a claim for restitution. It's a pretty strong claim. It's certainly good enough to get this -- to justify Beddoe relief. In fact, we'd say more than that, it's an extremely strong claim. I've mentioned in my skeleton there's an analogous situation. If your Ladyship needs one it's *Haugesund Kommune -v- Depfa ACS Bank* [2012] QB 549, which highlights that simply because a loan taken out by somebody which is *ultra vires* you can get it back, you can recover the money, the lender can recover the money on the basis of restitution. It's straightforward. It's what we've just discussed.

MRS JUSTICE ASPLIN: (inaudible).

MR. MOERAN: That's the one. Interestingly, (inaudible) is all about a UK local authority doing terrible swaps. It's nice to know that not just the UK local authorities that were doing it, the Haugesund Kommune was a Norwegian local authority that did exactly the same thing and entered into a series of swaps, this time buying from a Norwegian Bank but under English law, bizarrely, and unsurprisingly it came back with exactly the same decision. Now, the only question, therefore, it's not a question of whether we've got a good claim, it's a question of whether there are any effective defences and we have the -- we can literally only see----

MRS JUSTICE ASPLIN: Change of position.

MR. MOERAN: -- change of position or estoppel. And the change of position doesn't work because it's an MPVA loan agreement and the crucial thing here is change of position defence is not an entire defence, it's a spectrum defence, as in the degree of change of position as a result of mistake is how much defence you get. It's not a once and for all. And here, because the MPVAs were loans and therefore they were agreeing to repay them, the only consequence adverse consequence of the mistake is early repayment. So, in this particular case the only consequence of change of position, if it works, is the difference in the price of money, basically the interest rate you're paying under the MPVA versus an equivalent loan today. Now that might be a bit, but it's an interest difference, because they have to accept that they were going to repay this in one sense or another, or in one way or another.

MRS JUSTICE ASPLIN: I mean, the change of position might be placing one's other financial arrangements in such a position that it will not be possible to obtain another loan at a different rate in order to repay early.

MR. MOERAN: It's possible. It's possible. And this is why we would emphasise there might be personal defences on very specific facts which we can identify and consider at the second stage of the Beddoe relief.

MRS JUSTICE ASPLIN: Yes. Okay. I see. And the other one is estoppel.

MR. MOERAN: And the other one is estoppel. If it's estoppel by representation, we didn't make any representation, and if it's estoppel by convention it's the *Benchdollar* case from Mr Justice Briggs, as he then was, that highlights all the different problems, all the different complexities of estoppel by convention. It's just not going to work in this sort of situation. If, indeed, you can have estoppel by convention in any situation in relation to----

MRS JUSTICE ASPLIN: Just hold on a second, Mr Moeran. (Mobile phone rings) Please could everyone else make sure that they have also put all their devices to silent for me. And whilst I'm speaking also, I'm sure many of you won't necessarily want to take in every single word that Mr Moeran is saying. If you do want to go out, please would you just make sure that the door doesn't bang because it's quite distracting when it does and unfortunately these doors are not properly sprung. Thank you very much.

Mr Moeran, *Benchdollar* in relation to estoppel by convention?

MR. MOERAN: *Benchdollar*. You are supposed to have -- well, in order to have estoppel by convention you have to have an expressly shared understanding, you're supposed to have -- in particular the person who is estopped is supposed to have assumed some element of

responsibility and, in particular, it is still equitable -- is an equitable defence where it only operates where it would be inequitable or unjust for the party estopped to derogate from the common assumption. And this is *Crédit Suisse v Borough Council of Allerdale* [1995] 2 Lloyd's Rep. 315, 367-370. But by the time you've got to an unjust enrichment claim you only get it because it's unjust for the other person to hold onto the money so it's difficult to see why estoppel by convention would apply. And as I made out in the skeleton, it's odd to think of estoppel by convention ever working in relation to a mistake claim because if it did you would defeat every claim for mistake ever. It would overcome all those problems. So, either way, and all we need to do to simplify your Ladyship's consideration of this matter, all we need to do is identify that we've got a real -- a good real chance of success here, and we would say more than a good real chance of success. We've got a very good claim here. And although it is hypothetically possible for some defences to exist, at the moment we don't see them, certainly on the whole, existing.

MRS JUSTICE ASPLIN: And you say it doesn't matter anyway because you will consider it on a case by case basis----

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: -- when you get to the second stage?

MR. MOERAN: Absolutely. If there is an individual person -- in a particular personal capacity if there is, in fact, a defence, we consider it at stage 2, and that's when we would go, "Ah, turns out that they did, in fact, have a representation made to them in perfect terms." We both pull out of that particular claim. We are certainly not aware of them, though.

Now, that leaves the next point, which is cost benefit analysis and given the strength of the apparent claim on the MPVA recoveries, Mr Bryant has, perhaps unsurprisingly and quite properly, concentrated quite a lot of his fire on this issue. Now, he essentially says, and I do apologise to Mr Bryant in advance for any overly simplistic summary of this, but he essentially says----

MRS JUSTICE ASPLIN: I must apologise to him too, no doubt overly simplistically I have referred to lots of things that he may wish to say. But anyway, I am sure he will say them.

MR. MOERAN: His position is this. The chances of actual recovery are slim and the costs may well exceed recovery and therefore this is just not worth powder and shot. That's in addition to and in the context of the distress and discomfort that these claims caused. But the answer to that is that is just not accurate, and we start with the basic figures. We----

MRS JUSTICE ASPLIN: Well, your figures are all for things which aren't necessarily going to happen.

MR. MOERAN: Well, yes.

MRS JUSTICE ASPLIN: Therefore, the bankruptcy standard demands doing it en bloc, et cetera, whereas to a great extent you've now been forced to go down another route.

MR. MOERAN: To a great extent, but it's still going to give you an example of the sort of range of costs that your Ladyship is looking at. If you've got the----

MRS JUSTICE ASPLIN: But I have not got any evidence, Mr Moeran, in relation to the kind of range of cost foregoing the route that to some extent you are now committed to.

MR. MOERAN: Well, ah, hang on. Yes, we do. Start with the 144 standstill agreements.

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: That still goes down on exactly the same route as we've discussed before, statutory demand, possible bankruptcy proceedings, which is £2,925 net of VAT up to bankruptcy, uncontested bankruptcy petition. That's 144 of the 350-odd members.

MRS JUSTICE ASPLIN: Tell me again. That's 144----

MR. MOERAN: That's 144 of the members we've got standstill agreements.

MRS JUSTICE ASPLIN: And what are you telling me about cost and----

MR. MOERAN: And for those, costs of an uncontested bankruptcy petition per individual member is up to £2,925 net of VAT. And that's para.133 of Mr Fairhead's first witness statement.

MRS JUSTICE ASPLIN: £2,925 net of VAT if one goes bankruptcy route?

MR. MOERAN: Yes. And that's through to----

MRS JUSTICE ASPLIN: So, that's £2,925----

MR. MOERAN: -- an uncontested bankruptcy petition.

MRS JUSTICE ASPLIN: And that is £2,925 x 144, therefore?

MR. MOERAN: Yeah.

MRS JUSTICE ASPLIN: But I have no breakdown, do I, of the range -- I know the range of the amounts outstanding ranges from 2,500-odd up to 425 or so.

MR. MOERAN: Yeah.

MRS JUSTICE ASPLIN: But that is -- so at the bottom end, and for many of those at the bottom end, that already is uneconomic, or that's what Mr Bryant will say.

MR. MOERAN: For one or two of them, yes, it probably is.

MRS JUSTICE ASPLIN: But I don't know how many.

MR. MOERAN: I can take your Ladyship to that table.

MRS JUSTICE ASPLIN: No, but if you see what I mean----

MR. MOERAN: I do see what you mean. The majority -- the average one is about £20,000-odd.

MRS JUSTICE ASPLIN: Right. But in relation to those which are below the water already, or are close to the waterline, how many are we talking?

MR. MOERAN: Off the cuff I can't tell you, but I can tell you certainly by tomorrow morning, by tomorrow when we start again.

MRS JUSTICE ASPLIN: Yes. But I do think that's quite important. Thank you.

MR. MOERAN: Then we have -- and that's the ones who are proceeding on the original basis because there are standstill agreements. Then you have the other situation, which is there has been about £130,000 net of VAT incurred in relation to claims where claims have been issued. Now, once you've got the claims issued additional costs to take it through to stay and/or defence closes will not be that significant. It was a more up-front but less further on, inevitably, costs.

MRS JUSTICE ASPLIN: If you've issued claims you may have to serve them, but then you'd have----

MR. MOERAN: Oh, they're -- are they served?

MRS JUSTICE ASPLIN: Some of them are served, not many.

MR. MOERAN: Some of them are served. Sorry. Yes.

MRS JUSTICE ASPLIN: But not all of them. Only a few are served.

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: And then you would have to draft POCs in all of those. Presumably they are just claim forms at the moment?

MR. MOERAN: We've done POCs. They're standardised POCs. Sorry. Yes.

MRS JUSTICE ASPLIN: So, they're standardised particulars of claim but with hopefully the right figures in the right places?

MR. MOERAN: Yes, yes, details -- details inserted, yes.

MRS JUSTICE ASPLIN: Okay. So, the additional -- how many -- how many claims are issued and do you have a breakdown of what the range of outstanding loans are in relation to those and what the additional cost is likely to be in relation to those?

MR. MOERAN: Not immediately to hand, but I can get that as well.

MRS JUSTICE ASPLIN: Thank you.

MR. MOERAN: Now, leaving aside the people at the bottom level below the waterline, shall we say, where the amount that might be recoverable is so low that the costs are going to exceed it,

the really substantial point being made against us is are these people going to be good for the money if you do get a judgment?

MRS JUSTICE ASPLIN: Mmm.

MR. MOERAN: And the answer is we can't tell at the moment. And Mr Bryant, of course, quite properly has drawn the court's attention to CPR Practice Direction 67B para.7.2(3), which highlights the requirement for any evidence we have of the means of the other side to (inaudible) of a Beddoe application. Now, we don't have those details at the moment because that's part of what the Beddoe proceedings, Beddoe relief that we're seeking allows us to obtain. Now, we could go through----

MRS JUSTICE ASPLIN: Well, it doesn't, does it?

MR. MOERAN: Well----

MRS JUSTICE ASPLIN: Not at all.

MR. MOERAN: It doesn't specifically allow for it, but it doesn't(?) allow for us to go, "Right, if you're going to actually turn round and say you're not going to pay this because you can't afford it, tell us what it is before we start agreeing to that."

MRS JUSTICE ASPLIN: Mm hmm.

MR. MOERAN: Now, we could, I do acknowledge, we could do that before seeking Beddoe relief. But, to be blunt, the chances of getting ascertainably or enforceably more accurate information increases when you have the sharp stick of litigation behind it.

MRS JUSTICE ASPLIN: Well, if you wrote to me and asked me what my means were, I'd probably say, "None of your business, Mr Moeran."

MR. MOERAN: On the hand we say, "We're going to sue you----

MRS JUSTICE ASPLIN: Yes, I might be more interested in telling you.

MR. MOERAN: Exactly. It's -- it's not a particularly pleasant point to put but it is a realistic one. If we want to see if we're actually going to get any of this money back, the chances are that we're going to have to wave a very large stick. And it may well be that there's a chunk of members at the bottom of the level, at the bottom of the amount available, where they cannot and it is not economically viable for us to recover those sums.

MRS JUSTICE ASPLIN: But you're saying really that this decision has to be made without that piece of the jigsaw in place?

MR. MOERAN: Yes. We are aware of this point and we've flagged it up in our evidence. Mr Fairhead's first witness statement at para.153, and if I can just read this out to your Ladyship, it's in B1, tab B1 at p.41.

MRS JUSTICE ASPLIN: I am sorry, just a moment.

MR. MOERAN: Ah. Yes, I see.

MRS JUSTICE ASPLIN: Mine has disintegrated. B1?

MR. MOERAN: B1, p.41.

MRS JUSTICE ASPLIN: Forty-three. Yes.

MR. MOERAN:

> "The claimant is also aware that there may well be offers to settle made by the members who receive MPVA loans and that each such offer will have to be judged on its merits. In particular, the claimant is very aware the determining factor in many such cases will be an assessment of both the chances of recovering more by way of legal action net of costs, and the prospect of negotiating a better deal if the offer is refused. The claimant is concerned that given the level of sums involved in many cases such an assessment may have to be made economically before the costs of such an assessment render the process self-defeating."

We are flagging up that we are alive to this issue.

> "As such, it wishes the court to be aware that it may be that it will decide to exercise its power of compromise (Trustee Act 1925 s.15) without returning to court for further directions depending on the economics of each such case. It is not seeking a direction to be permitted to do this in advance, but merely noting for the court's attention and in the interests of clarity and to avoid any suggestion in future it was in any way seeking to hide such settlement. Moreover, in the event of any such settlements being entered into the claimant will update the court in relation to them as and when it seeks further directions more generally."

What I'm trying to do with that particular passage in highlighting it to your Ladyship is to emphasise that we are aware of the economic realities of this case. We are not saying that we go hell for leather and just pursue somebody regardless of the economic realities. It's quite clear that Dalriada will be considering whether or not it's sensible once we take into account what the evidence as to assets and the like.

MRS JUSTICE ASPLIN: Mr Bryant, no doubt, will say that also these people were, for the most part, probably not in good financial circumstances to start with, that's why they sought to spring some of the money out of their pension funds. Since then, they've received very substantial tax assessments.

MR. MOERAN: Yes. Now, there are two answers to that. The first point is if they have money to pay the tax assessment but without the tax assessment they have no -- sorry, if you ignore the MPVA recovery they can pay the tax assessment, we'd rather get some of the money that they have. And since it will be 40 per cent of the MPVA made, basically, you're going to be looking at, "We'd rather have some of that. Thank you very much." And you have that rather basic point which is the larger the MPVA taken the chances are the larger the pension pot that it came from. The larger the pension pot that it came from, and we don't say that this is universal but, the chances are the larger the assets the person has more generally. It's a terrible thing to say, but the smaller amounts of money will be more easily repayable and the larger amounts of money the people probably have more assets. They may not be able to pay it back all of it, but they may well be able to pay back some of it.

MRS JUSTICE ASPLIN: And presumably somewhere there is evidence, and we've been talking about this before, about the percentage of the loans which are above particular levels. You've got a schedule----

MR. MOERAN: We have got the schedule setting down all the loans. I will be able to give you a little bit more of an analysis tomorrow.

MRS JUSTICE ASPLIN: Yes. So, I think that we ought to be not only looking at those which are below your £2,900-odd----

MR. MOERAN: Mmm.

MRS JUSTICE ASPLIN: -- or are close to that margin because you will run up more costs quite quickly. It seems to me that anything, for example, below £3,500 is not worth even beginning to deal with.

MR. MOERAN: Mm hmm.

MRS JUSTICE ASPLIN: And then what percentage in different brackets, for example, what percentage is above £25,000, what percentage is above £50,000 and any other useful, sensible breakdown that you can think of.

MR. MOERAN: I will work on that tonight.

MRS JUSTICE ASPLIN: Thank you.

MR. MOERAN: I will give your Ladyship a breakdown of that tomorrow.

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: So, in broad terms we say that on a costs benefit analysis there will be cases where it's just not sensible to pursue it but Beddoe relief allows us to do that assessment in as good a way as is possible.

MRS JUSTICE ASPLIN: And I should say that in relation to that line of thinking, and it's only a line of thinking at present, I don't consider that if there were some cut-off point that were the ultimate conclusion that that is, in effect, saving some people and throwing others to the wolves, if that were an outcome, because if, in fact, your loan was only of that very small amount, although obviously useful and sensible and hopeful amount at the time that you received it, from the point of view of recovery it is a small amount, unfortunately on a costs benefit analysis, in fact, that is not saving that person and not saving another, it is looking at the matter in the round, concluding that for everybody's benefit in relation to the schemes as a whole that money should not be wasted on something----

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: -- which is purposeless which, in fact, is to everybody's benefit.

MR. MOERAN: Yes. it's saving the scheme's assets.

MRS JUSTICE ASPLIN: And I just want to make that point, that in fact it's not preferring some people over others.

MR. MOERAN: Absolutely. It is distinctly and necessarily an exercise in saving the scheme's assets from a wasted expenditure and that must benefit all members.

MRS JUSTICE ASPLIN: Benefits everyone.

MR. MOERAN: Absolutely. Now, that actually segues very nicely into my penultimate point, which is what happens if we do not pursue this. And this is really why the claimant does not see that not pursuing the recovery of the MPVA funds is a plausible option for a trustee in its position -- in its position.

MRS JUSTICE ASPLIN: Well, may I, before you begin, say - it may or may not be correct - but in the circumstances, would the trustees not also be seeking comfort from the court for not fulfilling what would otherwise be their obligation.

MR. MOERAN: If the relief is -- or the decision is that we don't pursue it, we will be -- I think it must inevitably follow that we would seek a direction that we would be at liberty to not pursue it precisely. And the problem is this: there were 348 members who received MPVAs, but there were 138 who didn't. And that divides up very unevenly between the schemes but I mentioned, when I was taking you through those tables at the end of volume 2A, that Lancaster had one out of 92 members didn't receive it. But Grosvenor had 37 members -- sorry, Woodcroft had 55 members who didn't receive it, that's 83 per cent of their members. Now, the difficulty is this: if MPVA payments are recovered, or not sought to be recovered, everybody in the scheme suffers, we would say *pro rata*, but they're going to suffer, one way or t'other. Assume *pro rata* for these purposes.

So, let's say there are two members, Member A and Member -- Member A1 and Member A2. Member A1 got an MPVA and the court decides that one should not pursue MPVA recovery, so they've got £1,000 in their pocket from the MPVA. But Member A2 didn't get an MPVA. All that they're going to do is Member A1 and Member A2 are going to suffer in relation to their pension fund. Now, that will be offset for Member A1 by the fact that they don't have to repay an MPVA. It will not be offset for Member A2 or the 138 members who did not receive MPVAs. And in this respect, in our representative capacity, we have to make this point; the members who received the MPVA loans agreed to repay them. That's the point of a loan. It's not a gift. They cannot now complain about having to repay them. They can complain about having to repay them earlier, but that's a cashflow issue which is vastly overwritten by the capital harm that is suffered by the non-recipient members.

Now, we also have the other points made in the skeleton about if and to the extent that we can get repayment it can reduce the tax charge, arguably, on the *Hillsdown Holdings* argument. Now, that is to the benefit of the member. It's also to the benefit of the scheme and therefore all the members of that particular scheme.

Now, the flip side of that, of course, is one has to look at what happens if you do pursue it. Of course, your Ladyship will be taking into account the fact that there is going to be early demands for repayment of these MPVAs instead of the 10, 15, 20 and 25-year periods.

And then there is the possibility, and this is where I want to deal with the issue of whether or not to go through to bankruptcy proceedings, the issue of bankruptcy proceedings. Now, Mr Bryant has indicated, and there was a debate in front of Chief Master Marsh at the directions hearing which set the scheme for this, which Chief Master Marsh pointed out, "Why would you go for bankruptcy? All it does is it means that you're never going to get anything more back." Or he says never got anything back and, of course, never going to get anything more back. The answer is twofold. First of all, bankruptcy proceedings can be a very cost-efficient way of getting back what you can. But the second point is a very human point. It deals with recalcitrant debtors very effectively. Bankruptcy proceedings where there is no dispute of the debt is one of, if not the most cost-efficient ways of pursuing a debt. It is far cheaper than pursuing through to judgment and then enforcement and so on and so forth. Send in a trustee in bankruptcy.

MRS JUSTICE ASPLIN: You have the problem there, don't you, that immediately -- first of all, in effect, you have lifted the burden from the member at that stage. But then, as I said before, you'll be in a pool with the other creditors of whom the greatest may well be the Revenue.

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MR. MOERAN: Yes. Yes. Absolutely. But if and to the extent we get to the point where they just haven't got the capacity to pay back these things then what alternative is there? If we take pennies in the pound, it's better than zero pennies in the pound.

B

Now, I acknowledge there is a balancing exercise to be undertaken. If we're going to get one penny in the pound by comparison to ruining somebody's life----

MRS JUSTICE ASPLIN: And also, and no doubt this was discussed in front of the master, there is the serious consequence----

C

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: -- the stigma of being bankrupt----

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: -- and all of the consequences which flow from this----

MR. MOERAN: Yes, absolutely.

D

MRS JUSTICE ASPLIN: -- including one's credit rating, but there are many others.

MR. MOERAN: Absolutely. And hence I emphasise ruining someone's life. I mean, that was a shorthand for all of those things.

MRS JUSTICE ASPLIN: Yes.

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MR. MOERAN: And that is something that Dalriada will take account of. We are not proposing just going forth and making people bankrupt willy nilly, it's if this is going to be a useful and effective and reasonable action to take. Now, there is a halfway point.

MRS JUSTICE ASPLIN: That's a very difficult situation for Dalriada.

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MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: And I fully understand what you're saying, Mr Moeran, but given the relief that you are seeking in order not in those grey areas to proceed you'd be coming back looking for further approval----

MR. MOERAN: Yes.

G

MRS JUSTICE ASPLIN: -- in relation to not proceeding, it seems to me, because you would have to create a set of parameters in relation to which you were deciding not to proceed.

MR. MOERAN: Yes. Now----

MRS JUSTICE ASPLIN: Otherwise it would be capricious.

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MR. MOERAN: Well, not----

MRS JUSTICE ASPLIN: That's a harsh word to use, but you know what I mean.

MR. MOERAN: Yes. It wouldn't be capricious to not come back. You would have to be careful to not be capricious in how you decide it.

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MRS JUSTICE ASPLIN: That's what I'm meaning.

MR. MOERAN: Yes, I understand.

MRS JUSTICE ASPLIN: How do you decide----

MR. MOERAN: Yes.

B

MRS JUSTICE ASPLIN: -- in that area, in that field of should we/shouldn't we? Will this ruin this person's life or that person's life?

MR. MOERAN: Well----

MRS JUSTICE ASPLIN: I use that phrase flippantly, but that was that was the phrase you used.

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MR. MOERAN: Absolutely. And that is essentially -- are we going to ruin this person's life in return for what we think we can get is the real question. And that's why, and that's why I highlighted para.153 of Mr Fairhead's first witness statement, which says there will be situations where we just think it's not economically viable. We are not planning on returning to court for approval of that. We're quite express about this. But we will be informing the

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court of what that is. That part, we are willing to take the responsibility on our own shoulders without particular blessing.

MRS JUSTICE ASPLIN: Mm hmm.

MR. MOERAN: But we do say that having that opportunity to take this through to bankruptcy

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on an uncontested liability, and it's only where it's uncontested that we're going to be doing this, if the statutory demand is disputed or if there's a defence put in we're not going to be going down that road. But if it's an uncontested liability and we're just sitting there going, "Well, we haven't had any information about this person's assets," or we don't believe what they're saying about the assets, we're going to pursue them through the bankruptcy. It's --

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why would we not be able to do that? If we have to come back to court it just encourages----

MRS JUSTICE ASPLIN: I'm sorry, we are going round in circles here. Because what you were just saying was there will be circumstances where actually the pain is too great.

MR. MOERAN: Yes.

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MRS JUSTICE ASPLIN: And I was saying if you're going to be doing that analysis, that balance, then there's a concern about capriciousness and exercise of that judgment. And how could you determine in that field, yes, it may look like it on the numbers or the numbers----

MR. MOERAN: Ahh.

H

MRS JUSTICE ASPLIN: -- or the numbers are quite close, but actually in this case we can see that the personal damage is too great.

MR. MOERAN: Ah.

MRS JUSTICE ASPLIN: And what I am saying, because I thought that's what you were saying, Mr Moeran, in relation to those that's why I mentioned capriciousness or the concern that the trustee might be seen to be behaving in a capricious way, that that would drive you back to court with a number of examples. That's what I----

MR. MOERAN: Now I understand what your Ladyship was getting at. Okay. What I was trying to get at, very ineloquently, was if we're looking at it on a costs benefit analysis and basically saying is this going to be effective or otherwise, chances are we are unlikely to be going back to court, we are just going to take that economic analysis. If it comes to a we are genuine -- let's take a really extreme example. Somebody is -- and I will take a really extreme example. Somebody is mentally ill and is refusing to pay on an irrational basis and we know that if we put them into bankruptcy we could get the money, or get 50, 60, 75 pence in the pound, but we also recognise that there's a genuine risk, not because they're being stubborn, but because they are mentally ill, that they might commit suicide. I think if we got to that particular decision, we probably would be coming back for a specific order. But we don't need a Beddoe relief to go into that minutiae. That's the sort of minutiae that we can deal with on an ad-hoc basis using our judgment, and what's more that we are comfortable dealing with on an ad-hoc basis using our judgment. And it will be -- there will be a few cases where we probably do want to come back and go, "You know what, this was really quite a difficult judgment. Here's what we did. Is there a particular problem with it?" And hopefully, most of those the court will look at and go, "Well, you're within the parameters of reasonable -- go ahead." In most of the economic cases we would expect just to tell the court, "Dear Court, so the court has the full background in these particular cases we have not pursued them because it didn't look economically viable. We don't need your blessing because it's just not economically viable, but while we're here we'll update you."

Now, that -- that's why we say that the court ought to grant us relief to take this through to bankruptcy proceedings. It's practical, we will deal with this on a practical basis, it allows us to enforce these proceedings or enforce the claims to the best and most economically efficient way and to a degree there has to be a certain set of flexibility, a certain amount of flexibility in a Beddoe relief that allows trustees to get on and do these things.

And that takes me to that next point, which is Mr Bryant goes and takes a couple of points at para.33 of his skeleton as to the precise details of relief sought and one of them is he says that relief should be exclusive and he says if we're to take any other steps than are set out we should be required to seek further relief. We very, very strongly oppose that. The starting point is we can do all of these things without the court's approval. We are at risk on costs, but we can do all of these things without the court's approval. So, it would be improper to prohibit such matters unless it appeared extremely -- or unless it appeared clear that to do so was wrong. And secondly, because of the difficulties of identifying exactly how you deal with the vagaries of life, it would be wildly inefficient to limit the action of the trustees by saying, "You can only do 'X' and if you want to do anything other than 'X' you must come back to court." It would be grossly inefficient and, indeed, improper to limit a trustee's actions in those ways.

The second point he makes at para.33 of his skeleton is the bankruptcy proceedings, which I have already just dealt with.

Now, that's all the details of the relief sought and I fully acknowledge and expect that if your Ladyship is minded to grant us Beddoe relief we will be going through the details of the precise wording of the Beddoe relief sought, Beddoe granted and will dot i's and cross t's and make sure it works.

But the last point I want to deal with on the Beddoe relief, before we move on to the tax appeals, is the standstill agreements. The standstill agreements are -- your Ladyship had already identified that your Ladyship has seen the extra witness statement from this morning. What I'm going to do is summarise this very quickly. There's a Miss Angela Brooks----

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: -- who has set up something called Pension Life. It operates from Spain. And she has been organising and is the chair of something called the "ARK Class Action Group", capital A, capital C, capital A. And Mrs Goldsmith actually refers to her in her witness statement at para.47 to para.52 and in a letter where she introduced herself effectively to Mrs Goldsmith she says that she's -- the reference, for your Ladyship's note, is volume 2B, tab 6, p.632. She says that she is a tax advisor appointed by a number of ARK victims who are participating against HMRC, Dalriada and the financial advisors who sold these schemes. So, that's the background to it. Now, what's happened is that when the standstill agreements got sent out, when we got to the point of issuing standstill agreements and talking about these with

the members, Ms Brooks and/or ARK Class Action and/or Pension Life, it's not exactly clear which variety of entities this was put forward, criticised the standstill agreements.

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And before I get on to the details, Dalriada does want to make this one point clear. Despite the fact that Ms Brooks is critical of Dalriada and the ARK Class Action are critical of some of Dalriada's actions, Dalriada has actually found the ARK Class Action Group to be actually quite useful, quite helpful. They represent about 120 of the members of the scheme. They are

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undoubtedly a useful conduit for information going back both from Dalriada to the members and from the members to the trustees and Mrs Goldsmith, who has been very helpful, is a member of that group and has their support. So, we are not criticising ARK Class Action per se, we are taking issue with the specific standstill agreement issues today.

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Now, the standstill agreement itself, and I will take you to this now, is in volume 2C. This is going to be quite a short point. 2C, tab 7, p.746. Sorry, do you have numbers at the bottom right hand side this time?

MRS JUSTICE ASPLIN: Yes.

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MR. MOERAN: Excellent. P.746. Standstill agreement. And if you turn on, at p.747, p.748 and p.749, it's an absolutely standard standstill agreement. And if your Ladyship turns on to cl.2, at p.747 through to p.748, it is simply saying:

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> "In consideration of mutual promise and covenants hereby agreed the parties agree the period for which this agreement remains in force shall not be taken into account for the purposes of determining the application the dispute of any limitation period."

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I mean, that's really what it's saying. There isn't anything special about this whatsoever. It's a standard standstill agreement. It doesn't do anything else. And at cl.3:

> "Period and termination of this agreement. The period begins on the date of this agreement and continues unless and until the earlier of the following occurs…"

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And it's 21 days' notice or the serving of proceedings. So, it's available to both parties to terminate the standstill agreement. There's nothing special about it. Now, if your Ladyship turns on to p.1056 of that bundle, tab 8, p.1056, which is almost, almost at tab 9----

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MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: -- you will see a document entitled, "ARK Report/Update for Kim Goldsmith as a Representative Beneficiary in the ARK Members v Dalriada Trustees" by Angela Brooks, Chairman of the ARK Class Action, 17th May 2017. This was exhibited to Mrs Goldsmith's statement. Now, we don't agree with a large number of the statements and allegations made in this document but the relevant passage is at p.1059, where it's dealing with the ARK Class Action. And effectively she's dealing with the standstill agreement. And at p.1059, about two-thirds of the way down the page----

MRS JUSTICE ASPLIN: Mmm.

MR. MOERAN: -- under ARK Class Action, then you have a paragraph, "Since 2014…" The next paragraph:

> "In August 2016, Dalriada, without warning, started sending out standstill agreements."

Then the next paragraph:

> "We sought urgent legal opinion on the wording of the standstill agreement and were advised it was worded in such a way that members waived all rights, were put at a severe and unfair disadvantage and as there was no longer a stop date gave Dalriada the right to take proceedings against the members indefinitely."

Well, that's what a standstill agreement kind of does and we would say that they didn't waive all rights. And then it says:

> "Our legal advisors helped us to add an extra 20 covenants in the standstill agreement. We then unsigned the original agreements and substituted the revised agreements. They were rejected by Dalriada on the basis they did not agree with most of the extra covenants."

Now, what's happened is that they tried last week, Ms Brooks tried again to put forward an amended standstill agreement. And what is being said, as we understand it, is that the -- what's being said is that, in effect, we should not get Beddoe relief unless there's an amendment to the standstill agreement. And the amended version of the standstill agreement is all the way on, I'll start with the correspondence, is tab 9 of that bundle, p.1077.

Now, this is an email, a substantial email, of 15th June, so last week, from Angie Brooks to Pension Life and it ends up going through to Dalriada Trustees that day.

> "Subject - Revised Standstill - Urgent. Please see attached the latest revised standstill agreement. This has been left to the last minute so that Dalriada do not have the opportunity to reject it before the Beddoe proceedings last week and so that the court will get to see it and take it into consideration carefully as part of the ultimate determination. We've kept in the additional covenants to which Dalriada either did not object or those to which they did not provide a plausible objection. The most important extra covenant, 11.16, has been extended so that we're asking Dalriada to make subject access requests to all the seeding providers. The focus of the agreement now is to concentrate on a coherent strategy to take criminal action against the perpetrators, who committed a financial crime, and the seeding providers who so negligently handed over so many pensions with no heed to the members' interests or the warnings of both TPR and HMRC."

Now, that's the background to how it's being put forward. And then if your Ladyship turns on two pages to p.1079 you get to the draft amended standstill agreement. Now, I will flag up immediately, it came in on 15th June. We haven't got a problem with dealing with it, it's just it doesn't really affect or apply to any of the matters we're dealing with today. And you can see this because at 1079 it just starts out with -- and what happens is the stuff that's in bold, or the words that are in bold are the additions, effectively. And in the recitals it's basically saying that they are giving 21 days written notice of termination and requesting Dalriada to now sign this new revised agreement which replaces the first amended agreement. And of the original -- additional covenants added to the version by Dalriada from August 2016 onwards, blah, blah, blah have been deleted as below and covenants blah, blah, blah remain and 11.16 has been expanded. And the importance of the expansion of 11.16 is the ARK members are now out of time to pursue any of the negligent parties for compensation for their pension losses, liabilities and the extreme distress they have all experienced for the past six years. Therefore, the criminal route must be pursued with criminal complaints being made against all those who committed financial crimes and all those who facilitated it. And that's essentially what's being done here. They're trying to use this as a way of addressing or supporting----

MRS JUSTICE ASPLIN: What has this got to do with the standstill agreement?

MR. MOERAN: A, what has this got to do with the standstill agreement? B, what has this got to do with Beddoe proceedings? And, C, what has this got to do with Dalriada? Because the criminal proceedings that they are talking about are in relation to pre-scheme matters. They're in relation to the representations or mis-sale or misrepresentations to the then prospective members for the transfer. Dalriada, as trustee of the scheme, doesn't really have an interest in that. Dalriada's got an interest in the MPVAs, it's got an interest in the assets being used to buy shares in companies in Cyprus, but it doesn't have an interest in the criminal matters.

Now, you then jump on to p.1081, and you see the wording of the covenants that have been attempted to insert and the ones that are crossed through are the ones -- because they've been crossed through they were put forward but are not now being put forward, so I will ignore those. But you can see the tenor of the covenants being put forwards.

> "11.5) Audited accounts will be produced immediately. 11.6) An independent audit shall be performed by an agreed third-party not previously connected with ARK/Dalriada matter and a professional independent opinion. The third-party may be made up of a number of different professionals, costs draftsmen and so on. The cost of this shall be met proportionately from each of the six schemes. Dalriada…"

It's nothing to do with the standstill, it's to do with administration of the scheme.

MRS JUSTICE ASPLIN: This isn't to do with standstill----

MR. MOERAN: Exactly.

MRS JUSTICE ASPLIN: -- so far as I can see from my short glance at it.

MR. MOERAN: There are three, possibly four, provisions that might relate to MPVA recover and I will highlight those. If you start with the deleted 11.10, it's deleted so probably irrelevant, but:

> "Dalriada will only recover the loans if and when it's determined by the tax tribunals. No unauthorised payment charges shall be levied if the loans are repaid. Further, Dalriada will only recover the loans from people who have sufficient liquidable assets who will not be financially ruined. This will involve a degree of reorganising of the individual schemes on a voluntary and non-contentious(?) basis."

I mean, we can't do that. It's absolutely hopeless. And what's more, if you want to run this, the *Hillsdown Holdings* argument, you've got to repay. So, that's point one.

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Point two, 11.15:

> "Based on a voluntary disclosure of members' assets, income and individual circumstances Dalriada will agree not to take any recovery action where such action would lead to severe financial hardship, homelessness or an inability to work or practice due to an adverse credit rating, such as an individual who works in the financial services or related industry, this covenant should remain."

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Now, again, if it's voluntary, again, we should not be doing that. We will assess the recoverability, but we're not going to take some sort of basis of voluntary disclosure.

11.16 is actually -- 11.16 part 2 is all to do with producing some sort of reports and making member access requests -- sorry, subject access requests. Again, irrelevant to the MPVA. The third point that might have to do with MPVA is 11.19.

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> "Dalriada will produce any documentary evidence relating to the alleged making of loans…"

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It says "by members"; I'm assuming that means "to members".

If and to the extent that documentary evidence is relevant it would, of course, be disclosable and to the extent that it's available then we'll probably provide it to the member in question. And then, finally, the only other point that might be relevant to the MPVA recovery is 11.20, which is deleted anyway and it's:

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> "The standstill agreement will be subject to a long stop date being the completion of Beddoe proceedings."

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Obviously, that will be irrelevant. So, it's irrelevant to standstill, it's irrelevant to the MPVA recoveries, it's irrelevant to the Beddoe and most of the matters are not really to do with Dalriada. We felt that we should draw the court's attention to it. It's clearly a matter of some

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concern to some of the members. But it really doesn't make any difference to our application whatsoever.

That, my Lady, is our submissions, or those, my Lady, are our submissions on the MPVA Beddoe.

I can deal with the second matter, which is the tax appeal Beddoe, really quite quickly because, very helpfully and, I would emphasise, very appropriately, the defendant is not really challenging the principle of this particular relief, because in both cases what we're asking for is relief that everybody wants.

Question 8 is Beddoe relief for the claimant trustee to dispute to charges against the scheme and question 9, I think though it's quasi-Beddoe, we want to assist members with a £50,000 plus VAT sum in disputing their tax charges.

MRS JUSTICE ASPLIN: How many £50,000 is that?

MR. MOERAN: No, no, one £50,000. Sorry. Total.

MRS JUSTICE ASPLIN: But I have trouble in relation to that.

MR. MOERAN: Mmm.

MRS JUSTICE ASPLIN: Because how is that within the powers of Dalriada as a trustee?

MR. MOERAN: Ah.

MRS JUSTICE ASPLIN: What is that? It's generous, but what is it?

MR. MOERAN: Right. I'll come back to that in a moment, but absolutely. So, that -- question 8 is a standard category 2 public trustee in Cooper question, nine is actually a category 1 and category 2 public trustee in Cooper. It's do we have the power and we are very aware that that is -- that question is essentially why we are in court with that particular issue. We'd love to do it, but we are aware that it's not absolutely obvious that we can do it.

So, question 8, the tax relief -- sorry, the tax dispute, it's not being disputed----

MRS JUSTICE ASPLIN: On behalf of the schemes.

MR. MOERAN: -- it's pretty obvious -- on behalf of the schemes, on behalf of the scheme, absolutely. It's pretty obvious, but I should just very quickly go through it. We have at least two arguments to raise and the first is that the unauthorised member payments were made under s.173 of the Finance Act 2004, this is the deeming provisions, deemed payment provisions. And if we're right on that and that's the basis on which Mr Justice Bean concluded

there were unauthorised payments, if we're right on that then the valuation of the payment made is under the cheap loans provisions of the ITEPA 2003, Income Tax (Earnings and Pensions) Act. And what happens is you compare the interest rate charged compared to a statutory standard interest rate and you take the difference and that's your charge. It's an annual charge. So, we've got three per cent charges. I think usually it's about five per cent or four per cent per -- you should be charging -- it's a one per cent difference. That one per cent of the loan is what your unauthorised member payment is. It's a massive -- it's one per cent of what would otherwise be the unauthorised member payment. So, if we succeed on that, okay, we have a small tax charge, but it's pretty trivial.

Secondly, we have the *Hillsdown Holdings* and *Thorpe v RCC* argument which I know your Ladyship is already familiar with. If there's been a void payment and it is repaid then there has been no transfer of beneficial ownership, no transfer of beneficial entitlement to this asset so there is no payment at all.

MRS JUSTICE ASPLIN: Same argument in the *BG Pension Scheme* case.

MR. MOERAN: Yes. And we have -- it's different, there are different legislations so in *Hillsdown Holdings* it was under the old ICTA, we're now under the Finance Act 2004. I will be discussing this particular point a little bit more in the confidential -- in the private part of the hearing, but the argument is obvious. We have a real prospect of success on one or both of those. The tax charge of about £4 million is such that we would say that the cost benefits analysis is pretty obvious, so there we go.

We do have a further document, which is a lot more difficult to tell the -- assess the benefit of, which is the scheme could be entitled to a good faith discharge on the scheme sanction payments. The difficulty is from 2014 it's just a straightforward would it be, I think unjust to charge the scheme administrators with taxation. Before 2014 it's whether or not it would be appropriate in the circumstances whether they thought it was reason -- where they had good reason to think that they were making an unauthorised member payment. I forget the precise words. Now, the point, though, is it depends on the state of knowledge of the trustees making the payment. So, because of that, it's more difficult for us to assess the merits of that particular element of the claim. This is set out in Mr Hyde's witness statement and in my skeleton argument. But we've got a chance of it, at the very least. And in any event, if we're doing one and two we may as well do three.

Now, some of the members may also wish to raise an argument which hypothetically would be open to us, which is the reciprocation argument. In other words, the fact that the loans came from Scheme A to a member of Scheme B and vice versa stops it being an unauthorised member payment. They may wish to raise it; we do not wish to raise that as an argument. I think I say no more about that in open court.

There are other arguments that the members will be possibly raising. In particular -- and whilst the members will be -- and I emphasise, the members will be raising the unauthorised -- the deeming provision, the s.173 argument and the *Hillsdown Holdings* argument.

There's another argument that the members might be raising that isn't relevant to the schemes which is, as your Ladyship will have picked up, HMRC----

MRS JUSTICE ASPLIN: Sorry. So when you say the reciprocity----

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: -- that is, of course, not under question 8, that's under question 9?

MR. MOERAN: Exactly. And if they want to raise it, that's up to them. We don't see -- it could be raised by the schemes, in theory, because that would apply to the schemes because it would mean this wasn't an unauthorised member payment.

MRS JUSTICE ASPLIN: Yes.

MR. MOERAN: We're not going to raise that argument.

MRS JUSTICE ASPLIN: Okay.

MR. MOERAN: Right. Now, there is an argument that we cannot raise but is obviously quite a valuable one for the members, which is at the moment the schemes are assessed for the scheme sanction charge on the basis of MPVAs made by each scheme. It's a straightforward you made an MPVA loan, that's an unauthorised member payment, therefore that's -- your tax charge is based on that. The members -- HMRC are playing hardball, I think would be the polite way of putting it. They are assessing it both on the MPVA received and nominally the MPVA made. And they assess tax on the worst of those two options, or the best for HMRC. And I can say this openly, it's nothing to do with us, I would expect some pretty strong arguments on behalf of the members on this because you can't have your cake and eat it and it's difficult to see why in a non-segregated scheme somebody should be assessed with tax on somebody else's receipt. However, whilst that may be useful to the members, it isn't actually useful to the schemes.

Now, Mr Bryant is not opposing relief in general, he is, of course, looking at the details of the relief sought and he has suggested two points. First of all, he suggests limiting the relief to the First Tier Tribunal, and secondly, he suggests a cap of £350,000 plus VAT on the cost, particularly on the basis that that is the estimated cost of if it goes to the First Tier Tribunal to----

MRS JUSTICE ASPLIN: So, £350,000----

MR. MOERAN: Plus VAT.

MRS JUSTICE ASPLIN: Plus VAT.

MR. MOERAN: And the reason for that, as I see it, is that that is our estimate of the costs of taking this through to a full hearing at the First Tier Tribunal. I would----

MRS JUSTICE ASPLIN: Your point is that you want to go straight to the Upper Tribunal?

MR. MOERAN: Hah, yes. Because this may well be a complex case, it could go straight to the Upper Tribunal. So, definitely don't limit it to the First Tier Tribunal, because it might end up literally just being in the Upper Tier, the Upper Tribunal. Obviously, you miss the First Tier costs at that point, but I don't want it limited to First Tier.

The second point is on the precise amount of money. Now, we see the point of capping it off at a particular amount for the first round of hearings. We re-emphasise, and Mr Bryant very helpfully recognises that this sort of assessment of costs is quite difficult. If we ended up going to the Upper Tier, the Upper Tribunal, the £350,000 assessment might -- might be different. It's a bigger juris -- it's a bigger tribunal. You spend more in the Upper Tribunal. I know one shouldn't, but one does. It's not great. I can see the crunching of the nose at that particular submission, but it is the real world. If there was a cap----

MRS JUSTICE ASPLIN: Well, if there's a cap you won't be able to spend any more. (inaudible).

MR. MOERAN: If there is a cap we would ask that it is made clear that it's not an indication of what is appropriate, it is a "come back and explain to us why it should be more", rather than simply saying now this is what is appropriate, because this is a very early stage in the process. If there is a cap, we would ask for it not to be in a sort of pejorative sense. And I would also, just to dot i's and cross t's, flag up that the cap should be on our costs, not on any indemnity against HMRC costs, in the admittedly very unlikely circumstances of a costs award in the (inaudible).

Right. That's question 8, tax appeal.

MRS JUSTICE ASPLIN: Well, it's question 8 and question 9.

MR. MOERAN: No, it's question 8.

MRS JUSTICE ASPLIN: Question 8.

MR. MOERAN: Question 9 is the point about whether or not we have the power to do this. Now, this is the odd situation where we are relatively sure that all the members would like us to do something like this. This is the supplying £50,000 plus VAT to support members in their challenging of -- specific members in their challenging of tax assessment.

The reason why we say that this is within our powers is this: any finding in relation to the members reducing the quantification of the "payments" made to them would, in turn, reduce the assessment of tax against the schemes. And the reason for that----

MRS JUSTICE ASPLIN: It doesn't mean you have got power to do it.

MR. MOERAN: Well, no, it doesn't necessarily, but the reason for that is that the assessment of a scheme sanction charge is by reference to a scheme charge or payment under s.240 of the Finance Act and a scheme charge or payment is an unauthorised payment under s.241. Now, if what we are doing is paying to ensure a reduction, ultimately indirectly, in a tax charge. This is a payment for the better administration or retention or preservation of trust assets. It is no more unusual -- okay, it is more unusual.

MRS JUSTICE ASPLIN: It is more unusual.

MR. MOERAN: It is more unusual, but it's----

MRS JUSTICE ASPLIN: I think you're going to have to take me, therefore, and I don't know whether this is the right time, to those provisions in order that I have some sense of how tenuous or otherwise the links are.

MR. MOERAN: Yes. This is in the authorities bundle at tab 16.

MR BRYANT: Sorry, which tab?

MR. MOERAN: Sixteen. Now, tab 16 is extracts from the Finance Act 2004. I'm afraid -- it's in order, but I'm afraid it's not absolutely perfect. So, starting at s.239. I can only ask your Ladyship to skim through s.239.

MRS JUSTICE ASPLIN: (After a pause) Yes.

MR. MOERAN: Section 239:

> "Scheme sanction charge. A charge to income tax, to be known as scheme sanction charge, arises where in any tax year one or more scheme chargeable payments are made by a registered pension scheme."

So, that's scheme chargeable payments. And then if you flick over two pages to s.240 you have the amount of the charge.

> "The scheme sanction charge for any tax year is a charge at the rate of 40 per cent in respect of the scheme chargeable payment, or the aggregate of the scheme chargeable payments, made by the pension scheme in the tax year."

Now, what happens under s.240.2 is that if somebody -- if the member, say, pays tax due on it, then unauthorised payments charge, s.208, then you get a deduction. But you always end up, even if they paid 100 per cent of their tax due, you always -- at most you get a reduction of 25 per cent, that's under subsection 3, so you always end up with a tax charge of at least 15 per cent of the scheme chargeable payment. But you then get, at s.241, scheme chargeable payment.

> "In this Part "scheme chargeable payment" in relation to a registered pension scheme, means - (a)an unauthorised payment by the pension scheme, other than one which is exempt from being scheme chargeable."

So, are tax charges -- the tax charge against the scheme is parasitic on whatever the unauthorised payment is. If the members -- if we persuade the tribunal that the unauthorised payment was a s.173 deemed payment, or we persuade the tribunal that the *Hillsdown Holdings* argument means that there was no payment, that defeats all of that.

What we are seeking is £50,000 plus VAT to be allowed to be used to support the members in effectively putting forward equivalent arguments. Now, is this going----

MRS JUSTICE ASPLIN: But you don't need to do both, do you? Because if you do -- if you persuade the tribunal, whether at First Tier or the Upper Tribunal, that, for example, it's a *Hillsdown Holdings* situation, then all the tax disappears anyway.

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: Once -- once those amounts are also repaid.

MR. MOERAN: Yes. What's proposed to happen is that at the hearing (inaudible) is going to be coming on with effectively representative or example cases of members appeals, so that we will be arguing on the same point as the members are at the same time on equivalent

arguments. And what we're trying to do with this is to make sure that our allies are properly armoured and armed.

MRS JUSTICE ASPLIN: But they wouldn't -- you would be producing these examples to the tribunal but that wouldn't be a multi-handed situation, that would be just on behalf of the scheme.

MR. MOERAN: Yes, it was.

MRS JUSTICE ASPLIN: The claims or defences on behalf of the members would be at a different place and a different time, but you would have no control over, for example, how that £50,000 was spent in relation to how the examples were chosen or the quasi GLO situation.

MR. MOERAN: Yes, I see that. First of all, it would probably -- the intention is that it would, in fact, be the same place and the same time. The second point is that the intention is that we would, in fact, be----

MRS JUSTICE ASPLIN: Oh, but it would be shown to be a rolled-up hearing?

MR. MOERAN: Yeah, yeah.

MRS JUSTICE ASPLIN: Why do you need it?

MR. MOERAN: Why do we need it? We want to make sure that we're doing the right thing in a professionally represented way so that we've got a well-advised and well-represented ally.

So, the explanation of how this works is in Mr Fairhead's first witness statement. Can I take your Ladyship to that, to talk your Ladyship through what we're suggesting?

MRS JUSTICE ASPLIN: Yes. I'm just worrying also about the propriety of paying for the representation of people who are supporting your argument at the same hearing.

MR. MOERAN: It's not (inaudible). First of all, that went. But it's more importantly we actually have a genuine interest in supporting their argument. And it's not the situation where you might get a third-party costs order, because we still have a genuine interest in supporting it. So, volume 1, tab B1, p.47.

MRS JUSTICE ASPLIN: Hang on a moment. I'm sorry, it's difficult to tell which file is which and in that regard I'm going to put out my usual request, which is in future please would solicitors also mark which file is which inside the file? Because otherwise there are a sea of black files on the bench and it's difficult to tell which is which. You were taking me to file 1?

MR. MOERAN: Tab B1.

MRS JUSTICE ASPLIN: Tab B1.

MR. MOERAN: Page 46.

MRS JUSTICE ASPLIN: Page 46.

MR. MOERAN: Sorry, p.47.

MRS JUSTICE ASPLIN: Forty-seven.

MR. MOERAN: So, para.173. Related to this application, talking about the tax appeal Beddoes:

> "The claimant wishes to propose that aside from seeking Beddoe relief in respect of his own appeal against the scheme sanction charge there would be merit in setting aside from the scheme a relatively small sum in order to enable the members to fund legal representation themselves in at least the First Tier Tribunal. The benefits of this would be (a) ensuring the members are better co-ordinated procedurally in terms of working with HMRC and the claimant in identification of appropriate test cases and (b) ensuring that arguments are put forward as effectively as possible on behalf of the members during the hearing. In that latter respect, while the claimant would have its own representation, there might be some argument that it would be less likely to consider appropriate (inaudible) for itself plus there might be a benefit to the schemes of a properly argued case put by a representative of the members increase the prospect of a successful challenge to the individual unauthorised member payment charges and in turn the scheme sanction charge. In making this proposal, the claimant is mindful that few members will have sufficient resources available to pay for appropriate representation. Moreover, (inaudible) tax judges does not lend itself to a conditional contingency fee arrangement, bearing in mind all the members concerned will achieve at best is ensuring they do not pay any tax rather than stand to gain anything."

And, of course, you don't get costs awards in the tribunal, usually. Then over the page at p.48, para.175:

> "More specifically, the claimant has in mind a figure in the region of £50,000 plus VAT as a maximum sum to provide for legal representation. The mechanics of how such a sum would be deployed would have to be handled carefully. The claimant has in mind a couple of potential counsel who might be prepared to act on behalf of the members and without solicitors, Direct Access claims, which would assist in reducing costs. Subject to one such counsel confirming their willingness to act at an appropriate fee, with an absolute cap of £50,000, the claimant proposes test cases identified and settled upon, be given the choice of being represented by that counsel.

Clearly, there would be no obligation to instruct that counsel, although if a member chose to act without representation or without separate representation. The funding of counsel would be handled directly by the claimant in much the same way as it would release funding to meet the costs of a representative beneficiary pursuant to a costs agreement."

MRS JUSTICE ASPLIN: Difficult, though, isn't it, because you aren't in any way binding the members, or is there a representation order?

MR. MOERAN: True. But it is quite similar or analogous to, not identical but analogous to the categories 1, 2 and 3 of trust disputes. Category 1, a directions hearing brought on costs and category 1 is a trust application brought by the trustees, category 2 is exactly the same, brought by a beneficiary or an interested party.

MRS JUSTICE ASPLIN: (inaudible).

MR. MOERAN: All of these -- exactly. Thank you. (inaudible), exactly. All these points are appropriate costs for the administration of the trust. I recognise that that's obviously administration of trust. This is an appropriate cost, we say, and we'd like to do it but we're not bleating(?) about it.

MRS JUSTICE ASPLIN: But what concerns me also is, as I say, you're not in any way controlling, nor are you able to control, nor should you be able to control, what the individual members do in relation to these tax liabilities and assessments. They're all going to be different and to some extent will have their own wrinkles.

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: But will have similarities, obviously. There is no suggestion that there is a kind of GLO in relation to those members. I don't know quite off the top of my head how that would work in the First Tier Tribunal or the Upper Tribunal anyway, and unless there were and in effect you were promising to pay for the representation for all members, it might be (a), you haven't got that control, but (b), it might be a waste of money if there are other counsel who also turn up and/or there are individuals who represent themselves and the matter, to some extent, gets out of hand.

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: It isn't neat.

MR. MOERAN: It isn't neat. All of those points, we are aware of. All those points are -- would have to be dealt with on a practical basis. And all those points, I would stress, are really dealt with at para.175. We are not saying we have a perfect answer to this. We are saying that if the

court allows us we will look at whether or not it's appropriate to do this. Because if we get -- if you get to the -- if we get to the point where we have six cases covering----

MRS JUSTICE ASPLIN: Mr Moeran, you say it's analogous to the situation in which costs of a representative defendant would come out of the fund.

MR. MOERAN: Mmm.

MRS JUSTICE ASPLIN: But costs of a representative defendant come out of the fund in order to argue a point which is specifically and solely for the benefit of the fund and also, which is not entirely the case here, albeit that it's possible that it may be as a matter of a dogleg, that's the first -- indirectly and the first point, and the second point that in those circumstances that is a representative defendant, whereas we don't have a representative situation here.

MR. MOERAN: No. But if, for example, we were a property owner and somebody next door -- and there were 200 property owners who were being affected equally by the local authority with some planning permission point and one of them said, "I'll take a test case if everybody stumps up a bit, if all the other property owners who were affected by this stumps up a bit towards the costs," it would be unarguable that the trust owners of this land were not entitled to do that. Because all they're doing is protecting their position. Now, that's a much more direct point, which is this planning permission point affects the land that we own. But in this particular case this assessment of tax, and in particular the assessment of what the payment was, affects our tax.

MRS JUSTICE ASPLIN: Well, the problem about that is that that is not quite right, is it? Because these assessments of tax, of which there are very many and which are varied and, no doubt, contain lots of other bits and pieces, including this one, do not directly affect. It's only the question in relation to how to treat the payments which crosses the line.

MR. MOERAN: Yes. Okay, that -- yes. One----

MRS JUSTICE ASPLIN: So, it's not the assessments, actually, it's the point.

MR. MOERAN: It's the point on the assessments, yes. Now, I accept that, that not all the parts of the assessment are going to affect it. But equally if you have a planning permission and they're saying, "We're going to argue this," and it's 90 per cent about the aspect that's going to affect everybody else and 10 per cent about a particular road on their land, it's still going to be a valid -- a valid use of trust monies because what it's doing is it is paying for something that may, it is a judgment call, but may assist in the preservation of trust assets.

MRS JUSTICE ASPLIN: So, what power do you say it falls under?

MR. MOERAN: I would say that it falls under the general powers -- well, in fact, I can get you the relevant -- yes. It's a catchall provision under 2A, tab C1, p.5 -- sorry, p.4 for your bundle 2A, cl.4, "Powers of Trustees":

> "A trustee and any administrator have and may exercise all powers, rights and discretions necessary or appropriate to enable them to carry out the purposes of the scheme. Without restricting this they may have the powers, rights and discretions given by law and specific powers, rights and discretions set out in the remainder of this clause so long as they are consistent with the law."

It's a catchall, but it is sufficiently wide to encompass this sort of action.

MRS JUSTICE ASPLIN: Mm hmm.

MR. MOERAN: As I say, we would like to do this. We strongly suspect that members would like to do this. The real question for your Ladyship is can we do this. I put forward----

MRS JUSTICE ASPLIN: How have you pinpointed £50,000?

MR. MOERAN: Bluntly, we thought that was a sort of appropriate amount of money that was going to sufficiently pay for counsel to do it but not allow it to through the roof. It was a mix -- yeah, it was to lick a finger and put it in the air for how much can we get a good enough counsel to do this. We have got a couple of names of counsel in mind who take Direct Access.

Now, the heavy lifting, on preparing bundles and so on and so forth, it is HMRC and Dalriada who will be dealing with that. So, what this is really doing is making sure there's counsel.

MRS JUSTICE ASPLIN: Well, if this is a brief fee, then that sounds like a lot to me for a brief fee in relation to a point which is already going to be covered by you or somebody else on behalf of the scheme in relation to a hearing before the First Tier Tribunal which shouldn't take more than a day.

MR. MOERAN: It's not -- well, I'd be very pleased if it took a day. It's not quite a brief fee. They are Direct Access so they will be doing more than a brief fee.

MRS JUSTICE ASPLIN: Anyway----

MR. MOERAN: But your Ladyship has the point. It may be a quantum issue but, yes.

My Lady, that was all our submission on questions 7, 8 and 9, the Beddoe, the Beddoe and the quasi-Beddoe. I can actually deal with the private part of the MPVA Beddoe hearing and the private part of the tax assessment Beddoe hearing well before 4.30 p.m., so we could get that

all done and then Mr Bryant can have the whole of -- well, I won't say the whole of tomorrow afternoon, but he can certainly kick-off tomorrow afternoon.

MRS JUSTICE ASPLIN: I'm sorry, I've intervened and wasted quite a lot of time. How are we doing in relation to time? Are we still on track?

MR. MOERAN: Yeah. We'll be finished well before lunch on Thursday, because the directions section, when we get to that point it's a lot quicker.

MR BRYANT: I'm not sure I agree with "well before lunch", but not far off.

MRS JUSTICE ASPLIN: Yes. Thank you. On that basis, I'd be grateful, therefore, if all those who are not directly involved on behalf of the trustee, Dalriada, would now leave the court and we will have a short period during which submissions will be made which have to be in private.

MR BRYANT: My Lady, may I say to those who are present who are not the defendant or those representing her that there won't be another, as it were, public part of the hearing today?

MR. MOERAN: Yes.

MRS JUSTICE ASPLIN: That's very helpful, Mr Bryant, that is absolutely right. This phase will take us through to the end of the hearing today and, in fact, tomorrow we're not going to begin until not before two o'clock because I can't sit tomorrow. So, this is the end of the public part of the hearing for today. Thank you for reminding me, Mr Bryant.

(4.09 p.m.)

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5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
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IN THE HIGH COURT OF JUSTICE No. HC-2016-002391

CHANCERY DIVISION

Rolls Building
Wednesday, 21st June 2017

IN THE MATTER OF (1) THE LANCASTER PENSION SCHEME (2) CRANBORNE STAR PENSION SCHEME (3) GROSVENOR PARADE PENSION SCHEME (4) TALLTON PLACE PENSION SCHEME (5) WOODCROFT HOUSE PENSION SCHEME (6) THE PORTMAN PENSION SCHEME

Before:

MRS JUSTICE ASPLIN DBE

(In Private)

B E T W E E N :

DALRIADA TRUSTEES LIMITED Claimant
(as trustee of the above named pension schemes)

- and -

KIM ANNETTE GOLDSMITH Defendant
(as representative beneficiary)

MR F. MOERAN QC (instructed by Pinsent Masons LLP) appeared on behalf of the Claimant.

MR K. BRYANT QC (instructed by Trowers & Hamlins LLP) appeared on behalf of Defendant.

PROCEEDINGS

I N D E X

(The judge's microphone appears to be faulty.)

(2.35 p.m.)

MRS JUSTICE ASPLIN: Good afternoon. I am sorry to have kept you until this late hour.

MR MOERAN: Not at all, my Lady. I have just got a tiny number of points to deal with before handing over to Mr Bryant. The first point is, your Ladyship will find out when your Ladyship looks at the bundles, that we've put in markers internally.

MRS JUSTICE ASPLIN: I'm very grateful.

MR MOERAN: The second point there is a correction on my submissions from yesterday. Yesterday you may recall me getting a little confused. I said Mr Tweedley's retirement as a director of the trustees----

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: --was in, originally I said June 2010 and then I took your Ladyship to Mr Fairhead's(?) witness statement where it said July 2010. That's actually a typo. The correct date was June 2010 and your Ladyship can find the reference for that in Mr Tweedley's own witness statement, which is B2A at p.263, at para.39. The significance of that is that it was before the MPVAs were made. The third point, the figures that your Ladyship asked for, we've done a little assessment and what I'm handing up now----

MRS JUSTICE ASPLIN: Thank you. (Same handed)

MR MOERAN: --it's a rather simple little point. On one page I've summarised the number of members with MPVAs totalling in that tranche, so you will see that there are two members with MPVAs totalling under £5,000, 50 members with MPVAs totalling between £5,000 and £9,999, and so on. Then the second document is just the data from which that was gleaned, and you can see it in amount order and, of course, I took that - that is an ordered version of the spreadsheet that is already in the evidence before your Ladyship, and the only thing I would really flag up on the underlying data is that the moment you're over £10,000 you're looking at quite substantial amounts of money. But even for the 50 members between £5,000 and £10,000 there's a handful of 7s, there's a handful of 8s, and then almost all of them are 9s, £9,000, £9,000 and then up to £9,975.

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: Now that's the figures that your Ladyship asked for. I can----

MRS JUSTICE ASPLIN: In relation to the two which are under £5,000----

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: --are there any which are under £3,000?

MR MOERAN: Yes, there is one. It's a £2,500 who had already signed a standstill agreement in fact.

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: The other one is £4,975, where they've not signed a standstill. There is a claim issued but not served.

MRS JUSTICE ASPLIN: Thank you.

MR MOERAN: The last point is a matter of my language yesterday. This is something that I was actually initially asked to deal with by my client. Dalriada was a little concerned, and understood why I put my case in the way I did, but was concerned that to a layperson it may have seemed that Dalriada had a particular attitude in this case. I'm sure that your Ladyship is aware and understood that I was presenting this on a representative party basis. There was no intention to indicate that Dalriada preferred one course of action over another or had any desired outcome.

MRS JUSTICE ASPLIN: That is the----

MR MOERAN: All we were doing was putting it forward.

MRS JUSTICE ASPLIN: That is the consequence of what we discussed at the beginning yesterday clearly, which was that in order to save money, rather than have a further representative party, you would argue the opposite side of the coin from what Mr Bryant is required to argue and the trustee was taking on that role. Accordingly what you were saying was in the spirit of the representation order, which was made, and therefore the arguments which you were required to run before me.

MR MOERAN: Exactly, exactly.

MRS JUSTICE ASPLIN: That is how I understood it, and it is not to suggest that the trustee, Dalriada itself, is in any way not an appropriate trustee able to carry out its functions properly in a way which is trustee-like and is also neutral as to the outcome of this case, but then needs, whatever the outcome, to deal with it efficiently and properly.

MR MOERAN: Well I'm very grateful for your Ladyship making that clear and was exactly the intention of my submissions, and indeed the intention of Dalriada. There is also one very specific point of language that I understood was of concern to some of the members who were sitting in court. I said yesterday that Dalriada has no interest in criminal proceedings relating to matters before it took over as trustee. I meant that in the technical, legal sense of no *locus standi*, or no standing, no legal interest. It's not that they (inaudible) concern, it is that they have no standing in such matters.

MRS JUSTICE ASPLIN: I understood that too, in the sense that as trustees of a pension scheme it is not up to them whether criminal proceedings are in train or not. Nor would any further, or it would seem unlikely that any further assets would be recovered for the members of those schemes as a result of those criminal proceedings, and therefore in their role as trustee, and in their role as therefore seeking to reconstitute the trust fund and do what is best for the members - from not just a financial, but on this occasion financially as the leading edge of their concerns - that whether or not criminal proceedings are on foot are not something which are either within the powers of their order, nor in fact go to fulfil and complete their obligations to the members.

MR MOERAN: Exactly. I'm very grateful for that very eloquent summary of our position. With those very short points I can sit down, my Lady.

MRS JUSTICE ASPLIN: I would just like to ask you----

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: --again about the issues about the suggested funding of, or counsel to represent the level of it in relation to tax appeals.

MR MOERAN: Question 9.

MRS JUSTICE ASPLIN: Question 9. First of all, is there any structure which has been agreed with the Revenue in relation to those member appeals?

MR MOERAN: Not totally agreed. It has been discussed. Can I just take a quick instruction on that one?

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: (After a pause) We are in the process of agreeing what's going to actually end up being six test cases, it seems likely. We are in the process of agreeing but have not got to the point but it is likely that it will be a First-Tier Tribunal hearing rather than an Upper Tier, Upper Tribunal.

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: But we haven't actually finalised that.

MRS JUSTICE ASPLIN: My next query is to take you back, and that is my fault, but I'd just like some further clarification in relation to what you were saying about s.239, 240 and 241.

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: It didn't seem to me - it seemed to me the reverse of what you said in a sense that if money is paid on any of those unauthorised payments, then that will in fact reduce the charge on the scheme under s.239.

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: As a result of a complication of s.239, 240 and 241.

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: So in fact its at least benefit to the scheme, and therefore indirectly to the members as a whole, if in fact the members as individuals pay.

MR MOERAN: If they pay on what is assessed, yes.

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: If, however - the benefit to the scheme would be a reduction in what is assessed as the payment, the unauthorised payment, that gives rise to the tax charge. So suppose there is an unauthorised payment of £1,000, there's a tax charge on the member of - it will be 55 per cent but actually the relevant point is 40 per cent - there's another tax charge, the scheme sanction charge on the scheme of 40 per cent of 1,000. If we can reduce the £1,000 unauthorised payment to £100 everybody benefits, or to zero, both the scheme and the member benefit. Wherever it ends up----

MRS JUSTICE ASPLIN: Well hang on, hang on, how is that right? The £1,000, I'm sorry to be so firm, it would be £1,000 for the purposes of unauthorised payment and a tax charge on the member, it gets driven down by argument in the First-Tier----

MR MOERAN: Yes, yes.

MRS JUSTICE ASPLIN: --to £100----

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: --which perhaps is the difference in the benefit, or something, as an argument----

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: --and it's now £100.

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: Tax is charged on the £100. That's marvellous for the individual.

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: Not as good as it could but it's better that you thought.

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: So their tax charge is very much reduced.

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: Okay. Why is that good for the scheme?

MR MOERAN: Because it's the same payment on which the scheme sanction charge is based. It is the unauthorised payment.

MRS JUSTICE ASPLIN: Well it's, if you have persuaded and there are (inaudible) of rolled up hearings, that if you have persuaded the First-Tier Tribunal that the unauthorised payment is 100 and not 1,000, then that applies also across the board and it is the same argument which is being run by counsel on behalf of the scheme.

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: But it doesn't do anything under s.239 or 240?

MR MOERAN: No, it's 241.

MRS JUSTICE ASPLIN: Why under 241?

MR MOERAN: Section 241 says that the scheme chargeable payment is----

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: --the unauthorised payment.

MRS JUSTICE ASPLIN: Yes, okay.

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: So it's in effect having both sets of representation arguing the same thing in relation to unauthorised payment?

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: But there isn't some - yes, I was trying to be too specific, I think, and failing.

MR MOERAN: No, no, it's as simple as the same argument being made by two parties to the same point.

MRS JUSTICE ASPLIN: Yes, yes, that's all. That's all.

MR MOERAN: In crude terms, why we really want this to - why we want to see the members have good representation is three-fold. One, we want to see them have good representation, full stop. But two, in terms of is this a proper trust expense, it helps us to have an ally arguing the same thing. It, it's terrible to say it but it is reality, or at least it's a perception of reality. Thirdly----

MRS JUSTICE ASPLIN: I don't know because (inaudible) twice into a route you rejected when you heard said once. You either reject it or you don't.

MR MOERAN: Yes, but I mean----

MRS JUSTICE ASPLIN: Anyway----

MR MOERAN: Yes, but the other thing which is - and this is, this is a tenuous point I grant you, but if you have proper representation for your co-defendant so to speak, or co-appellants, it makes your life easier and cheaper.

MRS JUSTICE ASPLIN: Right, okay. The other question is, it seems that it is maybe agreed that there are going to be six test cases.

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: If that is the case then how is it going to help to have one well-paid counsel?

MR MOERAN: Although there are six test cases, I can't see there's a conflict between them. They are all going to be arguing - well, no, actually that's not quite true. There is a conflict between two, two sides of the test cases. There's the people who are being tax charged on the paid, and there's people who are being tax charged on the received side. (After a pause) But outside of that they should be able to argue----

MRS JUSTICE ASPLIN: Yes, but why can't you - therefore how do actually see it working, Mr Moeran? Do you see what I mean?

MR MOERAN: I see, I see exactly what your Ladyship says. We don't have an absolute, precise built in mechanism for how this is going to work. What we see happening is we identify - and we've got a couple of names - but we identify particular counsel that takes direct instructions. We ensure that they are instructed by the relevant test case members, or at least, or at least, I should say, the relevant test cases members have the opportunity to instruct them. If they are instructed, if they are instructed then, and this is only an opportunity to use up to £50,000, if they are instructed and we think this is appropriate, we have put in place a cost agreement equivalent to the one, one used with representative beneficiary, or representative parties, whereby we will pay whatever is appropriate, a brief fee, on an agreed basis that they represent and argue the point. It would be, on a mechanical basis, very similar to how we deal with Mr Bryant.

MRS JUSTICE ASPLIN: Yes, but you also would want access to what they were going to argue. Now this is not a representative situation and therefore the individuals whose tax affairs are expressly and directly concerned will not be happy with that.

MR MOERAN: That is a fair point. If we got to the point where the member in question was not willing to agree to them, to their representative working with us to a sufficient degree that we were happy, then we wouldn't be paid.

MRS JUSTICE ASPLIN: Thank you. I think I understand. Mr Bryant, first of all before you say anything is there something that you need to say in private?

MR BRYANT: My Lady, there is. I think as I anticipate I wouldn't but on reflection I think there is.

MRS JUSTICE ASPLIN: But now you do, okay.

MR BRYANT: It will be brief.

MRS JUSTICE ASPLIN: Brief. I'm sorry but, therefore, I'd be grateful if everybody would leave the court for a few minutes.

(See separate transcript for proceedings in private)

MRS JUSTICE ASPLIN: Ladies and gentlemen, before anything else is said, may I ask for your indulgence. I got extremely hot this morning and I feel as if I have not yet fluffed that off and I'd be extremely grateful therefore if you will not take offence if I undo my gown a little bit, because I am becoming extremely hot in here. I know it's as cool as we can probably make it but given that how I was dressed, where I went and the running around, I don't feel as if I've cooled down yet. So please excuse me for this informal way of addressing the court. I have never take such steps but I think it's better that I continue to concentrate on what you're saying. Mr Bryant?

MR BRYANT: My Lady. Your Ladyship has my Skeleton Argument. I know you've read it.

MRS JUSTICE ASPLIN: I have.

MR BRYANT: I know you will have understood the points that are made in it. Indeed your Ladyship raised a number of those points with Mr Moeran yesterday. It is not my intention to take up necessary time going through slavishly every point that is, that is in there. But if you will allow me a relatively short amount of time to do so I think in the context of this case, and given the individuals towards the back of the court who will doubtless disseminate what has happened in these proceedings to others, if you will permit me to go through some of the points again. Hopefully so that those who have had access to my Skeleton Argument can follow matters more easily, I propose to deal with matters in the order in which I've set them out in my Skeleton Argument.

I needn't trouble your Ladyship with the introductory paragraphs, nor indeed with the short passages to do with the application to amend, which we've dealt with, or the section headed, "Representation Orders and Defendant's Role." Your Ladyship will be well aware of the defendant's role in these proceedings, as is she. This is an unusual case in some respects in terms of the level of member involvement, other than the defendant's, and member communication, and I will come to that in a moment by way of update. But she, as I've indicated, remains committed to her role and takes it extremely seriously, both on her own behalf and on behalf of the cohort and members that she represents.

I've set out in my Skeleton Argument a section under the heading, "Member Communication with D's Solicitors," and I've set out a number of matters there and you've read, I believe, Mr Mill's statement.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: And a number of documents are appended to it. As I indicated in the footnote, footnote 4 in my Skeleton Argument, I intended to update the court on anything that was received post Mr Mills' statement. Mr Moeran has copies of these and if I may hand up that. (Same handed)

MRS JUSTICE ASPLIN: Thank you.

MR BRYANT: It's in fact four documents but they're held together in three clips, as it were, in the order that, in the form that I received them.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: The first, just to explain the nomenclature. Your Ladyship will doubtless have picked up already, Elizabeth Mulley is my instructing solicitor who sits behind me and her name on the form, on the first page simply reflects the fact that it was printed off by her. The first document, it's an email from a member. We know it's from a member, of the 10th June, subject "Our Class Action." I think it best to leave your Ladyship to read the content.

MRS JUSTICE ASPLIN: Yes. (After a pause) Yes.

MR BRYANT: The second, which is in fact over the page from the first - I think if yours is the same as mine it's double-sided.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: Again it has Ms Mulley's name on it, simply because it was printed from her account. This I don't invite your Ladyship to read because you've already seen it in a slightly different form.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: This was the email that my learned friend referred to yesterday, that we believe was blind copied, as it is called, to Trowers & Hamlin at the same time as it went sent out to certainly some of the members, and it's the email under cover of which the further amended version of the standstill agreement was sent.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: Which you've already been taken through and I, I don't need to do that again. The next document was something received by my instructing solicitor. It's got my name on it because I was the one who printed it out yesterday, and it was sent to the dedicated email address of Trowers that was set up for the purposes of this claim, and again it's

relatively short. It's come from a member as we understand it, and I will leave your Ladyship to read the content.

MRS JUSTICE ASPLIN: (After a pause) Yes.

MR BRYANT: The final document I should explain a little about its provenance. You will see it says at the top left, "From Angela Brooks(?)."

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: That I believe is written either by one of my clerks or by one of our receptionists. Unlike the others which have the name of the person who printed them on this, as my chamber's, or it's written on my chamber's notepads as you will see, the - as I understand it, I wasn't directly involved this morning, but my understanding is that Miss Brooks who is involved in this matter you have already gathered, came to my chambers this morning, or possibly just after noon, certainly uninvited by me and was given a room, I think at her request, and she put down some points on paper. It is her specific request that these matters be put before the court.

Now this puts my client, my lay client in a slightly awkward position because Miss Brooks is not a member of the scheme, as I understand it, although she at least purports to act on behalf of those members of the scheme for various purposes. I've had a very quick skim through this document. We've been asked to put it before your Ladyship and we do so. Insofar as there are matters that are of direct relevance to the matters that your Ladyship has to decide in this trial, certainly my understanding is that they are already matters that have been raised in my Skeleton Argument and will be covered in part, at least, in my oral submissions in a moment.

There are various other matters in here and perhaps, again without wishing to take up time unnecessarily, perhaps I can invite your Ladyship to, either to read it now or perhaps at a convenient moment, if and when we have a break for your deliberations later.

MRS JUSTICE ASPLIN: (After a pause) Yes, I've read that. I ought perhaps to mention the first point, which is made on the first page, which is, I think says:

> "The very first statement the judge made was that the (inaudible) operation had been administration of [I think it is] Ark, constituted an abuse of vulnerable members of the public."

I just want to say that before anything else that I don't think I made that statement and that I had directed anything that I'd said to Ark in any way. Therefore if that was the impression

that was gained it was certainly not what had been intended, nor as I say do I consider that I said anything about Ark. I just make that clear.

MR BRYANT: My Lady, I'm grateful for that clarification. I think, and again I didn't write this so this is perhaps substituted on my part, your Ladyship was taken by Mr Moeran to the background and history of these schemes, and your Ladyship was aware that some of the companies involved have "Ark" in their name.

MRS JUSTICE ASPLIN: Certainly I may have said that unfortunately this entire scheme, if one can put it like that, has ended in this situation in which it has been an abuse of people who were, and are, vulnerable. That is what I certainly intended and I didn't mean to say anything about Ark, if that is intended to be Ark, the members grouping.

MR BRYANT: Well I believe the intention is to refer by use of the word "Ark," is to refer "the schemes," the six pension schemes, but there we are.

MRS JUSTICE ASPLIN: Well it does seem to me that the way that all of this has panned out, has turned out to be an abuse of vulnerable members of the public. I had no knowledge other than the short extracts to which I've been taken by Mr Moeran, and also by you, Mr Bryant, a little earlier this afternoon, to the underlying evidence in relation to the intentions of any, of the orchestrators of these schemes and so I can't say anything more than that.

MR BRYANT: My Lady, thank you. May I then move on to a related point to your Ladyship's last comment? It's para.15 and following in my Skeleton Argument.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: It is really by way of introduction to the defendant's position on the specific Beddoe matters, Questions 7, 8 and 9, and I will, I hope for obvious reasons, take your Ladyship through this. I'm not simply going to read it out aloud but I will take your Ladyship through this for a few moments if I may.

You have evidence - I won't take you to the statement; I know you've read it - from the defendant herself as to her circumstances. You, I know from earlier comments today and comments yesterday, are fully alive to the, to the personal issues involved in this case. The defendant's personal circumstances and those of her husband, who was also a member, as were those of their friends and family, are, it appears from the limited evidence we have, probably typical of the members who joined these schemes. She is a member of the Lancaster Scheme but she didn't know that at the time. There are some forms where someone has handwritten it on. It wasn't her and it wasn't on the forms when she was asked

to sign them. She transferred benefits from the local government pension scheme, again typical of members, a safe and defined benefit scheme, public sector, private sector. It seems that a large proportion of the members transferred their benefits in from such schemes.

She did receive, what was referred to as, a loan at the time, but she didn't know where from and I believe still doesn't know which scheme it came from. She was told all sorts of things at the time. She would receive a welcome pack, regular benefit statements and so on. She never saw any of that. She was told, as were others, all your, the money remaining in the schemes will be invested in high end London property. None of that ever happened.
My learned friend, for perfectly understandable reasons, referred you to some - I think it was a brochure, a scheme brochure, and I think it was described as "sales material." I am told certainly that the defendant and others to whom she has spoken never saw that sort of documentation. You've heard about investment choices. None of that was ever given and you know, and your Ladyship raised the point yesterday, certainly the defendant, as far as we know all other members, have received 55 per cent tax demands from the Revenue, even those who didn't receive an MPVA loan. So the 100 and something odd who put money into these schemes and got nothing out have also got rather sizeable tax bills.

I think the assumption HMRC has made is that on average people got 50 per cent out of what they put in, and therefore even if you didn't get anything out the taxman is trying to take 55 per cent of 50 per cent of what you put in. What the ultimate outcome of the tax affairs will be one cannot predict, but certainly as things stand every member of these schemes, as far as we know, has been presented with a significant tax assessment and that, in my submission, is relevant context when looking at the proposition that the claimant will seek to recover the entire sum of the monies that were paid out of the schemes to these individuals. As I've said already, the evidence that is available suggests that other members' stories are, obviously not identical, but pretty similar.

There can be no doubt, we say, that the members of these schemes are innocent victims. Whether one calls it pension liberation, or a scam, or fraud, or whatever, they are all words that have been bandied about, none of this is anything that can be laid at the door of the members themselves. I've used the word in my Skeleton Argument that they were persuaded to transfer benefits and, in my submission, that is justified on the evidence that

we have. If one looks at the evidence from the defendant herself, again I won't take you through it in detail, but you will have seen the reference to communications saying, "We found a match for you. It is really urgent. You need to do this overnight." This all, this has all the hallmarks of, for want of a better word, a scam, and you've already heard evidence, or read evidence rather, that Mr Moeran has referred you to the 5 per cent fees that were taken. I think some, it seems, slipped through the net and the schemes, the introducers, as it were, didn't take the fees for whatever reason. But the intention was a 5 per cent fee plus fixed fees on top, and in the defendant's case it was another £1,300 on, on top that was taken from her.

What is also a consistent theme of the evidence, that is before your Ladyship, is that the individuals who became members of these schemes had a real need at the time to release funds, and that comes from a number of different sources. You've seen the evidence from the defendant herself as to her family circumstances at the time. There are references also in Mr Tweedley's statement. I've given you the references in my Skeleton, and unless your Ladyship would like me to take you there I don't propose to, to do it.

Again one might say Mr Tweedley's statement in context at the time was a little self-serving, but I think the way Mr Justice Bean put it in his judgment was that he accepted that it may well be that this scheme was attracting those in a desperate need for, to release funds for various circumstances. You've seen the correspondence that my learned friend took you to yesterday and referred to in Mr Fairhead's first statement as to the, the desperate situation that members were in before they received these monies, and indeed the even more desperate situation that they find themselves in having spent the money and now being asked to pay it back, plus another 55 per cent to the taxman.

You also get a flavour of this, as I suggest, from the correspondence received by my instructing solicitors. The references again are in my Skeleton Argument at para.22 and it is, it's all part of a, part of a consistent picture. Yes, I'm not sure it's going to assist you. It all says pretty much the same. It's an individual saying, "Well I desperately needed the money before and I used it for the reason I had the desperation in the first place, and I simply don't have the money to pay it back now."

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: There are also, and I've referred you to the relevant correspondence in my Skeleton Argument at para.23, there are also indications that the members were being caught or there were attempts to catch them in the middle of various battles between those who had set the schemes up in the first place, and the current trustee, the claimant. You've seen, I know, in the bundle the attempts that were made by the, I think technically still current trustees, Athena and Minerva.

MR MOERAN: Technically but with no powers.

MR BRYANT: Technically but without powers to, to influence the hearing before Mr Justice Bean and indeed to, I think to find a relatively neutral way of putting it, to, to put their choice of individual in as a representative beneficiary for the purposes of an appeal. I raise this simply as part of the context and part of the background to impress upon your Ladyship----

MRS JUSTICE ASPLIN: What a very unhappy scenario.

MR BRYANT: Indeed, and what a very unhappy scenario for those caught in the eye of the storm, as it were.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: And that is the defendant and those she represents. The way I put, and I stand by this, is they perceive themselves as victims, which they are, and they consider it grossly unfair that on top of HMRC demanding 55 per cent, even if they didn't receive any money, they may now be pursued through the courts for repayment of the sums paid out by the schemes when it is simply money they don't have. References to bankruptcy do not alleviate the stress, nor indeed to other matters that are dealt with in the correspondence, the suggestion from various members is that they'll lose their homes. They've, a lot of them you will have seen from the correspondence are jobless and this is an extremely sorry situation. I think the word was used, possibly by your Ladyship yesterday, a tragedy, and that's exactly what it is.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: Before I go to the issues themselves I think it is also relevant to remind your Ladyship of one matter that arises from, certainly from Mr Moeran's Skeleton Argument and I think in one of Mr Fairhead's later statements, that attempts were made it seems to get back the 5 per cent transfer fees, which were, I think, certainly over £1 million in total, one point something. I think 1.1 is the figure that springs to mind. They're significant sums and £20,000 has been recovered, a tiny percentage. We don't know how much it has cost to achieve that. One imagines the cost is likely to be significantly greater than the amount

recovered. Again I raise this as a, as a part of the context in which this court is asked to sanction claims against the members themselves.

MRS JUSTICE ASPLIN: I understand why you say that but that's rather, well a cockeyed inference, isn't it, Mr Bryant? In a sense that those attempts were made, monies were attempted to be recovered. The fact that unfortunately such a small amount was recovered doesn't change the fact that, quite properly, attempts were made and that is the same argument that on appearance Mr Moeran has argued on relation to the monies outstanding.

MR BRYANT: Well----

MRS JUSTICE ASPLIN: I know the recipients will say, "We are victims and those people most certainly were not," but that is not the basis upon which trustees have (inaudible).

MR BRYANT: My Lady, no. But it is part of the context and, and it is part of the cause of the strong feelings that are----

MRS JUSTICE ASPLIN: I understand, yes.

MR BRYANT: --that are present on my side of the court and behind me. What, a related point and one that is perhaps of greater relevance to the specific issues that your Ladyship has to grapple with, is that, I think we were told yesterday, that Mr Tweedley has not been pursued because he's not well.

MR MOERAN: No, no.

MRS JUSTICE ASPLIN: I don't think that's right.

MR MOERAN: My Lady, he, no, there was a mention he isn't well but it wasn't the reason that we didn't pursue him. It was financial. Sorry, my apologies if that was confusing.

MRS JUSTICE ASPLIN: I understood that was what said that although reference was made to the fact that Mr Tweedley is not well, and to the fact that it was not economical. It was not cost benefit positive.

MR BRYANT: My apologies, I put two and two together and got a number other than four.

MRS JUSTICE ASPLIN: I would have taken the issue up with Mr Moeran when he said it if I'd have thought otherwise.

MR BRYANT: In which case, my Lady, may I move on to the specific issues that we're dealing with at this stage of the hearing? Question 7, the Beddoe relief for recovery and for the (inaudible) amounts.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: One matter I would ask your Ladyship to note, it seems that, and I think it breaks down roughly in this way, when the claimants came on the scene there was about a third of the original money left in the schemes. I am sure I will be corrected from my left if this is

not right. They have, through their efforts over the last few years, recovered another third from sources other than the members themselves, and the situation today, as I understand it, is that there's about two-thirds of the original sums in the schemes----

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: --without any recovery of MPVA sums. My Lady, I've referred you to various paragraphs in the **Practice Directions** at Part 64, Practice Instruction B. Unless you would like me to I won't take you to them. I know you're more than well aware of the matters that need to be taken into account.

MRS JUSTICE ASPLIN: In particular you are saying where is the evidence of means?

MR BRYANT: Yes, my Lady. Well, well where is the evidence of means further than the evidence we already have, and the flip side of that is the evidence we already have, and there is some, suggest strongly that there are unlikely to be many, if any, members who have actually got any sufficient means either to pay the loans back, or to acquire other loans with which to, to do so. There is nothing in the paperwork, and there is a lot of paperwork before you, to suggest that there is anyone who, who is in a ready position to satisfy the claims that the claimant seeks to make.

In terms of merits and defences, my Lady, I've already addressed you in private on the matters that I think appropriate to do so, and beyond that I won't, I won't address you in open court, as it were.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: Part of the context for your scrutiny of the claims that Mr Moeran has outlined to you, and he fairly raised this with you, this is a case where the trustees are in effect suing their own beneficiaries, or seeking to do so. It is perhaps as momentous a step as one can readily contemplate. I should also say that----

MRS JUSTICE ASPLIN: But why, Mr Bryant, is it any different from - I understand the context and I understand the sensitivities and why, on the face of it, you can (inaudible) and therefore it's different. But from the trustees' perspective it is similar, is it not, to having to recover a payment, an overpayment of benefits? I know you would say not, because you would say these people have been encouraged to take these loans, etc.

MR BRYANT: Yes, my Lady.

MRS JUSTICE ASPLIN: I understand that. But from a purely mechanical point of view there is no different, is there?

MR BRYANT: Well, my Lady, one, one - at the risk of being accused of dodging the question - one can't look at this purely in terms of the mechanics without looking at the context, and this is a very different case from a member who received some overpayments and the trustees seek to claw them back. Presumably in that sort of context there will be ongoing payments from which the payments can be recouped, and so on and so forth. This is a very different situation.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: You have individual members who in financial difficulties to start with.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: And who are not only being asked to pay back everything they were given by the schemes, but you've got the tax situation on, on top of it.

Your Ladyship raised with my learned friend yesterday the formulation as it currently is at para.7, which we're referring to as Question 7 of the Details of Claim.

MRS JUSTICE ASPLIN: Yes, yes.

MR BRYANT: I think the upshot of your discussion with him was his suggestion that your Ladyship could order whatever she, she saw fit. I don't believe there is a reformulation coming from the claimant's side at the moment. Whether one will appear at some stage I don't know.

MRS JUSTICE ASPLIN: I think it's too late now.

MR BRYANT: Fine. Then I'll - well my, the submissions set out in my Skeleton Argument were based on the formulation as it was, insofar as some of these issues are no longer relevant then they can be put on one side. Really I can deal with these points fairly shortly. Some of them, certainly your key points your Ladyship has already raised with Mr Moeran and is therefore clearly well, well alive to these points. "(a)," it's a small point but in my submission, it's one worth making----

MRS JUSTICE ASPLIN: So are we in file 1?

MR BRYANT: You are in file 1, tab A8.

MRS JUSTICE ASPLIN: Yes. Yes, I'm on the amended para.7.

MR BRYANT: Page-- indeed.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: It is simply this. What 7.1(a) as it's currently formulated deals with the, the amended matters, as it were, standstill agreements and issuing claims and such. (b) is what originally said to take preliminary steps for the recovery of MPVAs, now other preliminary steps, and this was drafted in its original form, as I understand it, on the basis that it would

be letters before action, wait for a response and if no response then go down a bankruptcy route potentially.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: It is simply the use of the word, "including."

"Take other preliminary steps for the recovery of the MPVAs including in particular issuing pre-action protocol letters."

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: Now Mr Moeran responded to this yesterday saying, I hope I summarise fairly and accurately, the trustees should not be fettered in terms of what their existing powers are under the scheme, and I don't seek to do that. When I suggest that the former relief should be exclusive and not inclusive, it is simply to avoid suggestions further down the line if steps are taken outside these specific matters, pre-action letters, statutory demands and so on, to avoid the suggestion that other steps were already covered by the Beddoe relief given.

MRS JUSTICE ASPLIN: No.

MR BRYANT: If this Beddoe relief is given. I put it no higher than that. The trustees obviously can do what the trustees can do under the powers of the scheme. It is simply that if it isn't one of the specific matters that they have sought and obtained Beddoe relief for, then they may be at risk of costs, but it's a matter for another day.

(b), and we're still on p.7 of my Skeleton Argument, bankruptcy proceedings. Your Ladyship has discussed this, I know, with Mr Moeran yesterday and a number of points arise out of this, one of which was raised by Chief Master Marsh at the last hearing. I've given you the reference to his, to the matter in the transcript.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: He queries whether bankruptcy would simply release members from liability rather than achieving significant recovery for the schemes. But beyond that bankruptcy has a number of other significant consequences for members, and my suggestion on behalf of the defendant and those she represents is that the claim should be required to come back to court before decisions are made on whether or not to pursue bankruptcy proceedings. I don't suggest that it would need to be on a case by case basis. But at this stage, in my submission, permitting bankruptcy proceedings before one has a greater knowledge as to how these matters are going to progress is not something that the court, in my submission, should sanction. (c) will----

MRS JUSTICE ASPLIN: Sorry, Mr Bryant, (c) in?

MR BRYANT: In my Skeleton Argument.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: I am simply going through the points that I've set out.

MRS JUSTICE ASPLIN: Okay. I was desperately looking for a (c) in para.7 and I couldn't find one.

MR BRYANT: My apologies, no.

MRS JUSTICE ASPLIN: No, no.

MR BRYANT: Yes. As far as I'm aware Mr Moeran hasn't added anything further.

MRS JUSTICE ASPLIN: Perfect. Is there a new draft? Yes, I'm sorry, Mr Bryant, you said (c)?

MR BRYANT: My Lady, not at all. Again these are points your Ladyship is clearly alive to already. But I reiterate the point I've already made that such evidence as one has, I say suggests strongly that the prospect of any substantial recovery from members is pretty slim at best, particularly, as they now all do, they have unauthorised payment charges and surcharges on top. It goes back to the point about evidence of means.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: There's nothing before the court, and one might say the claimant has had a number of years to investigate this matter, but there is nothing before the court to suggest that anyone is going to be able to pay this sum back, and that really leads me on to the next point, and one is - you've been provided with a breakdown of the figures as, as you requested yesterday. Mr Moeran has given you a breakdown of the figures.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: The smaller loans are unlikely, we say, to outweigh or certainly to outweigh by very much the cost of recovering them.

MRS JUSTICE ASPLIN: What do you say are "smaller"?

MR BRYANT: It's a difficult position for me to start divvying up my members.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: Or those who are represented by the, by the defendant and you have the breakdown and, and the figures. I assume they're accurate. The figures say what the figures say. Clearly those under - well the, the bottom two in terms of value, I'll come on to the costs, the likely costs. Again we don't have any information, - there is information that a significant number of the members are out of the jurisdiction. There are a variety from Scotland to Australia. I don't have the precise figures. It's in one of Mr Fairhead's statements I believe. I haven't done, if indeed it is possible to do, the cross-referencing between that and, and these figures for value. But in my submission the costs that are likely

to be incurred in seeking to recover from those sorts of members are going to be significantly more than the £2,900 odd that it is being suggested.

MRS JUSTICE ASPLIN: The £2,900 odd is on the basis of an uncomplicated statutory demand and bankruptcy position.

MR BRYANT: Yes. Case not resisted effectively.

MRS JUSTICE ASPLIN: And with the cheapest route.

MR BRYANT: Yes, indeed. Looking at the figures the, when this, when this matter was originally formulated I think the figure was something like £2,900 odd plus VAT per member, or on that basis. Whether that was a realistic basis in the first place is another matter. One knows, however, that a significant - and I think a total of £600,000 was - yes, I think I have given you the reference over the page in my Skeleton Argument. Originally it was envisaged that a total of £600,000, presumably plus VAT, would, would be a sensible pre-estimate. One knows from I think Mr Fairhead's latest statement that, and again for perfectly understandable reasons, limitation periods and whatever, more than half of that has already been spent and none of the steps that were originally envisaged have in fact been taken. So I think on any view, even on the relatively conservative estimates originally given, the costs are going to be significantly greater than originally estimated.

When one adds in the, what in reality is, is likely to happen, that a fair number of these cases are out of the jurisdiction - I can see Mr Moeran frantically adding them up as he goes through them and we'll be given a figure, I'm sure, at some stage - and the fact that it seems extremely unlikely that there will be the sort of easy passage, as it were, that is envisaged by the £2,900. It's conceivable, I suppose, that a few people might simply pay up. It seems extremely unlikely given previous, the previous dealings between the claimant and the members. If these claims are defended then one is, in costs terms, in a completely ballpark from the figures that are, that are put.

One also has the rather unattractive position, in my submission - it's (d) on p.7 of my Skeleton for your reference and that of others----

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: --that if one is in a position that will, that there might be a few members who can pay, even if the majority are not in a position to pay, that effectively the few members who are able to pay end up cross-subsidising everybody else. I'm not suggesting that it has to be

an all or nothing, but it is a relevant factor and it rather pushes one against permission to seek (inaudible).

MRS JUSTICE ASPLIN: So when you say that, Mr Bryant, that would mean that unless all were in a circumstance like this it could be guaranteed that there would be a recovery of all the claims, then you would say that none of them should be pursued. Is that right?

MR BRYANT: My Lady, no. I don't seek to go that far, nor I think probably could I. But given the information that your Ladyship has, which I say points strongly to the fact that very few, if any, of the members will be in a position to pay back these sums----

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: --the few who may be, effectively their repayments will, will cross-subsidise the vast majority of the membership, and it, as I say, it's not unless you can recover from everyone that you recover from no-one. But it's unless you can satisfy the court that you were likely to be able to recover a significant sum from a significant number of members. That's the point. It also ties in with, with the cost benefit analysis in terms of what, how much are you likely to get back as compared to how much it's going to cost you, because obviously the cost is not simply going to be referable to the, to the few claims you can recover from. You're going to have to pay to seek to recover from, from everybody.

My Lady, I think that's all I can usefully say on Question 7. I move on to Questions 8 and 9 and I can deal with these quite briefly. Again I've set out in my Skeleton, certainly in summary form, the points that I seek to make, but I'll take your Ladyship through them for obvious reasons orally. Question 8, which of these two questions 8 and 9 is perhaps, certainly in light of your Ladyship's comments over the last day and a half or so, is perhaps the more straightforward of the two. The defendant's position, as I've summarised at para.35, is that she has taken the view on advice, and in light of the information to which she has been privy, albeit others have not, I think this is part of the evidence that has been provided to her but not to the wider membership, she has taken the view that she cannot reasonably argue against the relief sought by the claimant on this particular question, Question 8, unless she takes the view that the cost benefit analysis weighs against it. Looking at the figures, and this is at the rare instance in this case where it is appropriate simply to look at the figures and the mechanics, the tax charges as we understand them are about £4 million.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: That comes from the claimant's Skeleton Argument. These are the scheme sanction charges rather than the individual charges.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: The cost estimate of the entire proceedings is given at £600,000, although as Mr Moeran rightly acknowledges it is difficult to assess without cursory advancement and quite knowing how things are going to develop. But weighing those two figures against each other, it seems to the defendant that it is not appropriate for her to put forward any positive case against the granting of relief under Question 8. Her concern, however, and we believe a concern shared by other members, is, well, two-fold, delay and cost, and again at the risk of being accused of giving evidence from the Bar, the principal concern, or a principal concern of a large number of members is that they perceive that what is left of their pension benefits is simply being spent by way of costs. Whether that is justified or not is another matter, but that is the perception. That is the basis on which we have put forward the suggestion that any relief to be given under Question 8 should be capped.

Now, I appreciate what we had suggested was limited to the First-Tier Tax Tribunal in the first instance, and with a monetary cap.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: I understand from Mr Moeran's submissions yesterday that there were discussions that it was - well it was certainly possible that it may go straight up to the Upper Tribunal, in which case----

MR MOERAN: Although it's likely to stay at First-Tier.

MR BRYANT: Well, okay----

MRS JUSTICE ASPLIN: Yes, that has changed from yesterday, hasn't it?

MR MOERAN: Yes, my apologies.

MR BRYANT: That seems to have changed from yesterday. Fine. Well in which case I was going to withdraw that suggestion and now I'm going to reinstate it, and the imposition of a financial cap, whilst perhaps unwelcome from the claimant's perspective, one might say having a cap will concentrate the mind as to, as to expenditure.

MRS JUSTICE ASPLIN: But as to the status, whether it's 600 or whether it's 350, I don't have any breakdown evidence about what actually might be necessary and what the costs might look like.

MR BRYANT: My Lady, no.

MRS JUSTICE ASPLIN: No.

MR BRYANT: One has, one has the figures from, from Mr Fairhead, I believe, and your Ladyship has as much information as I do.

MRS JUSTICE ASPLIN: I did, yes.

MR BRYANT: Question 9, if I may move on. The way we have approached Question 9, and this is the request for permission to fund, to a limited extent, the individual members' tax appeals. Now, my Lady, you were discussing with Mr Moeran yesterday whether there was some sort of GLO or quasi GLO in place, or envisaged.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: Certainly my understanding had been that if there were not a formal agreement there was some form of informal agreement between the claimant and HMRC that it would be dealt with on a test case basis.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: And that it, again it had to be agreed or, or informally agreed, that the individual tax appeals would be heard at the same time as the trustees' tax appeals. Certainly we are aware, the defendant tells me, that the claimant asked some time ago for volunteers to put themselves forwards as potential test cases, and indeed the defendant herself has put her name forward some time ago. So we thought that the matter was fairly well progressed. I am not sure that is quite right from Mr Moeran's earlier comment. He will correct me if I'm, if I'm wrong.

MR MOERAN: We've identified categories of test cases. That's the first thing. Identified what, effectively, the different classes are. We have put out requests for members to be test cases members and we got some responses, although I don't think we've finalised the identity of - we've got five out of six potentials. I should say, of course, potential test cases.

MRS JUSTICE ASPLIN: Thank you.

MR BRYANT: That's helpful. The defendant's position on this is, is essentially this, as I've already set out. She can see that the approach suggested by the claimant would be one where the cost benefit analysis would very firmly tip in favour. She can see that the outcome of the individual tax appeals, combined with the scheme (inaudible) charge appeal, assuming that to be together, would if the outcome is favourable to the members be of significant benefit to the schemes as well. It, it's - at the risk of being accused of putting it perhaps flippantly, there doesn't seem to be a downside to this. I think the only question really that you have raised with Mr Moeran yesterday, and indeed today, is I think a question of whether there is, whether there is power under the scheme provisions to, to make this payment.

The difficulty with the defendant's position is that it is in her interests for this relief to be granted, and indeed as far as she and those advising her can see, it is in the interests of every other member for this relief to be granted. How that sits with the representation order is, is perhaps an interesting question, and insofar as it may be suggested - I don't think it has been suggested positively yet - that it is nevertheless the defendant's role in these proceedings to argue against, in terms of trustee power, then, my Lady, you indeed yourself raised the very arguments that I think the defendant would, if push comes to shove, be, be putting before you.

MRS JUSTICE ASPLIN: Would you take me back actually to cl.4? I don't know whether I did actually now.

MR BRYANT: Clause 4 in the?

MRS JUSTICE ASPLIN: In the trustee, which is what Mr Moeran relies.

MR BRYANT: I believe it's B2A.

MR MOERAN: Page four.

MR BRYANT: Four.

MRS JUSTICE ASPLIN: I see.

MR BRYANT: Yes, B2A, tab 1, C1 - (After a pause) - yes, sorry, the bottom right numbering on p.5, middle numbering either four or two, depending which internal numbering you are dealing with. I think the exact numbering is----

MR MOERAN: The bundle (inaudible) number four.

MR BRYANT: Yes.

MRS JUSTICE ASPLIN: So it's cl.4. I've got it here, yes. So:

"May exercise all powers, rights and discretions necessary or appropriate in order for them to carry out for the purposes of the scheme ..."

Yes. (After a pause) Thank you.

MR BRYANT: My Lady, unless there are any specific matters I think those are my submissions on those first three questions.

MRS JUSTICE ASPLIN: I'm very grateful. Thank you very much, Mr Bryant.

MR MOERAN: My Lady, I have a tiny, tiny number of very short points in reply. First of all the figures for people outside the jurisdiction, there are four in Northern Ireland - this is out of the 348 MPVA recipients - four in Northern Ireland----

MRS JUSTICE ASPLIN: How much are they worth?

MR MOERAN: I can get that figure for you but I haven't had the chance to add this, add this all up.

MRS JUSTICE ASPLIN: Okay. Four in Northern Ireland.

MR MOERAN: There are 22 in Scotland.

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: I would suggest that Scotland Northern Ireland are relatively straightforward. There are 24 in other jurisdictions of which all bar, I think it's four, are in the EU. The other four are in the USA, Australia, Jersey, which (inaudible) part of the Custom Union is not part of the EU, and Bulgaria, which I think is in the EU but I have to confess I'm not 100 per cent certain, embarrassingly.

MR BRYANT: I think it is.

MR MOERAN: I think it is, yes. My next point is very, very quickly on the costs on the tax appeal. I would simply refer your Ladyship back to Mr Fairhead's first witness statement at paras.168 to 169. All it does there, and I'm sure your Ladyship recalls this, is it sets out the estimate of 250,000 for Pinsent Masons, 100,000 for tax, specialist tax counsel, and then at para.169 it goes through what items have been included in coming to that estimate. What it does not do, and I know recognise with the benefit of appearing in court, that it doesn't associate a particular cost with a particular stage, for which with the benefit of hindsight we apologise.

The very, very last point is something that has - and I recognise your Ladyship may not be taking much from this document, but I do think that it's important and I've been asked to make one particular point. In this document at para.3 there is a statement:

> "Quoting 'using a sharp stick,' was offensive in the extreme. Dalriada has done nothing to engage with members to establish willingness or ability to repay."

Now that was a reference to, and I think it was a reference by myself - it was by myself - to using, the possibility of using bankruptcy proceedings as a sharp stick with recalcitrant members. Now I want to first of all deeply and sincerely apologise for any misunderstanding or upset that this has caused, and I am aware that this did significantly upset members of the schemes who are sitting in the back of court. That is number one. It is a personal apology from myself.

Number two, I would stress that these were words that were used in submissions that had not been particularly, or indeed at all discussed with my clients. They were my words and I would stress that Dalriada would never seek to abuse the possibility of bankruptcy, or indeed any proceedings, and it was not a suggestion that bankruptcy proceedings would be used where they were inappropriate. It was not a suggestion that they would be used, or indeed thought of being used where there is a member who can't pay, or is attempting to pay, or is properly negotiating. The only reference I was making and it was, and I apologise again for any upset that it caused, was if one can, if one identifies hypothetically a member who can pay and isn't doing so, then bankruptcy is an enforcement procedure effectively, and that is all that it was meant for. So I just wanted to clear that last point up, my Lady.

MRS JUSTICE ASPLIN: Mr Moeran, can I ask you, and I assume unfortunately the answer is no, whether there is any kind of co-ordination with HMRC? It seems, as you put it, they are playing hardball.

MR MOERAN: Well, yes.

MRS JUSTICE ASPLIN: But that there is no co-ordination in the sense of it, if to the extent that - I am just wondering about the extent of tax charges and whether it would be accepted by HMRC, for example, if those, if sums were repaid that there were any effect as far as----

MR MOERAN: The opposite.

MRS JUSTICE ASPLIN: --the Revenue were concerned. That's how I understood it.

MR MOERAN: Yes. No, it, it's the opposite. We have had - effectively I personally, Mr Fenner Moeran, think that HMRC are using the Ark Schemes as a test case for quite a lot of what they want to do in relation to pensions liberation. I'm afraid to say it was one of the earliest to be caught by the Regulator. It's progressed further through its administration than most of the other ones. They see it - it's large enough for them to try out a variety of point and it's complex enough for them to try out a number of points. They are, this is a bad thing for the members of the Ark Schemes, but I think this is how HMRC are approaching it. That's number one.

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: Number two. We have found it to be spectacularly difficult to get HMRC to give an inch of any obvious points. For example, at first they were arguing that it's a segregated scheme with individual member's pots. It got down to the point of (a) referring to all the terms of the trust, to Mr Justice Bean's judgment. We even disclosed opinion of counsel to them, and eventually they backed down on that, and then they still issued, extraordinarily, issued tax charges against members who had not received on this peculiar

supposition that they were nominally giving away 50 per cent of their fund for (inaudible). So we have found it to be spectacularly difficult to get them to give an inch, and they are expressly digging their heels in about the (inaudible) holdings argument.

MRS JUSTICE ASPLIN: That I find----

MR MOERAN: Frustrating.

MRS JUSTICE ASPLIN: Well, yes.

MR MOERAN: Perhaps unsurprising in the context but frustrating.

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: I mean it is - we are fighting. I mean this is - we're being very polite but Dalriada is fighting this. This is not a simple turn up and have an educated discussion about tax statues and I'm - they're going to wheel out quite significant guns against the members. I mean they're going to wheel out the same guns against us. I can't believe that they're not going to go - well I won't use the phrase but they, they'll fight this one hard.

MRS JUSTICE ASPLIN: Thank you. I think the intention was to complete your submissions in relation to Questions 7, 8 and 9 this afternoon and for me to rule on those questions this afternoon. Then we were going to turn to the remainder of the directions and it was accepted that that would probably be tomorrow morning. Is that right or have I misremembered?

MR BRYANT: If at all possible, that's correct, my Lady.

MRS JUSTICE ASPLIN: Yes. On that basis I'm going to rise for a few moments now and then I'm going to give my judgment in relation to Questions 7, 8 and 9. I will be no more than ten minutes at the most.

(Short break)

(See separate transcript for judgment)

MRS JUSTICE ASPLIN: Mr Moeran, I think I have dealt therefore with the three questions as they are outstanding at the moment. I'd be grateful if you would take the opportunity to think about where that leaves you in relation to, particularly, Question 7 and how you would like to hone that.

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: Also whether you want to make more submissions in relation to it, and the top and tailing of the amounts outstanding.

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: I think that is best dealt with tomorrow.

MR MOERAN: My Lady, yes.

MRS JUSTICE ASPLIN: We may be able to discuss those matters with Mr Bryant also. That leaves us with the other directions and I hope that those can all be dealt with tomorrow. In that regard I wonder how you feel about your time estimates and how they stand now, and whether it will be necessary to begin at 10 o'clock rather than 10.30 a.m.

MR MOERAN: I don't think we need to begin at 10 o'clock. We are not going to make it by lunchtime now. But I think a 10.30 a.m. start will still be safe for tomorrow, including the debate about terms of the order and specific relief, particularly in relation to Question 11.

MRS JUSTICE ASPLIN: And including a short adjournment and my decision?

MR MOERAN: Yes, yes, absolutely, including a short adjournment and a decision on each of the three remaining little questions, 11, 12 and 13.

MRS JUSTICE ASPLIN: Thank you.

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: You're happy with that too, Mr Bryant?

MR BRYANT: I am, my Lady.

MRS JUSTICE ASPLIN: Okay. Well on that basis therefore, 10.30 a.m. tomorrow. Thank you very much indeed.

MR MOERAN: My Lady.

MR BRYANT: Thank you.

(5.08 p.m.)

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IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

[2017] EWHC 1881 (Ch)

No. HC-2016-002391

Rolls Building

Wednesday, 21st June 2017

IN THE MATTER OF (1) THE LANCASTER PENSION SCHEME (2) CRANBORNE STAR PENSION SCHEME (3) GROSVENOR PARADE PENSION SCHEME (4) TALLTON PLACE PENSION SCHEME (5) WOODCROFT HOUSE PENSION SCHEME (6) THE PORTMAN PENSION SCHEME

Before:

MRS JUSTICE ASPLIN DBE

(In Private)

B E T W E E N :

DALRIADA TRUSTEES LIMITED — Claimant
(as trustee of the above named pension schemes)

- and -

KIM ANNETTE GOLDSMITH — Defendant
(as representative beneficiary)

MR F. MOERAN QC (instructed by Pinsent Masons LLP) appeared on behalf of the Claimant.

MR K. BRYANT QC (instructed by Trowers & Hamlins LLP) appeared on behalf of Defendant.

J U D G M E N T

(The judge's microphone appears to be faulty)

MRS JUSTICE ASPLIN:

1 This matter relates to six HMRC registered defined contribution occupational pension schemes. They are the Lancaster Pension Scheme, the Cranborne Star Pension Scheme, the Grosvenor Parade Pension Scheme, the Tallton Place Pension Scheme, the Woodcroft House Pension Scheme and the Portman Pension Scheme. The claimant was appointed as trustee of each of the schemes by an order of the Pensions Regulator dated 31st May 2011, made under the Pensions Act 1997, s.7. The appointment did not remove the existing trustees. However it provided that the claimant, Dalriada Trustess Ltd. (Dalriada), could exercise the powers of the trustees to the exclusion of the other trustees pursuant to s.7(4) of the Pensions Act 1995.

2 The schemes were set up to operate something which was called the "Pensions Reciprocation Plan," which was designed, it appears, as a means of providing members with access to their pension capital prior to retirement without breaching HMRC's rules. The member obtained a loan from a sister scheme against the value of his or her pension. The loans were known as "Maximising Pension Value Arrangements."

3 The way in which that arrangement worked, and the way in which they were described by Mr Justice Bean as he then was, at para.10 of his judgment in *Dalriada Trustees Ltd. v. Faulds & Ors.* [2011] EWHC 3391, is as follows:

> "An individual, Member A, with pension benefits in an unrelated pension scheme is introduced to one of the Schemes, for example Scheme Y. Member A transferred their benefits to Scheme Y. A 5 per cent transfer fee was exacted and the remaining 95 per cent of Member A's transfer value was used as follows:
> (a) Up to 50 per cent of Member A's funds in Scheme Y is 'lent' to Member B in one of the other Schemes, for example Scheme Z, and that was an MPVA loan.
> (b) A reciprocal MPVA loan of equal value is then made by Scheme Z to Member A, using Member B's funds.
> (c) The remaining funds of both schemes are then invested in other assets."

4 The terms of the MPVA loans provided for repayment of the original loan together with simple interest at 3 per cent per annum at Barclays Bank base rate, with a maturity date which might have been anything from 5 to 25 years. Although there are 486 members of the schemes, only 348 of them received such loans. These range from £2,500 to as much as £420,000. In fact the total funds purportedly lent under the MPVAs was £9,767,895 which is approximately one-third of the schemes' original assets - that is all of the schemes - which were in the region of £27 million. However, on 13th June 2011 shortly after Dalriada was appointed, the sums which were available to these schemes stood at only £9,415,630. Since then approximately £7.5 million of scheme assets have been recovered.

5 I have been handed up a schedule of the MPVA loans, which show that only two of those loans were for less than £5,000, and in fact totalled £7,475. Fifty loans were in the bracket between £5,000 and £9,999. One hundred and twenty-four were in the bracket from £10,000 to £19,995. One hundred and thirty-two were in the bracket between £20,000 and £49,999 and only forty were in the brackets which were above £50,000. However, those forty totalled £3, 294,040. I should say that the one hundred and thirty-two in the bracket between £20,000 and £49,999 amounted to a total value of £4,165,415.

6 In the *Dalriada Trustees Ltd. v. Faulds*, which was reported in 2012, Pension Law Reports 15, the learned judge concluded that the MPVAs were unauthorised member payments, within the meaning of the Finance Act 2004 and, as such, were expressly prohibited by the terms of the schemes, their trust deeds and rules, and therefore were also outside the powers of the scheme trustees and were void in equity. He also concluded that the MPVAs were not investments within the meaning of the definitions in the trusts deeds and rules, and for that reason also were outside the scope of the schemes' trustees' powers. He also concluded that they were a fraud on the power of investment under which they were purportedly made, by which he meant that the powers in question were used for purposes other than those for which they were designed and intended.

7 Since the hearing before Mr Justice Bean, HMRC have issued tax assessments against members of the schemes who received MPVA loans on the basis that they received unauthorised member payments. They are at the rate of 55 per cent of the MPVA loans either made or received, whichever was the higher, plus an authorised payment charge, as I understand it, of 40 per cent, and an unauthorised payment surcharge of 15 per cent. HMRC have also raised tax assessments against members who did not receive any MPVAs assessed at 55 per cent or 50 per cent of the member's pension scheme pot, on the basis that the loans were, on average, made at half of the value of the member's pension scheme value. HMRC have also issued tax assessments against the schemes themselves for scheme sanction charges under the Finance Act 2004.

8 Dalriada by this Part 8 claim is seeking Beddoe relief in relation to the steps which it proposes to take in order to recover loans from members, and in relation to the tax appeal, both in relation to the scheme sanction charges which it is sought to levy against the schemes, and in relation to the tax appeals on behalf of members. Dalriada also seeks further directions. Chief Master Marsh granted an issue based representation order in respect of the defendant, Mrs Kim Goldsmith. She is a member of the Lancaster Pension Scheme and she transferred the transfer value of her deferred benefits in the Local Government Pension Scheme to what was described as the master pension scheme, in order to obtain access to an immediate capital sum to a maximum of £17,500. Her husband took similar action in relation to his deferred benefits in the Royal Mail Pension Scheme. She discovered only later that she had been transferred into the Lancaster Pension Scheme. She received £16,150 from that scheme, or perhaps not directly from that scheme, on 11th February 2011. She invested that sum in a cash ISA and later used it to assist in paying for a loft conversion at her home. She has received a tax assessment dated 11th April 2014 in the sum of approximately £9,000. She is a member of the Ark Class Action Group.

9 The representation order provides for the parties to argue for or against each possible outcome in this matter, on a scale ranging from their most preferred to their least preferred outcomes. The details are set out in a paper, which are annexed to the Chief Master's order. In essence, Dalriada is required to argue for each positive direction that it is seeking and Mrs Goldsmith to argue the contrary. In relation to the costs directions, in summary Dalriada was appointed to argue in favour of the allocation costs on a *pro rata* basis, and Mrs Goldsmith is appointed to argue in favour of apportioning costs equally between the schemes. In relation to the allocation of assets or costs between member accounts Dalriada was appointed to argue in favour of the allocation of costs on a *pro rata* basis by reference to whatever is the relevant and simple questions, and Mrs Goldsmith will argue in favour of specific allocations of assets and costs on a detailed basis. I have considered the details of the representation order and can see no reason to stand it its way.

10 This is not a case in which Dalriada surrenders its discretion to the court. It may seek directions which would enable it to take a particular course of action and, having obtained the court's approval for such a course, would be entitled to recover the costs of doing so from the trust fund. It does so despite having the power to take the steps in question and seeks the court's direction because of the momentous nature of the steps which are proposed. This applies to Questions 7 and 8, as set out in the amended Part 8 Claim Form. The question therefore is whether what is proposed is within the band of decisions, which could be reached as a result of the proper exercise of a trustee's discretion, by a reasonable trustee in the circumstances which apply. It also applies to Question 9, although that has an additional element. In that regard the question also arises as to whether Dalriada has the power to take the steps in question at all, and therefore requires me to consider the terms of the trust deed, which I should say are in identical form for each of the trusts/schemes.

11 Question 7 as amended is in the following form. The claimant seeks directions that:

> "(i) The claimant has permission as trustee of the schemes
> (a) where limitation periods have passed or expired, or are approaching expiry, may enter into standstill agreements or issue claims, and in relation to such issued claims pursue litigation to the stage of defences being entered, or enter into stays with the defendants at the claimant's discretion; and/or
> (b) take other preliminary steps for recovery of the MPVAs including in particular issuing pre-action protocol letters, or an equivalent letter where an action has been commenced, and/or statutory demands to the relevant recipients of the MPVAs, as well as issuing bankruptcy petitions and attending bankruptcy hearings where claims are uncontested.
> (ii) Thereafter the claimant has permission to apply to the Master on paper at first instance, for further Beddoe type directions to institute and/or prosecute and/or continue to prosecute such claims to recover MPVAs as appears to it to be reasonable on the basis of the results of the said preliminary steps.
> (iii) The claimant shall be indemnified out of the funds of the schemes in respect of
> (a) its costs properly incurred by it in connection with the above mentioned recovery of the MPVAs, and
> (b) any adverse costs orders awarded against it on such recovery proceedings."

12 An amendment to the relief sought was necessary, because as a result of the effect of the limitation period it has been necessary to seek to enter into standstill agreements and, in some cases, to issue Claim Forms and even to serve them. 152 claims have been issued. As at 17th May 2017, 37 had been served. Where the claims had been served Dalriada has sought to agree a stay of proceedings until at least six weeks after the decision in these proceedings. In total, as at 17th May 2017, 12 consent orders have been received and the claimant has agreed not to seek default judgment against one other member, against whom proceedings were issued.

13 Further complication has arisen in relation to the standstill agreement in recent days. Angela Brooks on behalf of one of the members' action groups, on her own behalf and on behalf of others, has sought to cancel the standstill agreements, which have been entered into, and substitute another version which contains numerous clauses, which are concerned with the way in which Dalriada should administer the schemes and the steps which allegedly should be taken in relation to those who are the architects of the schemes. It seems to me that those clauses have nothing to do with standstill agreements. The correspondence in relation to them is not directly relevant for the purposes of these proceedings before the court. I should add that further notes were handed up today, which were written,

I understand, by Miss Angela Brooks, and are comments on the proceedings and what was said yesterday. It seems to me also, but for the matter to which I referred earlier this afternoon, that they are not relevant for the purposes of the decisions which I have to make today.

14 First, I have to consider the merits of the MPVA claims. I had sight of a confidential opinion concerning those merits, and for the most part I accept the content of that opinion. Suffice it to say that the claims are considered to be strong. In that regard, in my judgment, it is necessary only to take account of the conclusions reached by Mr Justice Bean in his judgment by way of background. As I have said he concluded that the loans were unauthorised payments. They were expressly prohibited under the terms of the trust deeds and rules. They were void in equity. They were not investments for the purposes of those trust deeds and rules, and therefore were outside the trust powers, and their creation was a fraud on a power. Having taken account of the likely courses of action and the possible defences, it seems to me - and I agree - that in principle the claims are strong.

15 I also take into account the costs benefit analysis, in relation to which I only have limited information. It is said that if each claim led to an uncontested bankruptcy then actually the cost would be £2,925 plus VAT. However, it seems to me that the situation is much more complex than that and has been rendered more complex by the need to issue proceedings and, in some cases, to serve proceedings already. I have no real breakdown of the costs and the likely expenses in that regard. I also note, however, that the schedule which was handed up today makes clear that two of the loans are for sums under £5,000, and that was for only £2,500, and the other was for £4,975. In that regard one can see that the amount to be recovered in the first case is less than even the least costly route of recovery, and that the other will not be a great deal ahead of that sum when VAT is taken into account.

16 There is no real evidence before the court as to whether each potential defendant, of whom as I have said there are many, is good for the money, in a sense of good for the recovery of the loans which were paid to them. Mr Moeran, on behalf of Dalriada, says that that would be discovered at the next stage once the initial steps are taken. At that stage the trustee will consider whether it is worth proceeding further or not. He also accepts the difficult position in which Dalriada finds itself, given that it is asking for permission to sue the beneficiaries, the members, of the schemes themselves, and the anguish and the difficulty which will be caused to members if these steps were taken. He points out, however, that a bankruptcy procedure is cost efficient and that the loans were just that. They were loans and were always expected to be repaid, and what is now being suggested is that they are repaid early. He also makes clear that it is the trustee's duty to get in trust assets and that 138 members did not take out loans at all and therefore are prejudiced if the monies are not recovered. Some schemes made very few loans in comparison with their membership and some made a very high proportion. He says that recovery would benefit all members because repayment would create greater security for pensions over all and reduce the tax charge on the schemes, which is very considerable, and perhaps also on the members themselves who took out the loans.

17 Mr Bryant, on behalf of Mrs Goldsmith and therefore on behalf of the membership, because there is a representation order in this regard, drew my attention to numerous matters. In a private session, he drew attention to what he said were the weaknesses of one of the strands of the possible bases of claim against the members. He also emphasised the very nature of the circumstances and the fact that the members are the very victims of the nature and the structure of this scheme, that they were people who were seeking to take the opportunity to benefit from capital sums, which might not otherwise have been available to them, and were

therefore perhaps in desperate times. Now they have these enormous claims for tax relative to the sums involved and also their resources. He also asked me to take into account the very nature of the steps which are being suggested should be taken against members of the scheme by its trustee. In particular, the nature of bankruptcy, which has many ramifications and not just the one highlighted on behalf of the trustee (who also acts in a representative capacity in this regard), which is that it would be a streamlined and less costly route. It was pointed out by Chief Master Marsh, and also alluded to by Mr Bryant, that of course a bankruptcy will not necessarily be a useful route for recovery of monies.

18 Mr Bryant also drew my attention to the point that in fact there is no evidence before the court of the likely extent of recovery of sums were these steps taken, and therefore points out how difficult that is to balance against what may be the cost of doing so. He also points out that a number of members are out of the jurisdiction, and that will increase the cost of recovery against them quite considerably. In fact, Mr Moeran tells me that 4 are in Northern Ireland and 22 in Scotland, but 24 are otherwise out of the jurisdiction, of whom 20 are within EU countries, and 4 are otherwise, although one is in Bulgaria. Three are much further afield. Mr Bryant also drew my attention to the fact that £300,000 odd has already been spent on the steps which have had to be taken because of the concerns about limitation periods. So one is looking at a very considerable amount of costs. But on the other side of the coin, Mr Moeran says that one is looking at the recovery of around £9.75 million, which is obviously very considerable.

19 I have to weigh up all of those matters and, in particular, the very unusual nature of the directions which are sought, and the circumstances of this case; that this was a scheme which was directed at allowing people access to their capital within a pension scheme. Therefore, by their nature, those members may well have been vulnerable all along and now are vulnerable because of the tax assessments which have been made against them. I also take into account that in fact although these were loans to be repaid they, for the most part, were intended to be paid out of pension lump sums, which may or may not have been payable as yet.

20 Nevertheless, it is necessary for me to evaluate all of these issues under these very difficult circumstances. I bear in mind that this is not my decision. What I have to determine is whether in fact such a decision would be within the parameters of a decision, properly made, by trustees taking into account all relevant factors and ignoring all irrelevant factors and therefore come to, by reasonable trustees having acted reasonably. Taking all of those matters into account and not making the decision myself I, nevertheless, consider overall that it is appropriate that the trustees should be granted the relief they seek. But not in its entirety. It seems to me that trustees acting reasonably in all of these circumstances might well litigate down to a defence, or at least, to the opportunity to take stock of each individual situation, and to determine in their discretion in each of those situations whether it is appropriate to continue with any action.

21 I also have a number of other caveats in that regard. I consider that a reasonable trustee, taking into account all relevant factors, would also take a particular note of what seems is a very aggressive attitude being taken by HMRC in this regard, and would evaluate the individual cases and circumstances. A reasonable trustee would take account of the individual cost on the basis of bankruptcy alone, which if you take into account VAT would amount to around £3,600 for an individual case. It is relatively clear therefore that those in the bottom bracket on the schedule, which was handed up, would inevitably not be pursued. It is not for me to exercise or seek to exercise the discretion of the trustees, but it seems to me taking all matters into account that the line, after the costs benefit analysis has been

conducted, might well come much higher than that. It might come in fact as high as around £9,000. But I only mention that.

22 It also seems to me, however, that in the circumstances of the cases to which I have been referred and in the light of the matters to which Mr Bryant has drawn my attention, that I also agree with him that it is relatively unlikely that the bankruptcy procedure would be appropriate in the circumstances. Of course, I cannot judge, nor am I asked to judge, the particular circumstances. But I agree with Mr Bryant that bankruptcy ought not to be the first refuge of a trustee in these circumstances, a reasonable trustee acting reasonably and taking all relevant matters into account, and that it ought perhaps to be a second string to the bow and may need further directions to be given. It seems to me that all of the steps, which are normal in these circumstances, ought to be taken and ought to be within the directions for liberty for the trustee to take in order that they can properly evaluate those matters, which in fact at present, on each individual case, are not within their knowledge. They will then be in a proper position to determine what should be done and also the extent to which they may need more relief or more directions from the court.

23 I am happy not only to hear further submissions in relation to the precise directions, which should form the basis of what has been called question 7, or para.7, of the amended Claim Form. I think it correct to do so at the end of this hearing, and perhaps tomorrow.

24 On that basis I will go on to Question 8, or para.8. Question 8 is in the following form. The claimant further seeks directions that:

> "(i) The claimant has permission as the trustee of the schemes to initiate and/or continue appeals to the First-Tier Tribunal and/or the Upper Tribunal against HMRC's assessments against the scheme for taxation by way of scheme sanction charges under the Finance Act 2004, Part 4.
> (ii) The claimant shall be indemnified out of the funds of the schemes in respect of:
> (a) its costs properly incurred by it in connection with the above mentioned appeals; and
> (b) any adverse costs orders awarded against it in such appeals."

25 I have read the confidential advice in relation to the merits of the tax appeal on behalf of the schemes and I have also heard Mr Moeran's submissions, which were also heard in private. I have, of course, heard what Mr Bryant has said in this matter in private. Mr Moeran quite properly also in addition in open court referred me to *Clark v. HMRC* [2016] WR 04772428, which he seeks to distinguish to the extent that is necessary. I have heard submissions also from Mr Bryant about the cost budget analysis of the proceedings in relation to these charges, which are intended to be exacted upon the scheme. However, he does not argue against the relief which is sought in Question 8 in principle.

26 Despite the decision in *Clark v. HMRC*, it seems to me that I am satisfied that there are strong arguments which may be deployed in seeking to appeal the tax assessments made against the schemes in light of the findings of Mr Justice Bean. It seems to me on that basis it is obvious that given that around £4 million in tax is at state, and given the strength of the arguments, that it is appropriate to give the relief and the directions which are sought. It would be appropriate for Dalriada to seek to exercise its discretion to take steps to challenge the assessments, whether in the First-Tier Tribunal or in the Upper Tribunal if a leapfrog were arranged and considered appropriate. I also agree with Mr Bryant on behalf of Mrs Goldsmith, however, that in the first instance there should be a limit upon the amounts to be spent on such an exercise, albeit that as much as £4 million is at stake, and that that £4

million, of course, will benefit all of the members of all of the schemes if it is not to be paid. It seems to me, therefore, that there ought to be a cap on the amount to be spent initially by way of costs in seeking to challenge those assessments and that ought to be £350,000 plus VAT. If further sums need to be expended then, it seems to me, that further relief will need to be sought.

27 That brings me on to Question 9, or para.9, of the amended Claim Form. The situation in that regard is more complex. Paragraph 9 is in the following form.

> "The claimant further seeks a direction that it has permission as the trustee of the schemes to pay, at its discretion, sums up to a total of £50,000 plus VAT towards funding the legal representation of members of the schemes in relation to appeals against any tax assessments by HMRC against said members for taxation by way of unauthorised member payments, under the Finance Act 2004, in relation to the MPVAs."

28 Mr Moeran says that there is power to spend this £50,000 plus VAT on representation for members in relation to their appeals against the tax assessments. He referred me to s.239, 240 and 241 of the Finance Act 2004, and points out that if the members' tax liability is reduced it will have an indirect effect of reducing the schemes' tax liability. The approach of both the members and the trustees need to be co-ordinated, and representation on behalf of the members needs to be of good quality. He accepted that the advantage, which is being sought, is to have more than one counsel before the Tribunal arguing in relation to the same points, which are the nature of the unauthorised payments, the effects that that has on their validity and the fact that they remain trust property. He accepts, however, that Dalriada has no power over the way in which these points may be argued on behalf of the members and that each appeal on behalf of the members is separate, and that there is no question of there being a representative member for the purposes of those member tax appeals. However, as I understand it, although nothing has been agreed with HMRC for the moment, classes of tax test cases in relation to member cases have been identified. In relation to each of those classes, of which there are six, five individuals have come forward to say that they are willing to be test case claimants.

29 Mr Moeran also says that the payments can be made under the general powers contained in cl.4 of the Trust Deed and that that applies in these circumstances. Clause 4.4:

> "The trustees and any administrator has and may exercise all powers or rights and discretions necessary or appropriate to enable them to carry out the purposes of the scheme without restricting the (inaudible) shall have the powers, rights and discretions given to them by law under specific powers, rights and discretions set out in the remainder of this clause, so long as they are consistent with the law. If a law is framed, so as to allow something in the scheme, shall be deemed to include such a power and the ability to exercise it to its full extent."

So he relies upon the generality of that clause.

30 Mr Bryant, on behalf of Mrs Goldsmith, agrees that overall this would be for the benefit of members and therefore does not take issue with the proposal. He says that it seems that there is no downside to it and that is the basis on which he makes his submissions. He says that it also seems that it is going to be agreed that those members' cases are heard in the Tribunal together with that of the scheme.

31 It seems to me that a co-ordinated approach in which the members' interests were properly represented would be of indirect benefit to the schemes in the way that Mr Moeran described, because two voices are often considered to be more powerful than one. It is not clear to me in fact that ss.239 to 241 of the Finance Act 2004 are directly relevant however. In addition it is not clear to me that at the moment there is a co-ordinated approach that has been agreed, whether with the Inland Revenue or, in fact necessarily, with each of the members whose cases may be heard or may not be heard together with that of the schemes. I also consider that a maximum of £50,000 plus VAT, in the circumstances where the exact nature of what may take place remains very vague, is an excessive amount.

32 Taking those matters together and in particular in the light of the vagueness of what may take place, and the fact that this is not a situation in which there would be a representative member despite the fact that test cases are being discussed, I do not consider that to pay an amount to a barrister accepting Direct Access, selected by Dalriada and hopefully accepted by the member in question, is necessarily an appropriate step to take which reasonable trustees would take at this stage if they were considering all relevant matters. I take that view, as I say, for the most part because the position remains very vague. I am satisfied, however, that if the position were more precise, that it is first of all advantageous that there should be a co-ordinated approach, and that the trustee may wish to assist members by a modest payment towards proper representation.

33 In those circumstances it seems to me that it is, I would think, highly likely that such a payment would fall within the powers in cl.4 of the Trust Deed within a band of decision, which would be those which a reasonable trustee could take in these circumstances. However, given the vagueness of what may or may not happen in relation to those tax appeals and the uncertainty which remains, I am not able to grant the relief which is sought at present in that regard.

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IN THE HIGH COURT OF JUSTICE No. HC-2016-002391

CHANCERY DIVISION

Rolls Building

Thursday, 22nd June 2017

Before:

MRS JUSTICE ASPLIN

IN THE MATTER OF (1) THE LANCASTER PENSION SCHEME (2) CRANBORNE STAR PENSION SCHEME (3) GROSVENOR PARADE PENSION SCHEME (4) TALLTON PLACE PENSION SCHEME (5) WOODCROFT HOUSE PENSION SCHEME (6) THE PORTMAN PENSION SCHEME

B E T W E E N :

DALRIADA TRUSTEES LIMITED
(as trustee of the above named pension schemes) Claimant

- and -

KIM ANNETTE GOLDSMITH
(as representative beneficiary) Defendant

MR F. MOERAN QC (instructed by Pinsent Masons LLP) appeared on behalf of the Claimant.

MR K. BRYANT QC (instructed by Trowers & Hamlins LLP) appeared on behalf of the Defendant.

P R O C E E D I N G S

I N D E X

Thursday, 22nd June 2017

10.28a.m.

MRS JUSTICE ASPLIN: Good morning, Mr Moeran.

MR MOERAN: Good morning, my Lady. We have a draft order to deal with----

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: -- with the details of the Beddoe order. What I would suggest is we deal with that right at the end of the day when possibly we've got some other directions and we may have some other points on there just to go through.

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: We then turn to questions 11, 12 and 13 under the claim form, and obviously I'm going to be taking those in that order. May I suggest that we turn to and quickly go through those questions and then what I would suggest is that your Ladyship takes out the little table of positions, so that you can follow through where we're going as I – as I go through, or at least has it to one side. So the original – the claim form is bundle 1, tab A8.

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: And at p.25 we start with question 11. Question 11 is dealing with the costs between the schemes. Question 12, at p.27, is dealing with costs and attribution of assets within schemes, and then we come onto question 13 which is to do with administration and transfer fees; a slightly different sort of point.

Now, question 11(i) is attribution of the costs of recovery of the MPVAs, and that's a very specific – it's effectively litigation costs, although there are some administration costs associated with it. We jump then down onto question 11(ii). I will be going through the specific various options under each question when I come to them. Question 11(ii) is the costs of the tax appeal. Question 11(iii) is in relation to recovery and management of any non-MPVA assets. There will be some, considerably smaller costs than the MPVAs. And then question 11(iv) is other costs.

So 11(i), if I take your Ladyship then to tab 9, and your Ladyship will see this is set out – Oh, I should have flagged actually, of course, 11(i) is the second part of the claim form where there is an application to amend the precise wording of the claim form.

MRS JUSTICE ASPLIN: Yes, this is the additional words suggested by the Master.

MR MOERAN: Exactly, exactly. Now, turning to tab 9, you see a quick summary, a brief summary, alongside the order in which we will – both parties will be ordering it, and a quick summary of the positions that we are taking. And I start by ordering in favour of – in relation to the MPVA costs, I start by ordering in favour of apportioning them pro rata between the schemes by reference to, first, the respective amount of the MPVAs made by each of the schemes, by comparison to total MPVAs, and then, secondly, the recoveries as made by each of the schemes. And then I go on to fall-back position allocating it on – actually just allocating it on the basis of what they actually charged – sorry, the actual costs of recovery of each individual MPVAs, so strict apportionment. And then the full fall-back is in proportion to assets held and then ultimately – And effectively what I'm arguing against is an equal apportionment, just a strict one-sixth each way.

Now, before I get onto----

MRS JUSTICE ASPLIN: And this is why it starts at the other end of the scale and works back up.

MR MOERAN: Exactly. And what we've tried to do is apportion – is divide up the arguments so that Mr Bryant is arguing fundamentally for equal apportionment and I'm arguing for pro rata apportionment; in most cases pro rata by reference to assets, but in the case of the MPVAs first obviously by pro rata by reference to that sort of specific cost. So I will – I will address those particular arguments in a moment, but before I get onto the individual questions, 11(i), (ii), (iii) and (iv), I will – I want to make just a fundamental legal point about what is happening here. The trustees, the claimants happen to be trusts of – trustees of six different trusts. They happen to be operating in six different capacities, but, in theory, there could be six entirely separate trustees and those six trustees could be absolutely within their powers, actually as legal title-holders, agree to pay for certain costs that are jointly relevant to them. On any reasonable basis, there's no legal impediment to doing that. They could do pretty much any of these things so long as that particular decision was a reasonable one. It would be within their legal powers. It may be, therefore, that all or multiple of these options, multiple variations of these options, are within the powers.

And if your Ladyship turns back briefly to the actual wording of the relief sought, the question is, in each case:

"In relation to the recovery of the MPVAs referred to above, whether the costs of administering the Schemes should or may be …".

A

And your Ladyship has it within her power to determine that the trustees may do any of these things, but your Ladyship also has it within her power to say that the trustees should do either one specific thing or one of a number of options. So you could say, "You should do 1 or 2" or "you may do 1, 2, 3 or 4".

B

MRS JUSTICE ASPLIN: But this is not a situation in which you are asking whether any of these options lie within or without the power. You are saying, and it's not being traversed, that in fact all of these options are within the powers----

MR MOERAN: Yes.

C

MRS JUSTICE ASPLIN: -- of the trustees.

MR MOERAN: Absolutely, and it is within the powers of the trustees because they are the legal title-holder and they can go off and make contracts with third parties, so long as they're to do with the proper administration of trust assets. That's undoubtedly within their powers. The only question in this case is what's reasonable----

D

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: -- within the exercise of their powers. And that – that places, I have to say, both of us in putting forward one particular version of events, "one should do this", in quite a difficult position. To say that one "should" do one of these prima facie relatively

E

reasonable approaches over all the others, I have to accept, is quite an uphill struggle, but I will be submitting that in each case there is an obvious – an obvious choice to make and it's so obvious – I mean, the practical circumstances, in particular, of this case, there are at least some options that should not be taken. So – And that's the overarching submission. It's

F

within your Lady's – your Ladyship's power to determine that they're all reasonable. The last background bit is what's happened to date. Now, to date all costs have been apportioned between the schemes on a pro rata basis by reference to the total funds transferred into the schemes by the members.

MRS JUSTICE ASPLIN: The total sums transferred in?

G

MR MOERAN: Transferred in, and that's – and the reference for that is Mr Fairhead's first witness statement at para.182.

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: Now, that was a simple pragmatic resolution of, what, the action taken by the

H

claimants. There's no express agreement between the schemes, or between the claimant as

trustees of the multiple schemes. It's what they did. They looked at it on a practical basis and went forward, but there wasn't any sort of sitting down and going, "We're going to do this legally", and the claimant has very clearly made – made certain that it is, of course, willing to retrospectively adjust between the schemes and has been thinking about this at least for some time before issuing the claim itself.

MRS JUSTICE ASPLIN: Let's backtrack in relation to that. I assume that that decision, like any other decision of a trustee, was taken having considered what the options were and what was considered to be the appropriate and reasonable step to take in the circumstances at that stage.

MR MOERAN: Yes. At the risk, and indeed, frankly, by giving evidence from the Bar, it kicked off with a decision of what was practical in the circumstances. Quite soon afterwards there were general discussions as to what the legal position was and, without breaching privilege, there was actually legal analysis of it and it was a point that was flagged up for "we will have to take direction from the court as to what's appropriate. In the meantime, carry on". So there was consideration of that. It looked appropriate. It was within the parameters of what was considered reasonable in those circumstances.

MRS JUSTICE ASPLIN: Right.

MR MOERAN: As to whether or not what's happened in the past assists in determining what should happen in the future, it's something of a double-edged sword. If it could be said to support, and I think it's quite difficult to say that it should support certainly in relation to the future, if it could support, it supports us in relation to questions 11(ii) and 11(iv) and actually goes slightly against us in relation to 11(i), the MPVA, because we're saying on the MPVA you shouldn't be doing it on a pro rata by assets; you should be doing it pro rata by reference to MPVA costs. So on that we say it's neither positive nor negative for either side and, as I would emphasise again, the claimant's always been willing to adjust and the fact that it's been done in this way in the past is a mere historic convenience.

So with that background set, I can then address your Ladyship on the – the arguments that were taken. Question M – question 11(i), MPVAs. We are arguing in the following order. First, we say that apportionment of costs between a scheme should be pro rata by reference to primarily the amounts of the MPVAs made or, as a fall-back position, the amounts of recoveries of the MPVAs made, and that's Chief Master Marsh's suggestion.

Now, our primary position is very much one of crude fairness. It's rough and ready, but the cost and benefit of the MPVA recovery proceedings is likely to adhere to the schemes in proportion to the amount of the MPVAs made by each scheme. Now, it won't be perfect. The one thing you can be certain of is it will not actually adhere to it exactly like that, but it's the best possible practical estimate that we have at the moment. I suppose the one exception to that might be the £400,000 MPVA, if you can – that might have a particular distorting factor, but outside of that particular heavy item everything else is going to – will average out roughly towards cost and benefit. Across 348 of these items, it should statistically average out relatively well. It's a statistically significant population. So the fairest way to split the costs should be to divide them along precisely those lines.
It also gives a degree of sharing of risk between the schemes which minimises the potential disproportionate division of costs and recoveries on the basis of random chance, and random chance, as I say, will inevitably bite at some point, although to what extent we don't know, but this, what I'm putting forward on this basis, is effectively a degree of mutual insurance. It's sharing of risk.

Now, the perfect division of cost benefit would be on the basis of the second option, which is divided up on the basis of MPVA recoveries, and in the ideal world that might be a preferable solution. The problem is that that has one massive impracticality; you can't divide up until you – until you've collected in all the MPVAs or decided to abandon some of the MPVA sums. And that practical difficulty, you would not know how to divide those costs until all the MPVAs had been collected or abandoned, makes – even a representation order makes, I have to say, that particular submission almost untenable.

Now, Mr Bryant has said, and he has a strong point here, if one attributes costs on this basis it results in a somewhat random attribution of costs which is unfair to some members in that it was outside their control which schemes – well, first of all, which schemes they went into and, secondly, which schemes made what MPVAs. And he says, and the reference is his skeleton at para.40(c), he says, and I'll just read it out: "To allocate costs on one of the second to fourth" bases, which is pro rata by reference to assets through to pro rata by reference to MPVAs made, so he makes this point about all of the pro rata sharing, to allocate costs on one of those options "would therefore tend to prejudice members of some Schemes and advantage members of others as a result of matters entirely out of the control of those categories of member". Now, that is true; that is logically and mathematically

necessarily true, but every of these approaches will prejudice members of some basis. The only question is how much will it prejudice them and the equal division of costs would actually prejudice them in many ways the most.

So if I can take your Ladyship to volume 2A, and it's at page – it's right at the end. It will be your p.363, in the middle of the page.

MRS JUSTICE ASPLIN: 363?

MR MOERAN: 363. It's a table headed "Summary of MPVAs by scheme".

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: Now, just going through, I'm going to take up the two most extreme examples. It's Lancaster and Grosvenor. Now, the Grosvenor Scheme, or the Grosvenor Parade Scheme, had 59 members but only 22 of them received MPVAs. And your Ladyship----

MRS JUSTICE ASPLIN: Received?

MR MOERAN: Yes, received MPVAs.

MRS JUSTICE ASPLIN: Rather than MPAs granted?

MR MOERAN: Yes, exactly. Exactly. Now, and you'll see at the bottom, well, the second – third row down is "Total transfers in", 3.176 million, and then total amount paid out as MPVAs, penultimate row, 475,000. So that's actually only basically fifteen per cent of those particular fees were made, but what you do have is a large number of members not receiving MPVAs but, more importantly, the 475,000, as a percentage of the total MPVAs made, which is, you'll see in the far right-hand column, is 9.7 million, it's only 4.8 per cent of all the MPVAs made were made by or made to, I should say, Grosvenor Parade MPV – members. Sorry, no, that's not quite true. It's were made by Grosvenor Parade. You'll get – you'll get a roughly equivalent amount being made to the Grosvenor Parade members, but this is about schemes so it's made by the Grosvenor Parade.

MRS JUSTICE ASPLIN: So 475,000 is the amount paid as MPVAs it's said?

MR MOERAN: That's correct, by Grosvenor Parade.

MRS JUSTICE ASPLIN: Paid? What does that mean?

MR MOERAN: So Grosvenor Parade actually paid out cash from the Grosvenor Parade fund to other schemes' members £475,000.

MRS JUSTICE ASPLIN: Okay. But do we know how many loans at what per cent, do we? No?

MR MOERAN: No, but that's certainly the amount that was made and if you look up at the number of individuals receiving it, you've got 22 of them, it's going to be somewhere approximating that because there was a rough approximation of in and out to other schemes. It didn't always tally exactly but it was rough approximation.

MRS JUSTICE ASPLIN: Okay.

MR MOERAN: Let me just double-check this. (After a pause): Yes, you – (after a pause): Hang on, I might – I might be able to get that. No, I can't – I can't get that data. I can tell you which schemes paid what to them but I can't tell you how many MPVAs were paid to them.

MRS JUSTICE ASPLIN: And what's 14.9? That's proportionate total transfers----

MR MOERAN: That's the proportion of its funds paid out. Now, back to Grosvenor Parade. If one was to divide up costs of recovery of MPVAs equally across all six schemes it would be 16.66 per cent of all costs would be attributed to the Grosvenor Parade Scheme.

MRS JUSTICE ASPLIN: Say that again, Mr Moeran.

MR MOERAN: If you divide up the costs----

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: -- equally six ways----

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: -- each scheme has to pay 16.66 per cent, one-sixth. This is despite the fact that Grosvenor Parade only made 4.8 per cent of the MPVAs, is – is going to at most get back the 475,000 that it paid out. And it also should be noticed that its assets, transferred in funds, no longer assets but transferred in funds, was only 3.17 million which is a total of 11 per cent of the funds transferred in. So if it's paying one-sixth, it's paying about three times as much as its percentage share of MPVAs made, and it's paying about fifty per cent more than its percentage share of the total assets transferred into the schemes. So it would do very badly out of this. It would do less badly – it would be fairer, we say, to say, well, 4.8 per cent of MPVAs made, it's not perfect but we'll apply 4.8 per cent of all costs to it. Again the distinction between 4.8 per cent and 11 per cent pro rata, by reference to assets transferred in, is substantial but it's less substantial than a straightforward one-sixth, which is a vast difference. And----

MRS JUSTICE ASPLIN: But it's said by Mr Bryant that actually members had no idea, in fact, which schemes they were going to----

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: -- be allocated to or what the loan regime was going to be.

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: And, in fact, what he's saying, therefore, is everybody fell into this particular pot----

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: -- together----

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: -- and accordingly should bear the pain equally.

MR MOERAN: Well, everybody fell in unknowingly and unfairly into it. The question is should one person bear more of the pain relative to another member? And we're trying to even out the pain suffered as best we can, and what we're saying is that if you divided up one-sixth straight off it would be disproportionately unfair if for no other reason than, for example----

MRS JUSTICE ASPLIN: Well, he would say that's all very well and it's true but people didn't know how they were going to be allocated between the schemes, but the effect of dividing the costs amongst the six schemes in that way, the (inaudible) way, in effect assumes something which is not true, which is going forward that they will be actually aggregated together.

MR MOERAN: Exactly.

MRS JUSTICE ASPLIN: And they are not.

MR MOERAN: And they are distinctly not. And if you want a really example of how they are not aggregated together and how they are different between the schemes, you simply have to look at the number of members. So the number of members of Grosvenor Parade is 59 members, whereas the number of members of Portman is 95 or Lancaster is 92. Should 59 members be bearing the same amount of costs as 95 members? It's very, very difficult to justify that. And just to finish up on the percentages, the opposite extreme to Grosvenor Parade is Lancaster, well, in terms of numbers – of number of members – Oh, no, it's actually – it's Portman, sorry, but I've done the calculations for Lancaster, so my apologies.

MRS JUSTICE ASPLIN: Yes, they're – they're not a great deal different, are they?

MR MOERAN: They're not a great deal different. I'm grateful. So this is – compared to 3.17 million, Lancaster is 5.5 million and that's 20 per cent of the assets transferred into all the schemes as opposed to 11 per cent, so they would be getting 16.6 per cent of the costs but only – but whilst they have 20 per cent of the assets. But also of the total amount of MPVAs, 2.755, that is 20 – and that's the reason I chose Lancaster, because it's the highest in total amount of MPVAs paid, 2.755 is a total of 28 per cent of the MPVAs made. So they're getting almost twice the – they have almost twice the MPVAs made as a percentage of all MPVAs compared to one-sixth. They'll be getting MPVA recoveries at 50 per cent cost effectively as opposed to Grosvenor Parade getting it something like three times cost. It's not that you couldn't in theory divide up costs equally between six schemes; it's just that in this particular set of circumstances that results in a particularly unfair division which

will particularly benefit certain members and particularly harm others. We are not saying that division on the MPVA made basis is perfect. The best possible division in terms of fairness would be in terms of recovery amounts but that has such major practical problems we actually go against that.

MRS JUSTICE ASPLIN: Yes, so that's (a) and (b).

MR MOERAN: (a) and (b). (c) is if you're not going to divide it up on the MPVA costs then you should do it pro rata by reference to the value of the schemes' respective assets – sorry, no. Sorry, (b), or (ii), is simply the schemes bear – each bear the costs of their own MPVA recoveries. Now, that is quite appealing actually in this particular case and the reason is you – each scheme simply takes the burden of whatever benefit they get, but there are two reasons that would be less appealing than just on the MPVA made basis. First of all, is that the administration required would be complicated and somewhat expensive. Now, you have to divide up all the costs on an individual claim basis. You could do that relatively straightforwardly for the legal costs. You'll almost certainly have to divide up the legal costs on some basis so you could recover them in any proceedings. But the administration basis would always have to be divided up and that becomes complicated if you've got 348 claims being run by Dalriada. And you also lose the element of mutual insurance, the division of risk between the schemes, and with that you – that division of this between schemes has sort of two practical – practical consequences. Number one is obviously it makes it a little easier or a little safer for all of the schemes, particularly for the smallest scheme, but it's safer for all the schemes in terms of going, "Well, we might be unlucky but it's okay, whoever's unlucky will have the burden shared". But you also allow, with the division of risk, allow a greater ability to predict, plan and budget and, as you end up with the last tail claims at the very end, you don't get somebody being forced to effectively say, in relation to that very last claim, "I'm going to have to immediately cut off because for this particular scheme it's not going to work". If you've got five of them running across five schemes it's easier to keep them aggregated.

As I say then, it has a simple benefit and burden appeal to it, but if that is not sufficiently appealing to your Ladyship in this particular aspect, and it is a very specific litigation-type cost, in this particular aspect, then the next logical approach would be a division simply on a pro rata basis by reference to assets transferred into the scheme; assets held as transferred into the scheme. So – And that's again----

MRS JUSTICE ASPLIN: So that is – that takes us onto (iii)?

MR MOERAN: Exactly, that's (iii).

MRS JUSTICE ASPLIN: And (iii) is therefore apportioning pro rata by reference to value.

MR MOERAN: Value of assets held and then you have----

MRS JUSTICE ASPLIN: Of assets held?

MR MOERAN: Yes. Now, then you have the two different options, which is either based on sums transferred into the scheme, and that's our starting point, or then on some sort of annual assessment of value of the – of the sums held, and that is – I should carry – this is at p.26 of bundle 1. "Annual assessments by the trustees of the schemes of the value of their assets (using a trustee's reasonable endeavours and best estimate)". Now, that's going to highlight a practical problem. It's very easy, we have a calculation and what we've been working so far, as I mentioned earlier, on the basis of pro rata by reference to assets transferred in. It's a simple – it's a fixed percentage ratio. That has simplicity and administrative ease going forward.

There is a reason for thinking that it would be fairer to divide up on the basis of assets held on an annual basis if you are deciding to divide up on the basis of assets held simply because it's a mixture of how much you can afford and, to a degree, how much benefit you're getting. If you're actually going that way, and you have a change in the assets, why would you not adopt the new ratio? And the reason is a very simple practical one. Until and unless there has been an assessment, that particular percentage figure cannot be judged, and how you assess the value going forward is potentially complicated. Are we going to assess the remainder of the Freedom Bay asset as zero or not? How are we going to assess the value of the MPVA claims? We do have come to that later but that's within a scheme and do you take them as nil or as you approach success or as you got settlement agreements in place? Do you take that as a higher value? We are not, I would emphasise, we're not setting this in stone. If – Say the schemes are still here in five years and the MPVAs recoveries have been effectively completed or abandoned, and we have by this stage normal pension-type assets, all shares on the London Stock Exchange. At that point Dalriada could very easily do an annual – a daily calculation of different assets and attribute costs on that basis, and it's quite possible that at that point Dalriada would be reconsidering how to do it. But at the moment this is a problem and therefore it would be preferable and easier just to do it on the basis of transferred in.

It also, and this does actually go back into what Mr Bryant says, not only were the members not in control of which scheme they went into or which schemes made what MPVAs, of course, they were also completely not in control of which other investments the schemes made and, as your Ladyship has seen – and I will be returning to this later in relation to question 12 – as your Ladyship has seen, these assets were, if anything, not what was represented to the members.

MRS JUSTICE ASPLIN: No.

MR MOERAN: So on this one again there is a random allocation of, in many cases, rather bad investments, to say the least, and who takes the burden of this bad asset versus that bad asset? We say the only fair way to deal with this is to effectively ignore what bad luck some – one particular scheme or member has had and go back to the starting point where everybody was. And if this was just within one scheme, and it were possibly within one scheme segregated into six schemes, you might say that within that scheme one trustee had committed breaches of trust by doing this particular bad investment for this segregation and that particular bad investment for that segregation, and you might get some sort of claims across to even it out on some sort of accounting basis. It's more complicated because they are six schemes but, at heart, there shouldn't be – what it amounts to is no more than a random allocation of further bad luck. These people are, I'm afraid to say, all in a very bad situation as a result of the former trustees' actions. This is in relation to the other assets, I should say. All in a bad position as a result of the former trustees' actions and, although it's not perfect and at the moment no one knows who would be better off one way or t'other, if you use what might be called "the veil of ignorance", which is a phrase from a philosopher called John Rawls, if you use a veil of ignorance and stand behind it and say, "I do not know where I'm going to be at the end. The best way I can deal with this is to say that everybody shares the pain on a reasonable basis", and that – that reasonable basis, we say, is the pro rata by reference of value of assets transferred in.

If, however, you're not going to do that then the very last fall-back position is pro rata by reference to assets on an annual basis doing our best to value them. It's still less bad than equal apportionment between all six schemes. My Lord, that's question 11(i).

MRS JUSTICE ASPLIN: As this is so complex, I'm proposing that I then – I hear Mr Bryant now and that I decide as we go along----

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: -- otherwise it seems to me that we're going to end up in a----

MR MOERAN: Yes, I see.

MRS JUSTICE ASPLIN: -- very complex and difficult situation, and it seems to me that's the best way forwards. So you have outlined all of the alternatives under 11, and I'm now at p.25, divider 1, 11(i) through to, where am I, in fact right the way through.

MR MOERAN: Yes, right the way through. The only – I was going to make a – There's one last little point in that case, I'll just dot Is and cross Ts. The only other point I make is, if you are going to take the last fall-back position that we say, which is (iii) – 11 – hang on, I'll use the phrase – the paragraph numbering – 11(i)(b)(ii)----

MRS JUSTICE ASPLIN: 11?

MR MOERAN: Sorry, 11(i) – 11(i)(b)(ii), annual assessment by the trustees and schemes of the value of the assets.

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: If you were to do that, I would just emphasise, what that does also is randomly attribute the harm done by the MPVAs to the schemes and therefore to the members, because, of course, as you go forward on an annual basis and you discover that MPVA number 39 is not recoverable, that scheme then has less assets. Whereas, if you stay with attribution pro rata by reference to asset transferred in, you can ignore the impact of – it's not just ignoring the impact of the investments, it's ignoring the impact of the MPVA investments.

MRS JUSTICE ASPLIN: Recovery.

MR MOERAN: Well, yes, recovery but ultimately the impact of the MPVA investments which is, we say, helpful because it helps – it helps ameliorate that particular breach.

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: My Lady.

MRS JUSTICE ASPLIN: Thank you, Mr Moeran. Mr Bryant, are you happy to deal with this in this way, so this is the cost of recovery of the MPVAs, and then we'll go on stage by stage?

MR BRYANT: My Lady, yes, of course I'm happy to deal with matters in that way. Certainly for my part, what I have to say about the matters under question 11, as I think we're calling it, (ii), (iii) and (iv), are pretty much the same----

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: -- as I have to say on (i), so it may be that----

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: -- we can deal with them and I see Mr Moeran nodding.

MRS JUSTICE ASPLIN: But let's do it stage by stage----

MR BRYANT: Of course.

MRS JUSTICE ASPLIN: -- and then I think that everybody is able to follow what is going on.

MR BRYANT: Indeed, and I think----

MRS JUSTICE ASPLIN: I think that's important.

MR BRYANT: -- I think I speak for both of us when we say that this particular question is the hardest of the lot, so once that's out of the way the rest may flow rather more readily.

MRS JUSTICE ASPLIN: But I do think that also, given that there are numerous members of the public, who are also members of the various schemes, in court it's important that we create a structure----

MR BRYANT: Of course.

MRS JUSTICE ASPLIN: -- which is, I hesitate to use the word "easy" to follow, but is less difficult to follow.

MR BRYANT: Less impenetrable perhaps.

MRS JUSTICE ASPLIN: Absolutely.

MR BRYANT: Yes. My Lady, a very few introductory matters, if I may, before I launch into the specific matters on the MPVA recovery costs. My Lady will have spotted the point already, but we do not have certainly a full breakdown of the effect that each of the various options and sub-options would have in practice. Mr Moeran has valiantly done some maths. I'm not sure it was on the spot but some percentages from the tables and such, and you and I can perhaps adopt the same approach, if we have the inclination and the time. But it's not a straightforward process and it may be that quite sensibly the detailed exercise hasn't been undertaken simply because it can't, and you will have seen from the evidence, particularly from Mr Fairhead, that the documentation that the claimant was provided with when it took over the trusteeship of the schemes was far from complete. They've undertaken a reconciliation exercise as best they can to try and work out who lent what to whom in terms of the schemes. I think the figure is that they've got about ninety per cent of the way through that, but there are still significant numbers of members where it's, as I understand it, unclear what the state of play is and presumably there is a corresponding amount of money that has been paid out of the schemes and it's not entirely clear where it's gone and by whom it was paid in terms of schemes or to whom it was paid. So as a – as a matter of general context to all of these matters, it is far from straightforward to work out what has gone on and I suggest, therefore, in terms of the detail of the pro rata options, what would be "the fairest method to adopt". So to a large extent, we are necessarily arguing these matters in the abstract, but there we are.

I also accept, as I think I must, Mr Moeran's submission that, my Lady, you may reach the conclusion that more than one option under each question would be a reasonable approach for a reasonable trustee to adopt. Some of them, I think, are certainly outside the bounds of reasonableness. I think Mr Moeran, having amended the claim form to add Chief Master Marsh's suggestions, suggests and now describes it as "almost untenable", but there we are. But it may be that you reached----

MRS JUSTICE ASPLIN: I'm sure it seemed like a good idea at the time.

MR BRYANT: I'm sure – I'm sure it did to both of them, but there we are. I accept that it may be that you conclude that more than one option under each question would be reasonable. And I also accept that it may be that you reach different conclusions in respect of past performance, as it were, and the future. It's conceivable and it would be an approach that your Ladyship may adopt to say, "Well, this is what's been done to date. That's perfectly reasonable. In future more options would be reasonable or this one is and this one isn't". So there are a number of ways in which your answers to the questions may breakdown. My final introductory comment is this, and it's perhaps obvious to your Ladyship already, it is difficult, if not impossible, in respect of many of these questions, 11, 12 and 13, to work out where my clients' interests in fact lie or, indeed, any of the members. Someone can see where it's likely to lie, but the dividing line between the various cohorts on some of them one simply can't tell.

MRS JUSTICE ASPLIN: Yes, so your position is truly one of arguing----

MR BRYANT: Indeed.

MRS JUSTICE ASPLIN: -- in order to put all of the points to the court.

MR BRYANT: Indeed.

MRS JUSTICE ASPLIN: I understand that.

MR BRYANT: I'm grateful. Coming to the specific question of recovery of MPVA costs, there are four options, as your Ladyship knows. The order in which I put them in terms of attractiveness is as set out at para.38 of my skeleton argument. It's the opposite of the order that Mr Moeran has just taken you through. And I say, as an overarching point, which applies to this question and indeed to the remaining questions under para.11 of the claim form, that there is a lot to be said for adopting the same approach for all of the various types of cost. I argue principally for equal distribution between the schemes or what I've called "tweaked" equal distribution, and I'll come to that in a moment. But in terms of simplicity of approach, and therefore ease of administration and therefore minimum cost, adopting the same approach across the board has, I say, considerable attraction.

So equal apportionment between the schemes: you have the point already, my Lady, as clear from discussions with Mr Moeran a short while ago, the members were allocated to schemes, it seems, largely at random. In fact it seems it wasn't quite as random as one might think. It was more a question of timing. What seems to have happened, and I'll be corrected from my left if I get this wrong, was a pair of schemes was filled up with members, MPVA loans were going to and fro, not precisely matched between the schemes but for the most part. When the number of members in each of those paired schemes got close to a hundred, with the obvious increased requirements on the scheme, they started to fill up the next pair and so on. So in that sense it's a question of timing rather than being purely random but the effect is much the same. Members had no choice or, indeed, in the case of the defendant and one imagines a large number of others, a knowledge of which scheme they were going into or which scheme they received an MPVA from. And, as I mentioned yesterday, Mrs Goldsmith doesn't still know where her payment came from in terms of scheme. So that's the starting point, as it were.

There was, even if, as I think Mr Tweedley suggested, there was an intention to match members. It simply didn't happen in practice, as far as one can tell. And again I made the point yesterday, it's in footnote 9 of my skeleton argument, there is, as I put it there, "more than a hint" that there may never have been an intention to match members. That is, I suggest, supported by the defendant's evidence of her own situation where she was effectively bumped, is it were, into signing some forms overnight; told there was a very open case that she'd been matched to. No evidence that there wasn't anyone identified with whom she was to be launched at all, simply, it seems, a device to get people to sign up quickly.

The principal point I make in support of equal apportionment is the very point Mr Moeran read out to you. It's para.40(c) of my skeleton argument. If you were to – or if the trustee were to allocate costs on one of the pro rata bases, second to fourth options in the order that I'm arguing, that would tend to prejudice members of some schemes at the expense of members of other schemes as a result of matters entirely out of any of the members' control. And I take the point a little further, whichever of the second to fourth options one might look at, it's going to have a different disadvantageous effect on a different cohort of member. I think the way Mr Moeran put it was none of these options is perfect. Well, I accept that but any of the pro rata options will skew the unfavourable treatment, as it were,

one way or t'other. The least unfavourable, the least worst option, as it were, on that basis, in my submission, would be some sort of equal allocation between the schemes. It's very rough and ready. It's not going to be in any sense a perfect attribution of cost, but it's simple and it's cheap and it, I suggest, does the least skewing of disadvantaging one way or the other between the different, at the moment unidentifiable, cohorts of member.

Mr Moeran took you to some of the tables at the back of bundle 2A. I think it was page----

MRS JUSTICE ASPLIN: Yes, it's 363.

MR BRYANT: 363 on the middle numbering. He's taken you to that table and I won't take up time unnecessarily doing so. But if you turn on a couple of pages to p.365, one has a similar table but this is perhaps helpful. It shows you presumably insofar as the claimant has been able to reconcile the figures, so, as I understand it, it's not – it's not a precise and complete set of figures, but doing the best that they can on the information they have, this tells you totals of loans made to or from particular schemes. Those are the outside column and row at the bottom. And also a breakdown of where each scheme's loans have gone to, and where each scheme's loans have come from, and it's quite a helpful table in that sense. It gives one an overall flavour of the figures.

Again by way of illustration, Mr Moeran took you to the figures in the previous table for Grosvenor Parade. Perhaps I can do the same. If you look in the – it's the fourth column along, MPVA loans from Grosvenor Parade, we have a total of 475,000-odd, which I think is the same figure----

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: -- as we've seen in the----

MRS JUSTICE ASPLIN: In (inaudible).

MR BRYANT: -- in the previous table. But then if you look in the left-hand column, three inches down, MPVA loans to Grosvenor Parade, one goes across and the figure is 623,135.

MRS JUSTICE ASPLIN: I'm sorry, I'm lost with that.

MR BRYANT: My apologies.

MR MOERAN: The far right column.

MR BRYANT: The far right----

MRS JUSTICE ASPLIN: Yes, yes, I've got it. Sorry.

MR BRYANT: The far right column, third entry down, 623,135.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: Then if you track to the left along that row----

MRS JUSTICE ASPLIN: Yes, yes, I'm sorry.

MR BRYANT: -- one sees that. That's the total loans insofar as the claimant has been able to work it out.

MRS JUSTICE ASPLIN: So the 475 is the amount which Grosvenor paid out?

MR BRYANT: Yes.

MRS JUSTICE ASPLIN: And 623 is the amount which members of Grosvenor received?

MR BRYANT: Yes, as I understand it, subject to the ten per cent plus of figures that haven't been reconciled yet presumably. And, similarly, one has perhaps a more stark difference between the money in and the money out in respect of the Woodcroft House Scheme, and the respective figures are – it's the third column from the right-hand side – total loans from Woodcroft House, so money being paid out by that scheme, just under 600,000; total loans to Woodcroft House, so money received by its members, significantly under 300,000, so again a significant difference in figures. Differences in figures for the other schemes but less stark. And that, in my submission, just illustrates the problem with the various pro rata methods. Whichever one----

MRS JUSTICE ASPLIN: I'm so sorry, yes.

MR BRYANT: -- whichever one adopts is going to skew the figure – the disadvantage one way or t'other between members of different schemes. And whilst I accept that it's rough and ready, is the way I described it earlier, it's very much an imperfect solution but I suggest less imperfect than the others, simply to adopt equal allocation across the schemes. Paragraph 41 of my skeleton argument, again I'm sure your Ladyship has the point already, Mr Moeran used Grosvenor Parade – I think it was Grosvenor Parade – as an example of one of the problems that will be caused by equal allocation. He says, quite rightly, "Well, look, it's not got as many members by a long way; not got as much money by a long way". Again doing the maths, one doesn't reach in any sense nice round figures or proportions, but if there is concern that dividing the bills by six between all these schemes creates unreasonable inequality between the big schemes and the small schemes, then, again adopting a fairly rough and ready approach, what seems to have happened, again going back to the history as we understand it, the last two schemes to start filling up with members seem, on the figures, to have been Grosvenor Parade and Woodcroft House. That, I surmise, may well explain why fewer members, less money in, less money out. But, again very rough and ready, if absolutely equal apportionment, i.e. a sixth of the cost to each scheme, is felt not to be a reasonable or the most reasonable approach, then I suggest a sort

of tweaked equal apportionment might be a more reasonable approach and the suggestion that I've made is, well, the four large schemes pay a fifth each and the two smaller schemes, which, again very rough and ready, are about half the size of the others ish, pay a tenth each. In fact the maths becomes rather easier if you do it that way. You have twenty per cent of the cost for four of them and ten per cent for the others. I accept that it's mathematically not in any sense a perfect solution, but it has the distinct attraction, I say, of simplicity, ease of administration and therefore unfairness, a perceived unfairness between the schemes may, to some extent at least, be outweighed by the saving ultimately in cost. That's all I need to say in favour of equal apportionment, but in my representative capacity I need to go through the other options, albeit I can do it fairly briefly. The next, on my list of preference, is apportionment by reference to assets held by each scheme. This, as Mr Moeran confirmed this morning, is the method adopted to date and, if you're against me on the equal apportionment or the tweaked equal apportionment options, then this does have the distinct advantage that it would involve no change of methodology, not change of the existing administrative processes, so again it's going to be cheaper to – well, not to put in place because it's already in place. That is its distinct advantage over the other methods, I suggest.

You have two sub-options that have been put before you by the claimant. One is value of assets transferred in in the first place; the other is using a current or recent valuation of assets. In my submission, the distinct preference between those two sub-options must be some sort of current or recent value approach. There has been significant recovery of assets. We heard about that in Mr Moeran's introduction yesterday. Some of that is specifically attributable one or a few schemes. Particular assets, it appears, were the subject of investment by not all of the schemes. There wasn't a sort of global approach. And insofar as the relative asset levels within the schemes has changed with time, in my submission it's only right, if one is going to adopt this pro rata approach at all, to do it on the basis of the best evidence one has on the current financial position. If the aim is to make the richer schemes pay more, one needs to know which schemes are richer now, not five, six, seven years ago. Excuse me.

Mr Moeran's principal objection to that approach, i.e. current valuation rather than value of assets transferred in, appears to be that it will be a bit complicated and expensive to do that, but, in my submission, the trustee has certainly been undertaking some sort of valuation

because we've got an awful lot of very precise figures in the evidence, and the evidence suggests that a number of members, a significant number of members, are – have reached 55 and are entitled to take benefits or transfer out. One of the later questions, question 13, deals with the valuation for transfers out, so it's obviously something that is on the trustee's to do list. And, in my submission, it seems inevitable that valuation of the assets will have to be done even if it hasn't been done already, and it will have to be done on a fairly regular basis as members put in transfer requests and so on. It is right, and again it's the subject of later questions, question 13 again, well, one has some investments. There's a property investment in the Caribbean, I think. There's also the question of how you value the MPVAs, but again those are matters that will be resolved today, and those are matters that will have to be – the trustee will have to make decisions about that in any event. So, in my submission, current valuation is significantly preferable to valuation on a transferred in basis.

The third option in terms of my order of preference would seek to allocate costs to individual schemes on an individual basis. As I understand it, this would mean each scheme bearing the cost of seeking to recovery MPVA loans made by that particular scheme. This, again subject to the overarching point I've already made that MPVAs made by a scheme entirely outside the control of the members and the amounts paid out not, on the face of it, directly proportionate to the number of members or the amount of money transferred in or the amount of money received by those members, and I take you back to the figures at p.365. So this option again would skew matters in a different direction.

But this option, and indeed the final option, which would be apportioning costs by reference to MPVAs made or recovered, would have the distinct disadvantage that it may well lead to entirely anomalous results. One doesn't know how the membership breaks down between schemes in terms of likely level of recovery, if the trustee, pursuant to your judgment of yesterday, seeks to recover from a significant proportion of the membership. One simply doesn't know. One doesn't know the breakdown, therefore, of likely recovery at all and one might well be in the situation, and, in my submission, there is a significant risk of this, to take it to perhaps an absurd extent, but you will get the point I'm sure, one scheme may have made significantly more MPVA loans than another, but it may recover none of them. The other scheme may have made half the loans but it may recover all of them. So, in that sense, either of options 3 or 4 could lead to entirely anomalous and extremely unfair results.

Dealing specifically with option 4 and the two sub-options, as it were, they are MPVAs made, on the one hand, or MPVAs recovered, on the other, pro rata by reference to.

Mr Moeran describes Chief Master Marsh's suggested sub-option, the apportioning costs by reference to MPVAs recovered, as "almost untenable" and I don't think I would disagree with that at all. I think the way he puts it in his skeleton is "administrative nightmare", and again I think that must be right.

In terms of apportionment by reference to MPVAs made, at the risk of repeating myself, one has exactly the same overarching and specific points that I've already made, and principally on this option, as indeed option 3, the risk of entirely anomalous and grossly unfair results.

My Lady, unless you have any questions, I think that's all I can usefully say on those matters.

MRS JUSTICE ASPLIN: Thank you. Mr Moeran, do you want to add anything?]

MR MOERAN: Two very short points. If one were to look at Mr Bryant's twenty per cent or ten per cent dividing up, effectively this accepts in principle division on an asset basis, so why not do it on an asset basis simplicita? And the reason I didn't take your Ladyship to receipts by the members of the schemes of MPVAs, receipts of MPVA's levels, is that is irrelevant to the recoveries by them, by those member schemes. It's all about what you made out and what you get back rather than what your members received, because of the reciprocation nature of this.

MRS JUSTICE ASPLIN: Thank you. I think I'm going to, as I say, deal with each issue as it arises.

(See separate transcript for judgment)

MRS JUSTICE ASPLIN: Is that sufficient for the purposes of the trustees and have I dealt with all of the options adequately and properly?

MR MOERAN: Yes, my Lady. That's very helpful.

MRS JUSTICE ASPLIN: Thank you. I've put it in that way and also, therefore, adopted a slightly shaded version because I don't think it's appropriate for me to say that one way – in the circumstances, that one way is the only way, but it's for the – I have said that I think one or two ways are not good, but within those that I've said may be the way, or are perfectly reasonable, I think it's also appropriate, therefore, that the trustee has the discretion,

depending on the circumstances, to determine what is the fairest in the circumstances as they pan out. I will say, it is possible that that may change.

MR MOERAN: Yes, absolutely, my Lady, and that is extremely helpful. That was question 11(i), but with the answer to question 11(i) in mind, it actually answers quite a lot of question 11(ii) and (iii) but I will go through them stage by stage and I would suggest we stick to the breaking it down. Now, 11(ii) is, of course, the tax bill. It's a much simpler question. It's effectively on the conform it's simply between should the cost of the tax bills be apportioned equally between the schemes or apportioned pro rata by reference to assets. And I think I cannot see any reason why your Ladyship's reasoning on 11(i) should not apply *mutatis mutandis* to 11(ii); so, in other words, applying the same principles on those two options you will end up apportioning between the schemes retrospect – in the past pro rata by reference to transfer in is fine, but going forward it would be better to do it by means of an annual assessment of assets, rather than – and apportioning equally between the schemes would not be appropriate. It's effectively the same points made again.

The only variation or divergence from the particular point on 11(ii) is a point that I made in my skeleton at paras.144 and 145, and, my Lady, the point is very simply this. When we were before the Chief Master last year we made it very clear, and there was a discussion of it, that if we thought of or if anybody else thought of another alternative way of apportioning costs or apportioning assets or the like, we would raise it with the court and it would be open to the court to consider it. And whilst writing the skeleton I came up with what I should have thought of some time ago, which is apportion the costs of the tax appeals by reference to the MPVA sums paid out. And your Ladyship has said, in relation to the recovery of the MPVA costs, that would be an acceptable way of apportion. It's different. It's actually – I would suggest actually a slightly more powerful argument in relation to the tax costs because the charges that have been levied against the schemes, the scheme sanction charges, are expressly on the basis of the MPVA payments made by the schemes. So whereas you could apportion costs on the tax appeals by reference to assets, as a rough and ready way of getting benefit and cost and dividing up risk and so on, in this particular case there would be certainly initially an identity of cost and benefit in dividing it up by reference to the MPVAs made.

Now, I say initially because, of course, it may be, if we were to succeed on a *Hillsdown Holdings* argument, it then starts varying depending on which members can repay the

MPVAs as to how the tax charges ultimately end up. But at least initially there is an identity of benefit and burden that way.

Now, I would suggest it's not expressly on the claim form, it is, however, covered by 11(ii)(c) on some other basis and, if so, what basis – the usual catch-all – I would suggest in the circumstances that it would be appropriate for your Ladyship to conclude (1) 11(ii)(a), apportion equally between the schemes, is not appropriate; 11(ii)(b)(i), to apportion by reference to sums transferred in prior to claimant's appointment, is appropriate for up-to-date costs; 11(ii)(b)(ii), apportion by reference to assets on an annual assessment, is appropriate for going forward costs, but also as another option, not an exclusive option but as another option, on the basis of MPVAs made.

MRS JUSTICE ASPLIN: I understand.

MR MOERAN: My Lady, that's all my submissions on that.

MRS JUSTICE ASPLIN: Thank you. Mr Bryant?

MR BRYANT: My Lady, I can be, I hope, even briefer. In terms of equal apportionment, you have my submissions. They apply to this point as much as they did to the first point. I think, certainly my note of your judgment on this was that it – you were almost convinced that equal apportionment was not within the bounds of reasonableness but presumably, by definition, not quite convinced that it was outside. I think that's as far as I can put that point.

In terms of the other options, again you have my point about the preference for current valuation as opposed to transfer in and, indeed, it found favour and Mr Moeran quite fairly has put his points on that basis. His new option, as it were, apportion by reference to MPVs paid out, the only point I really make on that is, I can see why he's put that in as an option and it's a matter for your Ladyship what you make of it and whether it's within the bounds of reasonableness and, if so, how close to the centre or close to the edge. Ultimately the tax both in terms of the scheme sanction charge for the trustees and, indeed, for the members, is not simply going to be a proportion of MPVs paid out by each scheme. Certainly, as I understand it, the Revenue has put a number of alternative arguments and I think their taxing----

MR MOERAN: That's in relation to the members. In relation to the schemes themselves, scheme sanction charges are in fact calculated by reference to the MPVAs made. It's a peculiarity but you have therefore a disconnect between the way the taxing – Is that right?

I'm just double-checking with this. I'm getting a – I looked at the calculations and I was pretty sure that it was, in fact, a calculation based on that figure.

MRS JUSTICE ASPLIN: I think – I think the answer must be that----

MR MOERAN: We're not absolutely certain.

MRS JUSTICE ASPLIN: -- at the moment the Revenue seem to be running a lot of horses in the race and it's difficult to tell.

MR BRYANT: They're trying to run as many horses as they can in parallel.

MRS JUSTICE ASPLIN: Yes, use both ways of coming home.

MR BRYANT: And, I'm tempted to make an Ascot reference which I shall refrain.

MRS JUSTICE ASPLIN: Well, I was just thinking about Ascot too!

MR BRYANT: Which one is going to win one simply doesn't know at the moment, plus one has the *Hillsdown* arguments which may throw the whole thing up in the air, and to peg costs of the trustee's tax appeal by reference to the MPVs paid out when that may well not be the final basis on which the tax bill is calculated, that would not be a reasonable approach. I don't think I can say anything more.

MRS JUSTICE ASPLIN: Thank you.

MR MOERAN: I think that must be correct, I think, yes. We don't know.

MRS JUSTICE ASPLIN: We don't know?

MR MOERAN: We don't know.

MRS JUSTICE ASPLIN: Yes.

(<u>See separate transcript for judgment</u>)

MR MOERAN: My Lady, that's very helpful. We can turn then to question 11(iii). Can I take your Ladyship to question 11(iii) in the bundle, bundle 1, tab A8, p.27? I'm doing this because I want to highlight what is actually being argued for. Again, I'm going to obviously adopt the same arguments in relation to apportioned equally between the schemes, but 11(iii)(b) is what we're putting forward.

MRS JUSTICE ASPLIN: I'm sorry, 11(iii) is?

MR MOERAN: The costs of recovery and management of non-MPVA assets. So, for example, the Freedom Bay asset or whatever other assets there are. Now, as Mr Bryant pointed out, assets are held by the schemes jointly but not necessarily by all of the schemes, and it may well be – I think to date there are no particular assets that have been held by just one scheme but it may well happen in the future that they are. So what we are proposing is that the costs of recovery and management of assets should be – and it breaks down as the first

part outside the brackets, "allocated on an individual basis with each scheme bearing their own costs in relation to assets held", and effectively held by them solely. So if we've got an asset held by one scheme alone, that scheme bears all the costs of recovery and management of that asset, and that must be right. But, in the brackets, "(and where an asset is held jointly by the schemes it should be apportioned pro rata between the relevant schemes relative to the proportionate holdings of the asset in question)". So, say, for example, it's held by four schemes, the costs of recovery and management of that asset should be held – borne just by those four schemes and pro rata depending on how much they hold. And this is absolutely fair. It's absolutely common sense and it also equates to what one would do on an equitable accounting exercise of jointly held assets. So we think this is actually the most straightforward question on the claim form and that's it.

MRS JUSTICE ASPLIN: Mr Bryant, what's your position?

MR BRYANT: You have my arguments on it. For apportionment, I have heard twice how favourably that was.

MRS JUSTICE ASPLIN: No, no, no, but it's your – that is the position that you're required to take.

MR BRYANT: Of course. And I'm not sure I can improve that.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: The only thing I would query, and perhaps it's something I should have asked Mr Moeran earlier, my understanding had been that costs to date, as in all costs to date including these, had been allocated on the basis of transferred pro rata by----

MRS JUSTICE ASPLIN: By way of transfer in.

MR BRYANT: -- reference to transfer in. That's not one of the options put forward here so I wonder if there needs to be consideration of that, but in terms of my submissions as to whether that's----

MRS JUSTICE ASPLIN: It's just (inaudible).

MR BRYANT: -- a good idea or a bad idea it's----

MR MOERAN: No, that's actually rather helpful and thank you for drawing that out. Some – I've just taken instructions – some of the investments, where they are held just by a few schemes, the costs have actually been ring-fenced. I'm sorry that didn't come out in the evidence. There's one complexity I should highlight. So the South Horizon asset----

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: -- was the Cyprus property that was sued to recover. Of that a certain amount of money came in and was immediately – some of that money that came in was dispersed for

those – for the South Horizon legal costs, so I think the effect of that is that those particular costs will have been borne just by those four schemes for that South Horizon investment? So, yes, I think actually I have to correct the slightly overly general statement about all costs being apportioned pro rata by assets transferred in. In a specific number of assets specific management costs they have actually been ring-fenced but I can't give you details any further than that. I'm sorry.

MRS JUSTICE ASPLIN: Yes.

(See separate transcript for judgment)

MR MOERAN: My Lady, that's very helpful. Having just double-checked, and this is just for the transcript really, I note that in fact our evidence did say at para.187 of Mr Fairhead's first witness statement, that on the costs and recovery of recovering management of non-MPVA assets to date, "where practicable costs relating to specific investments have been allocated to specific schemes". We did actually have that in evidence. I just missed it.

MRS JUSTICE ASPLIN: I was going to say, and if and to the extent that that is not the approach which has been adopted in the past, I think that given that there is not in this case a proper reason for a watershed between the past and the future, and that that second option ought to be adopted across the board.

MR MOERAN: Fortunately it has. My mistake for not having it there before. Now, that leads us to the last of question – parts of question 11, 11(iv), which is other general costs, and this is in relation to legal or administrative – costs of legal or administrative issues which apply to or in common to all the schemes, and again it comes down to the options being equally between the schemes or pro rata by reference to value of assets. Your Ladyship has heard my submissions on the two distinctions. There's nothing to – there's nothing to change those on this particular point.

MRS JUSTICE ASPLIN: And, I'm sorry, the two options are?

MR MOERAN: Divide the costs equally between the schemes or divide them pro rata by reference to the assets, and there's sub-options there, pro rata by reference to assets transferred into the schemes or pro rata by reference to annual assessment. And we say that it must follow that your Ladyship's earlier conclusions on this point apply *mutatis mutandis*.

MRS JUSTICE ASPLIN: So – I'm sorry, I'm just making it clear for my notebook – my note. Thank you.

MR MOERAN: So a good example of this would be, for example, the costs of the proceedings before Mr Justice Bean, or – or, in fact, the costs of today. It applies equally or it applies to all the different schemes. How do we divide up the costs between the different schemes?

MRS JUSTICE ASPLIN: Thank you. Mr Bryant, do you say that this is different?

MR BRYANT: No.

MRS JUSTICE ASPLIN: No.

MR BRYANT: I can't see how I can.

MRS JUSTICE ASPLIN: I was just wondering whether you might say that these are common – completely common administration costs. They were necessary in order to determine, for example, the legal issues before Mr Justice Bean, to actually determine central matters in relation to the nature of these payments and that, therefore, possibly there was more to be said for the equal allocation?

MR BRYANT: Well, my Lady, yes, and I can see that that would support an argument that it perhaps drags equal apportionment back slightly from the precipice at the end of reasonableness.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: But terms of – but based on your Ladyship's conclusions on the first three parts of question 11, I think it's difficult for me to suggest that it swaps the order, as it were.

MRS JUSTICE ASPLIN: Thank you.

(See separate transcript for judgment)

MR MOERAN: My Lady, that's extremely helpful. We will work out a way of putting that in in directions. I suspect that what I might end up doing is putting simply down what – saying something along the lines of, "The trustees may apportion", blah blah blah, "on the following basis", and then just not saying anything about, for example, equal apportionment because that avoids the issue of saying it's not absolutely out there but it's extremely unlikely, and just leave it in the judgment and simply expressly – expressly embody your Ladyship's judgment that you may definitely do these things and then we don't need to cover the rest of the things. We've got the judgment in the background if we need to go back to it for guidance.

MRS JUSTICE ASPLIN: I have no intention, Mr Moeran, of making life difficult or making life uncertain for Dalriada, quite reverse, that's why they've come here and they need certainty, but also, for the purposes of the members, they need certainty because they don't want there to be any leakage of costs, any further expense, to have to be expended by Dalriada in order

to determine what to do. That is not my intention because that is of no benefit to anyone, particularly, at the end of the day, to the members because it will just cost more and do more harm. But by not absolutely ruling out the equal apportionment, what I'm saying is that it's not for me to say that in all circumstances a reasonable trustee could not do this, and therefore it's not, it seems to me, appropriate for me to say, "You may not", and that is not what I'm saying, but I'm giving, I hope, a very clear indication of what, in the circumstances as they are presented to me, is the appropriate way of doing things.

MR MOERAN: And that is – I mean, that's exactly what Dalriada needs and it's that – your judgment does that perfectly and, I think, if we put down what we may do and then leave silent on the other issues, because, as your Ladyship says, your Ladyship considers, and I agree, not saying – your Ladyship is not saying we definitely can't do it but it's, as – to use your Ladyship's phrase – at the precipice. We don't need to have long words about a hypothetical situation. We've got enough to administer the scheme carefully and reasonably, so that will suffice.

MRS JUSTICE ASPLIN: Thank you.

MR MOERAN: That takes us on to question 12. Now, question 12 is dealing with the allocation of costs and assets within a scheme between the members. So question 11 was between the schemes; question 12 is within a scheme. And when I was opening on Tuesday I took your Ladyship to the deed rules and I showed your Ladyship the non-sectionalised, or otherwise known as non-segregated, nature of the schemes funds, and I also highlighted the statements in the background documentation to investment facilities, and the parts of the rules that deal with investment facilities, and I also highlighted to your Ladyship the evidence of what actually happened, and I mentioned a few minutes ago the fact that the investments bore no relation to what was – what was, to use a loose term, "sold" to the prospective members. And, indeed, one of the complaints of the members, as Mr Bryant's skeleton emphasises and Mr Bryant emphasises, is that the members' funds were invested in, I think the phrase is, "highly speculative investments", and that is polite, over which they had absolutely no say.

Now, with those background details in mind, I would briefly remind your Ladyship of the precise terms of the schemes' deeds and rules because, of course, that's the starting point for all this. It's very quick and it's very simple. It's in tab – bundle 2A, and the relevant provisions are – starts with clause----

MRS JUSTICE ASPLIN: Where am I?

MR MOERAN: This is bundle 2A, p.6, middle number, p.6. Now, the costs clause is cl. 10 and it's a very wide provision.

> "Any costs, liabilities and expenses properly incurred by the Trustees in connection with the Scheme shall be met out of the Fund. The Trustees may decide that specific costs arrangements should apply to any transaction that applies to a Member's Account".

So that looks like that it is in default of that discretion being exercised it's borne by the fund as a whole and, therefore, it would in fact be borne pro rata by the members in proportion to their member's account, and I'll come back to that in a moment, in proportion to the total of all the members' accounts. Now, that's the – that's the cost provision; nice, simple, clear. There is a discretion to apply particular cost arrangements in relation – to particular transaction to individual member's account. Simple discretion.

Assets, slightly more complicated. Your Ladyship has already seen there's no real express provisions as to how to deal with it in the clauses. Clause 8 is about as close as one gets. It's the investment clause. 8.1 is the power to invest in their absolute discretion as though they were beneficially entitled. 8.2 is the relevant one for these purposes:

> "The Trustees may select and notify Members of any Investment Facilities. The Trustees may add to, vary or withdraw any Investment Facilities."

Now, the reason that is relevant is we turn to the rules, which are at p.11. Section 11, the starting point is – I'll start with "Members' accounts" definition.

> "'Member's Account' an account under the Scheme referable to the Member which account may comprise or include any contributions, payments or transferred-in amounts and any investment profit or loss."

Now, that is really about as good as the wording gets in this particular case. It's not eloquently put. I'll come back to what we say that means in a moment. The only other assistance that we really get is from the term "investment facilities" means:

> "The Investment Facilities, if any, specified in clause 8.2 and rule 6".

Then we go on to rule 6, at p.12, and it's:

> "The Trustees may (but shall not be obliged to) select and make available Investment Facilities for the investment of a Member's Account. The Trustees will notify the Members of any Investment Facilities. The terms of any Investment Facilities are decided by the Trustees. The Trustees can decide to make available different Investment Options … to different Members."

Now, this didn't happen. The reason I'm flagging this up is that, when you then jump down to 6.3:

> "When a Member joins a Scheme where the Trustees have selected and made available any Investment Facilities, each Member will be invited to select which of the available Investment Facilities is to be used for the investment of their Member's Account".

Now----

MRS JUSTICE ASPLIN: If that had taken place one could understand the business about taking the profit and loss in your own notional pot.

MR MOERAN: Exactly, and that's what I was highlighting.

MRS JUSTICE ASPLIN: But it didn't.

MR MOERAN: But it didn't, so what I'm – what I was emphasising there was this is a non-segregated scheme and it's non-segregated, we've already seen – it's actually cl. 1.2, we saw it on Tuesday, it's p.3 and the classic, "No person has any right to any particular assets of the Scheme".

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: You've seen the definition of "Member's Account", and in like way, with almost all money purchase schemes today, what happens is you get your member's account and then you'll benefit to whatever your member's account pays for. Interestingly, the member's account definition is: "[it] may comprise" – it says "may" but I think that must be obligatory effect.

> "… [it] may cay comprise or include any contributions, payments or transferred-in amounts [rather than 'assets'] and any investment profit or loss."

It doesn't say profit or loss on those assets, because they're not assets, they're amounts. It's investment profit or losses, and we say what that is – what that means is, in the absence of nominal segregation through investment facilities possibly. You are simply on a basis of you put your money in, you get a share of the fund and then it's just an account. Every time there's a profit or loss on any assets you take your share of the profit or loss.

I emphasise the investment facilities because it does show that it is possible to have nominal segregation and it is arguable, hence the question today, that you could have some sort of attribution, but it's whether it should happen. Now----

MRS JUSTICE ASPLIN: In the circumstances----

MR MOERAN: In the circumstances----

MRS JUSTICE ASPLIN: -- which have happened.

MR MOERAN: -- that have occurred. Exactly. Now, that – with that in mind, my Lady, I then take your Ladyship back to question 12(i) which is the assets point. Costs is actually, in many ways, simpler but the assets is the – is the starting point. Question 12(i):

"Whether in determining and calculating the value of a member's Member Account".

And then 12(i):

"The Schemes' assets (including any gains or losses thereon) should or may be attributed to the Member Accounts".

And what happens is, you divide up in the following order: (1) just pro rata by reference to value of the funds transferred into the relevant scheme by each individual member in proportion to the total sums ever transferred into said scheme. So this is the simplest way, and the one that we're arguing for in my – as our starting point. You simply take the amount transferred in and it's everybody that has that same share of it. Now, it is very simple and it is, in a crude way, fair because it stops people being affected by the random order in which they joined and the random order in which the scheme's assets were then expended. So we say that that is the most sensible and fairest way to do it.

If one isn't going to do it that way, then you turn over the page to 12(i)(b), pro rata – and this is basically on a sort of unit trust – The first one is a very crude unit trust basis, but the second one is a proper unit trust basis where it's pro rata by reference to value of funds transferred into the relevant scheme by each individual member in proportion to the "value of the funds in the scheme at the date of the transfer in, subject to any transfers out or other determination", blah, blah. Now, what that's doing is on January 1st 2011 scheme 4 starts and the first member transfers in £10,000. On January 2nd, £5,000 is used for an MPVA, which we are going to say is value at nil. On January 3rd the next person transfers in another £10,000. On 12(i)(a) they both have equal shares because it's just £10,000 transferred in, £10,000 transferred in. On 12(i)(b) member 1 has half the shares of member 2, because by the time member 2 transferred in the assets of the scheme were only £5,000 and he was transferring in £10,000. He's transferring in twice as much as the original assets. That's the difference between 12(i)(a) and 12(i)(b).

Now, the difficulty with this is that it would be hysterically difficult to work out how it went. It would be completely random as to who got what share of what assets, or it really – actually strictly speaking, it wouldn't be who got what share of assets. It's who got a valuation or a purchase of a unit based on what those assets were worth at the particular

time. It would be almost a tracing exercise. Not quite, and I'll – because the tracing exercise is 12(i)(c). It will be almost a tracing exercise for no good reason and it would be (a) difficult and (b) expensive to do this.

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: And then you take that to its logical conclusion and say, well, if you are indeed transferring in – January 1st, transfer in £10,000 and that MPVA goes off that way – well, why not attribute that particular asset to the individual member, and that's the nominal segregation route. And, again, it's possible to do this but why would one? It would be utterly random and some people would do much better than others because – And the person who did absolutely best would be the person who transferred in just before the, in this particular case, just before the, say, Hyper investment was made because we actually got – we got back more than the Hyper investment that was made out.

MRS JUSTICE ASPLIN: But it wouldn't make any sense surely because these members hadn't – were nothing to do with what investments were made?

MR MOERAN: Yes, not only nothing to do with it but the investments were actually contrary to what little they were told was going to be happening. So actually these investments were, well, at least arguably in breach of trust, definitely contrary to what the members were told and, if there is indeed a loss or a consequential profit on a breach of trust, that really ought to be attributed to the fund as a whole, which brings us straight back to 12(i)(a), pro rata by reference to amount transferred in. It is the simplest, it is the fairest way forward.

And the last point is that 12(i)(a) avoids all – not only avoids the complexities and difficulties but it also massively avoids the difficulties of calculating the value of the MPVAs in particular. Now, when we get to 13 we will be arguing for the assessment of MPVA values to be nil at least until they're recovered, and that is a practical and that's pretty much the only sensible way to do it. But eventually we will assess that some of the MPVAs are genuinely valuable and some are not, and when they were made there must have been some sort of value to the MPVAs of some sort. We're saying they should be valued at nil for administrative purposes because that's the only way we can deal with it, but if you're going to go down into some sort of unit trust basis, there will be not only unfairness but unreality at some point. So that's why we go in that order.

My Lady, that is, in a nutshell, or indeed a long-winded nutshell, our submissions on 12(i).

MRS JUSTICE ASPLIN: Thank you. Mr Bryant?

MR BRYANT: My Lady, you have the three options that are put forward. As before, I argue them in the reverse order to----

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: -- Mr Moeran. The first, in my order of preference, nominal segregation; the second pro rata by reference to value at date of transfer in as a proportion of total value of scheme funds at that date, and the third, in my list, the first on Mr Moeran's, pro rata by reference to value transferred in as a proportion of the total funds transferred in at whatever date they came in.

With regard to the first option on my list, nominal segregation, Mr Moeran's taken you to the trust deed and rules. It's clear the trustees had power to do this and, indeed, still do have power in terms of what I call the investment funds. But that, as we know, didn't happen. My duty, as you know, is to argue a positive case if I see that it is reasonably arguable.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: And in terms of the past I don't think I reasonably can. Effectively treating members who have already been treated in a pretty arbitrary way in a further arbitrary way by assigning particular assets to them, and giving them no choice, would, if anything, compound problems.

As I've suggested in my skeleton argument, however, in terms of the future – and I say this on the basis that one of the principal concerns that members have expressed so far is the complete lack of control or choice that they had, whatever the brochures may have said, whatever the scheme rules may say – and it would certainly, in my submission, be reasonable for the trustee for the future to provide investment options and such. Now, how much that forms a part of your judgment is a matter for your Ladyship, but I think it appropriate to make that point.

In terms of the second and third options on my list, Mr Moeran's first and second----

MRS JUSTICE ASPLIN: So this, in fact, now is going to what, is pro rata in relation to what was transferred in?

MR BRYANT: It's pro rata in relation to what was transferred in----

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: -- and the difference between the two is whether it's a proportion of what's in the scheme at the date you transfer in and what's – what's been transferred in as a – as a total of what was transferred in----

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: -- at any stage.

MRS JUSTICE ASPLIN: And so you're doing Mr Moeran's (a) first, which is pro rata on the basis of what was transferred in as a whole?

MR BRYANT: That would, I think, in terms of the order of arguments in my list of preferences, that would be----

MRS JUSTICE ASPLIN: Second.

MR BRYANT: I think pro rata by reference to the total transferred in----

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: -- as a proportion of the total sum ever transferred in----

MRS JUSTICE ASPLIN: Yes, that's his (a).

MR BRYANT: That's his (a), yes.

MRS JUSTICE ASPLIN: And it's your second in your order of choice?

MR BRYANT: No, that has to be my third choice.

MRS JUSTICE ASPLIN: That's your third choice?

MR BRYANT: Yes.

MRS JUSTICE ASPLIN: So your – so you are in reverse order from Mr Moeran?

MR BRYANT: Yes, we----

MRS JUSTICE ASPLIN: I didn't understand quite. I'm sorry. So you are going back up, (c), (b), (a)----

MR BRYANT: Yes.

MRS JUSTICE ASPLIN: -- and (c) was nominal segregation.

MR BRYANT: Yes.

MRS JUSTICE ASPLIN: That's what you've covered. And (b) is pro rata on the basis of what was transferred in but at – taking account of----

MR BRYANT: At the date of the transfer in.

MRS JUSTICE ASPLIN: -- the date when it came in. So that (b) is your second option?

MR BRYANT: That's----

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: His (b) is my (b).

MRS JUSTICE ASPLIN: Yes, exactly. I'm so sorry.

MR BRYANT: No, not at all. I think, if it helps, the list----

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: -- the table at pp.31 and 32, which is tab 9, I think, of bundle 1, is----

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: -- perhaps makes it more obvious. Having said all that, I can see the force in Mr Moeran's submissions----

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: -- concerning the difficulty of valuing the assets at pretty much every day over a six, nine, ten month period where one has monies flowing in and out on what appears to be a fairly regular basis and not a basis that, I think thus far, has been entirely reconciled. And acting, as I must, in the best interests of the defendant and the members, it seems to me that that is – well, it's both our middle options but it's – if it's better than nominal segregation it's not much better. I can see that it would be extremely difficult to administer and extremely expensive, and if the aim of this particular exercise is to bring clarity and stop, as your Ladyship put it, leakage of costs, that is not a way to achieve that.

MRS JUSTICE ASPLIN: No. And that's brings you to your----

MR BRYANT: And that brings me to----

MRS JUSTICE ASPLIN: -- at least on your list, to your least favourite.

MR BRYANT: -- on my list to my least favourite option and Mr Moeran's most favoured.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: And I'm not sure there's anything I can usefully say that I haven't already said.

MRS JUSTICE ASPLIN: Thank you.

(See separate transcript for judgment)

MR MOERAN: My Lady, I am grateful for that. Question 12(ii) is therefore allocation of costs. This is, I suggest, slightly simpler because we actually have a cl.10 dealing with costs that one can look at. There are four possible options for allocation of costs between members and we are putting forward the case in the following order: First, all costs are borne by the fund generally, and that has the effect that they are borne by the members' accounts on a pro rata basis determined by the value of their member's account in proportion to all the accounts. If your Ladyship is not happy with that, then costs – we actually argue that the costs should be – Hang on, I'll double-check which order I'm doing this. (After a pause):

MRS JUSTICE ASPLIN: So hang on a moment. So by a fund generally----

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: -- which has the effect of pro rata?

MR MOERAN: Yes, pro rata between the members' accounts.

MRS JUSTICE ASPLIN: Yes, and then you are doing it in the order next of equally?

MR MOERAN: Equally.

MRS JUSTICE ASPLIN: What do you say about equally?

MR MOERAN: The reason we go for the first option over the second one is that the second option is actually contrary to cl.10, is the starting point. Clause 10 simply says:

> "[All] costs, liabilities and expenses properly incurred by the Trustees in connection with the Scheme shall be met out of the Fund."

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: It doesn't say "out of the fund and divided up between the members' accounts". What it does say is:

> "The Trustees may decide that specific costs arrangements should apply to any transaction that applies to a Member's Account."

Now, that would give the trustees a discretion to attribute across, but the starting point is you have to exercise that discretion and there's no reason to. So that's why the first option is correct compared with the second option. However, the second option also gives rise to a random degree of iniquity that we've been talking about earlier, but it's – and I find myself arguing on the other side of the coin but I'm not quite sure why we've organised it in this particular way – in this particular case it would be preferable to the third option, which is attribute pro rata by reference to value of the funds transferred into the scheme by each member as a proportion of the total transferred in. And obviously in this particular case that would be less preferable to the equal division if you're not taking simply just apportion by the fund, because when you're getting away from the fund you may as well do it by equal division as opposed to pro rata by transfer in.

Now, the fourth option, the fourth option is a bit more complicated. If your Ladyship turns----

MRS JUSTICE ASPLIN: Hang on. What's the real difference between 1 and 3?

MR MOERAN: 1 and 3 is it's likely – well, now we know that the members' funds are actually going to be on the basis of funds transferred in, it will probably, in practice, be exactly the same.

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: Unless there's been some particular cost applied in the past. So if there is an event where one member's account is reduced down by a bit, they will bear a little bit less of the costs thereafter or, in theory, if they – No, in fact – no, the (a) (b) (c)s will be completely separate. So, yes----

MRS JUSTICE ASPLIN: The likelihood is that 1 and 3 are pretty much the same?

MR MOERAN: The likelihood is that 1 and 3 are pretty much identical.

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: Yes. The fourth is more complicated and can I take your Ladyship back to p.28 of bundle 1?

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: Because it is worth looking at the precise wording of it. Right.

MRS JUSTICE ASPLIN: What's this? Are these the rules?

MR MOERAN: This is p.28. It's 11 – sorry, 12(ii)(d).

MRS JUSTICE ASPLIN: No, I'm sorry, I'm in the wrong file.

MR MOERAN: Sorry.

MRS JUSTICE ASPLIN: And it's all my fault. You were taking me to? I'm now in the right file.

MR MOERAN: Bundle 1, tab A8----

MRS JUSTICE ASPLIN: Page 28.

MR MOERAN: -- page 28.

MRS JUSTICE ASPLIN: I'm on that page, yes.

MR MOERAN: Right. So this is the question:

> "The Schemes' costs (including but not limited to those identified in paragraph 11 above) should or may be attributed to Member Accounts".

And what I've done is taken it in order. (b) is my first position.

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: (a) is my second, (c) is my third and (d) is the fourth. Now, fourth----

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: -- is in relation to costs which are general to the scheme on one of the bases set out above. So that's already been covered by my submissions. And in relation to costs specific to a particular asset which is attributed to specific member accounts. You can ignore that now----

MRS JUSTICE ASPLIN: There aren't any.

MR MOERAN: -- because there aren't any. And:

> "Costs specific to a particular member, such costs are to be borne by the said Member Account."

Now, that can be done under the second sentence of cl.10:

> "The Trustees may decide that specific costs arrangements should apply to any transaction that applies to a Member's Account."

It's possible to do this, and I can't say that in the future there won't be circumstances where it would be appropriate, but what one is thinking about here is in most DC schemes a member-specific cost is usually not attributed to their particular little pot. So when you have a letter out to a particular member you don't charge them £5 for that, or when they put through a CETV request, the cost of calculating the CETV valuation is not attributed to their particular little pot. And it is possible but the reason we would say one shouldn't do that is it can end up – first of all, the costs of doing that are probably disproportionate to the costs in question and, secondly, it can end up being a polarising effect on smaller funds who want to do something, or, indeed, just trying to exercise their perfectly clear and valid right; in particular, and it's not limited to this but the one one identifies in particular on a scheme like this, is if people start thinking about taking transfers out. It's going to disproportionately harm or disincentivise the small pots.

So whilst I'm not saying that Dalriada cannot do this in the future, for example, if there's one particular member who, for whatever reason, their actions trigger a particularly large group of costs, yes, Dalriada would have the option, where it's appropriate, to attribute those costs to one particular member. But, in general, that's – that sort of transaction, that sort of administration, is what one gets as part of being a member of a DC scheme like this. So on that basis that is – that's my submissions on question 12(ii).

MRS JUSTICE ASPLIN: Thank you. Mr Bryant?

MR BRYANT: I will try and keep it within the four and a half minutes left until one o'clock. My Lady, as with all these, I argue in the opposite order from----

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: -- Mr Moeran. I'm not sure Mr Moeran thought he was arguing in the order that he has, in fact, ended up arguing but that's a quirk of the way----

MRS JUSTICE ASPLIN: He tried to keep to that order.

MR BRYANT: Yes, indeed.

MRS JUSTICE ASPLIN: So in relation to what I call 4, which is costs specific to the member----

MR BRYANT: 4 is my 1.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: And I then go in reverse order.

MRS JUSTICE ASPLIN: So what do you say in relation to 4?

MR BRYANT: In relation to 4, it splits into two parts, one of which is no longer applicable. One was any costs specifically attributable to a particular asset. That was predicated on nominal

segregation so that point has gone. What I say about costs attributable to a particular member, I hear what Mr Moeran says about the general approach in DC schemes and I don't say that that is not the general approach in DC schemes, but I would say that it must be within the claimant's power and within the bounds of reasonable actions by a reasonable trustee, and so on, to attribute specific cost to specific members, in particular where it is specific conduct by a member that will have no benefit to any other member. Why, one asks rhetorically, shouldn't that member incur the specific cost? It's difficult to argue and, given the nature of your Ladyship's judgments on previous questions, I sense that this is not where your Ladyship will end up in any event, prescribing that a particular one of these options is to be followed and others are not. Without specific facts and specific scenarios----

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: -- it's difficult really to take that matter much further. As to the remaining options, my 2 is pro rata by reference to value of funds transferred in as a proportion of total transferred in.

MRS JUSTICE ASPLIN: Yes, which is roughly the same as 1.

MR BRYANT: Which is probably the same as my 4 in----

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: -- in practice.

MRS JUSTICE ASPLIN: In practice.

MR BRYANT: Yes, and, indeed, as I said in my skeleton, is probably preferable from the order in which I've argued other things, to what is in fact my third option, which is equal split between all members. And I think in terms of an equal split, the suggestion, I think, by Mr Moeran is, well, that – you know, a lot of scheme costs give more or less equal benefit to all members so why not divvy them up equally? But, in my submission, that is certainly not the case for all scheme costs and for a member who has a nominal member account that's worth, say, a tenth of another member to say exactly the same share of the cost would, I say, result in unfairness. So if you're against me on the number 4, which is my first option----

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: -- specific attribution, and, indeed, even if you're with me on that, because the way it's framed is specific attribution of costs where – where it can be attributed----

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: -- otherwise you need another option so that you can----

MRS JUSTICE ASPLIN: Yes, you'd cover everything.

MR BRYANT: In my submission – in my submission, the other option is pro rata by reference to funds transferred in as a proportion of total transferred in, which is probably going to be the same.

MRS JUSTICE ASPLIN: Which is (inaudible) as well.

MR BRYANT: Which is – Indeed.

MRS JUSTICE ASPLIN: Thank you. I'm just going to deal with this now. I think that's appropriate.

(See separate transcript for judgment)

MR MOERAN: We're very grateful, my Lady.

MRS JUSTICE ASPLIN: I'm sorry, I've taken you over a few moments but I thought it was appropriate to conclude that issue. On that basis, I think we're doing very well, and therefore I think perhaps 5 past 2.

(Adjourned for a short time)

MRS JUSTICE ASPLIN: Mr Moeran.

MR MOERAN: My Lady, so we're now going on to question 12(iii), which is the transfer fee. This was the five per cent fee that was paid out.

MRS JUSTICE ASPLIN: Where do I find that in your skeleton?

MR MOERAN: In my----

MRS JUSTICE ASPLIN: Yes, it's the one – I've got it.

MR MOERAN: Yes. So just to summarise, this is the – as they transferred in five per cent of the transfer value paid in----

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: -- was paid out, in fact it was paid out initially to the RLLPs, and it was only paid out for the majority of members transferring in, not all of them, and, in particular, and the evidence on this particular issue is Fairhead, first witness statement, at para.205, but, in particular, it's para.206 and 207. The difficulty is not quite all of them – all of the members paid out and which ones did or didn't was effectively a random element of – The early ones tended to but the later ones tended not to, partly as a question of Dalriada being appointed and stopping the payments out. But the other slight complication is, and this is at para.207 of Mr Fairhead's witness statement, because these five per cent fees weren't paid out on the individual basis, they were bulked together and then you'd get a number of them paid out, it

hasn't been possible to reconcile all of the transfer fees and we've only managed to reconcile about ninety per cent of the transfer fees relating to specific or particular members and, as Mr Fairhead's evidence says, it's difficult to see how a full reconciliation could be completed. Moreover, no proper paperwork was maintained to show in respect of which members the transfer fees had been paid, and I note that Mrs Goldsmith is one member for whom there has been no identified and reconciled transfer fee. Now – Which is actually quite useful for the representation position because it puts her in a position that actually accords with the arguments she's taking.

Now, what we say the approach should be, and this is how the representation is done, what we say the position should be is that it should be – that the transfer fees effectively as a cost, almost, should be attributed pro rata by reference – basically just spread across the fund so everybody – everybody bears a share of it.

What Mr Bryant will be saying is that it should be attributed to member accounts or members' accounts on an as paid basis where it's possible to reconcile and effectively whatever's left over goes generally.

Now, the reason we say that our approach, the fund should bear it, should be taken is two-fold. The first is a legal analysis of what has happened. Legally these monies were paid out of a non-segregated fund in breach of trust and it must be that this was in breach of trust, because these transfer fees were not fees or expenses relating to the scheme; they were not scheme expenses. There is no authority under the trust deed or rules to pay for somebody else's fees and, as a result, they were paid out in breach of trust. So this is not a cost attributable to an individual member's account in any normal sense, and because it's a non-segregated fund it's not even a cost attributable to assets of the members' accounts, or a loss attributable to assets of a member's account. Rather it's a loss suffered (by reason of breach of trust but nothing special about it) by the non-segregated funds and that should follow on, therefore, from your Ladyship's decision on issue 12(i); attributed fund, everybody takes a pro rata share of the loss. So the first point is it's the proper analysis of how this should be dealt with.

The second point is, to the degree in which – and I would say this is a loss rather than a cost and therefore probably doesn't come under cl.10 – but if and to the extent that this were to

be considered to be a cost, and, therefore, attributable under the discretion under cl.10, we would, but strangely, that would be an inappropriate exercise for discretion not least because this is (a) a random issue as to whether or not these monies have been taken out in relation to one particular member rather than another and (b) you have this complexity of who it was attributable to looking at ninety per cent but not the last ten per cent. You have a double level of randomness as to whether or not it can even be attributed and, again it comes back to, it was a breach of trust.

Now, I would acknowledge that the members signed, when they signed their application notices or application forms, as I showed your Ladyship on Tuesday, they did – there was a part of the members' declarations that said, "Yes, I agree to this fund – this five per cent being paid", but there is absolutely no chance that they understood or that this was an informed consent for breach of trust. There's no – I would never suggest that that was the case. They were completely in the dark as to the true unlawful nature of these payments. So in those circumstances we just say it should lie where it falls, which is on the fund.

MRS JUSTICE ASPLIN: Thank you.

MR MOERAN: My Lady.

MRS JUSTICE ASPLIN: Mr Bryant.

MR BRYANT: My Lady, on this, and as indeed every other issue, I argue the opposite to Mr Moeran. My preferred option would be attribute to specific members and member accounts where possible to identify, which would leave an alternative basis needed where you can't identify. My not preferred option, Mr Moeran's starting point, attribute to the value of a member account as a proportion of value of all member accounts. Query, what difference there will be in practice between these two methods. I don't think we've had figures to indicate what – well, whether in fact there would be a significant difference between the methods for the vast majority of members. One can imagine there may be a slight difference but possibly not particularly significant. And I add to that, a point I make at the start of my skeleton argument on this issue, para.70, presumably, given that although ninety per cent reconciliation has been achieved, the ten per cent remaining I don't believe we have information, or indeed whether it is possible to work out the information, as to how this issue affects across the schemes; how it's distributed across the schemes, the remaining ten per cent.

The essence of my argument is this; where there is a particular transfer fee that is attributable to a particular member who signed the form acknowledging that this five per cent would be taken out, then I say that should be attributed to that member. Mr Moeran says against me, well, it's all randomness upon randomness, I think – two layers of randomness I think he says. I accept that it appears to be largely, if not in (inaudible), whether your five per cent was taken out or not or, if it was, whether it can be identified, as in the defendant's case herself, whether or not it has been taken out. But all number of aspects of these schemes were a matter of luck. It was a matter of luck which scheme you went into, whether you got an MPVA, if so, from which scheme; all sorts of other things. These schemes and their entire set-up was riddled with randomness, if I can put it that way, and some members benefited from luck or, rather, didn't have the detriment for random reasons in certain respects and others in other respects and this, I suggest, is just one of those features. As I say, the obvious fair approach is where it can be reconciled which member had which particular transfer fee taken out then that should be apportioned to their pot.

Mr Moeran has suggested in his skeleton, although he didn't repeat that in his oral submissions, that this process would involve a costly investigation. Well, it appears that's already been done. I assume that's what's meant by ninety per cent reconciliation, so that point is gone.

That would leave the relatively small ten per cent and the question what to do about that if you can't assign what's left to particular members. And in that respect I suggest that the obvious thing to do is to divide pro rata between who's left. Presumably there is a certain amount of money that is not attributable. There is a certain number of members to whom it is not attributable and I suggest that the obviously sensible thing to do there would be to divide it amongst the remaining members pro rata. I suggested in my skeleton argument that it would be a more favourable – a more reasonable approach in principle to do it by reference to amounts transferred in in total so that the members' total transferred in as a proportion of the total transferred in to a particular scheme. I think the way the question is framed in the claim form does it on a value of member account as a proportion of the total member account. As we discussed under the last question, it appears that is unlikely to make any practical difference. Further than that, I think I need say no more. Thank you.

MRS JUSTICE ASPLIN: Mr Moeran?

MR MOERAN: Nothing to add, my Lady.

(See separate transcript for judgment)

MR MOERAN: My Lady, I am grateful for that. That concludes question 12, leaving us only with question 13 to deal with. If I can take your Ladyship to question 13----

MRS JUSTICE ASPLIN: I don't know whether you actually want to take me to what might be the power in relation to the second option because that might mean that I would actually say that it would not be something that the trustees could do. I don't mind whether you do or you don't in relation to that order or whether what I've said is sufficient for your purposes.

MR MOERAN: I think it is sufficient for my purposes. I think the second – the power, if we were to attribute it on the second option, would be cl.10 as a cost, so attributable as a cost.

MRS JUSTICE ASPLIN: I'm concerned about whether it is a cost.

MR MOERAN: Yes, well, hence my submissions that it would not be. I suppose the alternative is that what this is doing – I know I'm arguing against myself on this point, but if arguing against myself, volume 2A, tab 1, p.11, "Members' account".

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: Of course, the member's account is:

> "… an account under the Scheme referable to the Member which account may comprise or include any contributions, payments or transferred-in amounts …".

And (a) I suppose you could say that the transferred in amount was subject to an immediate cessation, not quite under a scintilla of time but an immediate, not cessation, severance of the five per cent amount, or (b) that the five per cent could be seen as a loss. Now, it says an investment profit or loss but it might just about be shoehorned into a loss. Now, however, we do say it's not attributable. This is a loss on the scheme. It's not a cost. That's why it goes on the front and that's why, since you have 12(i), the decision on 12(i), this is, in fact, borne by the whole of the scheme and should be borne by the whole of the scheme as a matter of law, hence my opening submissions. I think----

MRS JUSTICE ASPLIN: I just – I just wanted to give a complete answer----

MR MOERAN: Absolutely.

MRS JUSTICE ASPLIN: -- and, as I say, I do have reservations about whether this is a loss; about whether – I'm sorry, about whether this is a cost and whether it falls within the terms that you've just referred me to in relation to the definition of "members' account", whether it neatly falls into that first part or, for that matter, the second part----

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: -- in that sense of whether it truly can be deducted from the transferred in amount or whether, in fact, it is an investment loss, and that is why I consider that there are serious doubts in relation to how one would deal with the – at least the unattributed ten per cent and that is also why I consider that a reasonable trustee, in these circumstances, would much prefer the first option.

MR MOERAN: My Lady, I think that's sufficient for our purposes. I'm grateful. Right, while you're got volume 2A open, if you turn back two pages – sorry, page----

MRS JUSTICE ASPLIN: Yes, yes.

MR MOERAN: -- yes, to p.9 of 2A.

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: I'm just adding this up. I'll come to it shortly. It's the transfer provision----

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: -- and it's cl.18.2. 18.1 is transfers in and 18.2 is transfers out, and I'll just flag this up. I'll come back to it in a moment.

> "If a Member is entitled by law to a transfer of assets from the Scheme [say CETV legislation] (or in any case where the Member does not have such a right, if the Trustees at their discretion permit the Member to transfer assets from the Scheme) he may exercise that right or concession. If it [sic] by concession, then any transfer is subject to any terms the Trustees impose."

So I'm coming back to that shortly. Now, question 13 is a slightly odd mixture of two parts. It's – Question 13 is at tab A8 in volume 1.

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: And I would emphasise the opening part of it:

> "The Claimant seeks a direction that pending:
>
> (a) The final recovery of the Schemes' assets or the determination that recovery is impossible and the asset in question is valueless including, but not limited to, the MPVAs."

Actually it's now the MPVAs. There's a – there's a, for all bar the Freedom Bay hypothetical outstanding bit, which has almost certainly gone, but it's the MPVAs that's really important. And (b):

> "The final determination of the Schemes' tax liabilities as are subject to the tax appeal referred to above".

It should be at liberty as trustee of the scheme – there are two parts. (a) to value the MPVAs as valueless, unless and until any specific MPVA is recovered, and (b) where a

member has requested a transfer or his or her benefits to another pension scheme to make partial transfers of the side member's benefits subject to such reasonable terms as it determines. So the first part is really a practical one, are we – are we performing our evaluation for the purposes of determining what a member's account is reasonably when we say that an MPVA , until and unless it's recovered, is worth nil.

Now, on this first part, we were arguing in favour of being able to value it for nil and the representation order is that Mrs Goldsmith, Mr Bryant, would argue in favour of – or against that. But we're immensely grateful to the defendant, entirely appropriately, we say, making a concession on this point. Realistically how else are we supposed to value the MPVA? And I would also emphasise that this concession ties in with the position that they're taking on the economic irrecoverability or lack of desirability to recover the MPVAs in the rest of this proceeding. So not only are they being sensible but also taking a coherent approach throughout. And, on the flipside, we have taken this approach seeking to value the MPVAs on a pragmatic and temporary basis, and I would emphasise, as is made clear in the evidence, in Mr Fairhead's first witness statement at para.221, that – and I'll just read it out for the transcript:

> "On the first question, the claimant will of course have to exercise its judgment. However, in the absence of anything else at present, it proposes valuing MPVAs at nil until recovered. It is therefore asking for a direction that it be at liberty to operate as stated. It will of course keep this policy under review".

And, of course, as we go on through the recovery of MPVAs, as we get a better feel for it, it may be that we think differently about this. So on question 13 – well, it's 13, effectively (a), unless your Ladyship feels particularly uncomfortable about that, we would – that's our submissions on that and there's a concession made on it.

MRS JUSTICE ASPLIN: Yes. Mr Bryant, that is the position, isn't it?

MR BRYANT: My Lady, yes, and query whether I'm formally in the position to make a concession.

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: No, no, I don't think you are. It's something that you don't think it's appropriate to argue.

MR BRYANT: Not positively to argue against.

MR MOERAN: All right.

MR BRYANT: But the effect is the same.

MRS JUSTICE ASPLIN: Yes, and it seems to me that that is not only a pragmatic but also a sensible approach given that I can't see how you could argue otherwise in the circumstances, and therefore it's entirely consistent with your duties as counsel for the representative defendant.

MR BRYANT: I'm grateful.

MRS JUSTICE ASPLIN: In those circumstances, it seems to me also that it is the only reasonable and proper view which the trustees could take in relation to that issue.

MR MOERAN: I'm very grateful. Now, that leaves the very last part of the case which is 13, I'll call it (b). It's on the question of whether or not we can effectively make partial transfers and then later make top-up transfers. Now----

MRS JUSTICE ASPLIN: Have you looked at the tax consequences of doing so, Mr Moeran? Because there are tax consequences of doing so, I think, or there might be in relation to the second part and whether the Revenue would be happy to treat it all as one.

MR MOERAN: You know, I have not.

MRS JUSTICE ASPLIN: That is something that I, in a previous life, had an unfortunate experience in having to consider and I think that, therefore, that is an issue which does need considering.

MR MOERAN: Right.

MRS JUSTICE ASPLIN: And I'm sorry----

MR MOERAN: No, no, I'm grateful.

MRS JUSTICE ASPLIN: -- I'm sorry, I should have raised it earlier but literally it has just come to the top of my thoughts now that in the past I was involved in a situation in which I was asking the trustees to do something rather similar, but there are Revenue considerations and whether the Revenue are being reasonable, sensible, pragmatic or are not might affect whether you were willing to go that route or not. So I think that the only way in which you can deal with this issue is to say, if and to the extent that there were no other substantive issues which needed to be taken into consideration, would it be appropriate for the trustees to take this course.

MR MOERAN: Yes, absolutely. I'm (a) very grateful for having that pointed out. It had not crossed my mind. I had not thought about that. (b) I think that must be the approach.

MRS JUSTICE ASPLIN: I mean, it ought not to be.

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: It ought not to be, Mr Moeran, but one can never take anything for granted.

MR MOERAN: No, absolutely. And (b) the approach your Ladyship has set out is entirely within the capacity because what I am saying is that there is a discretion to do this, and whether or not we can do it is the real question. Whether or not we should do it will obviously take into account the question of tax consequences.

Now, the reason that we say you can do it is, well, there are two ways of making a transfer. There's the statutory power and there's the discretionary power here. The statutory power, I would expressly say, we agree with Mr Bryant that the statutory power is a once and for all. You cannot do staggered or conditional or contingent transfers. And although it's not absolutely clear on the legislation, the simplest way you can see it is that you see it specifically from the definition of how – not the definition but the calculation of how you value what the cash transfer value is with the money purchase scheme. And if I could take your Ladyship very quickly to the authorities bundle, or indeed just read it out, there is the – the valuation is calculated by reference to the----

MRS JUSTICE ASPLIN: Where are we?

MR MOERAN: Sorry, it's authorities bundle, tab 17----

MRS JUSTICE ASPLIN: Yes.

MR MOERAN: -- and this is the Transfer Values Regulations, and your Ladyship will be familiar with this, that under the Pension Schemes Act 1993, now Part 4ZA, there's a right to a cash transfer, and how you value the cash transfer is fixed by prescription, by prescribed regulations, and this regulation 7C is the regulation in question for a money purchase scheme. It's tab 17.

MRS JUSTICE ASPLIN: No, it's not.

MR MOERAN: Tab----

MRS JUSTICE ASPLIN: Tab 17 is the Finance Act 2004.

MR MOERAN: Could you try tab 18?

MRS JUSTICE ASPLIN: I did and it's not there either. It looks like something out of (inaudible) or something like that.

MR MOERAN: Ah. How about turning to the last two pages to tab – tab----

MRS JUSTICE ASPLIN: **Goff & Jones**, (inaudible) and then nothing.

MR MOERAN: How about, ah, the last two pages of tab 16? The one that had the Finance Act.

MR BRYANT: We have a spare copy.

MR MOERAN: Right.

MRS JUSTICE ASPLIN: 7C?

MR MOERAN: That's the one.

MRS JUSTICE ASPLIN: I'm very grateful. 7C, I have it, thank you. It is at the back of tab 17 so I'm sorry.

MR MOERAN: No, no.

MRS JUSTICE ASPLIN: I should have looked for it.

MR MOERAN: My apologies. So----

MRS JUSTICE ASPLIN: So this is----

MR MOERAN: This is regulation 7C.

MRS JUSTICE ASPLIN: -- the Transfer Values Regulations.

MR MOERAN: Exactly. And it's the – it's regulation 7C, "Manner of calculation of initial cash equivalents for money purchase benefits and for cash balance benefits not calculated by reference to final salary." And it's really obviously sub-(2) which is the crucial part:

> "The initial cash equivalent is the realisable value at the date of calculation**]** of any benefits to which the member is entitled.".

And that gives rise to two points. First of all, it's the realisable value, and we say that the realisable value is what you can realise your benefits for and if your benefits are by calculation to assets, you just have to look at what the assets are worth. And it's at the date of calculation, so that allows for an asset to be valued, if you went out to market people might think of it, you know, say it was a piece of land, development value would be included, but you wouldn't get -- six months later when development permission was granted, you wouldn't go back in time and top up. So that is a specific at the date of calculation one-off calculation of your cash equivalent. And that figures logically as well, because if you are doing a transfer under the CETV legislation it must be a once and for all because otherwise it would be impossible to know as and when trustees were – had limited – had terminated their liability and the transfer had happened and they were able to move on.

Now, there are a few situations in which you can change what a cash equivalent valuation is if you have late payment, and the specific one is if you – you're supposed to do it within six months and if you don't do it within six months you're basically supposed to top-up to increase at a rate of interest, but that's the only real exception for increasing for late payment or for further top-ups. In the absence of anything like that, we say the legislation is, in fact, quite clear. CETV legislation only allows a once and for all.

So we, therefore, have to go back to the cl.18.2 discretion that I took your Ladyship to a few minutes ago, and in that case it is – it was in any case where the member does not have such a statutory right, if the trustees, at their discretion, permit the member to transfer assets from a scheme. Now, we say that that gives us a power – even though you have a CETV right to do a one-off transfer, we say it gives a power or a discretion to the trustees to allow for a staggered valuation – a staggered transfer valuation on the basis of today you get £100 but in the event that actually the tax liability was less than we expected, or actually the MPVAs did actually generate some money, we can come back and give you whatever reasonable top-up appears appropriate in the circumstances. Now, the reason that we say that power is there, and it's just a power, it's not necessarily that we will exercise it, the reason we say the power is there is the wide words of "in any case" where the member does not have such a right. Now, the member does not have a right to those – to transfer value or transfer of assets representing those contingent uncertain events.

MRS JUSTICE ASPLIN: The trouble is that they do (inaudible) then it is if a member is entitled by law or in any case where a member does not have such a right, and what you're doing is actually mixing the apples and the pears in the basket because you want to say, "They are entitled by law, and they can have that, and then, if they're not entitled by law to some more, but we would like to give them some more by an exercise of our discretion", and that's not, on the face of it, on a first blush reading, what 18.2 says. Apples or pears not apples and pears.

MR MOERAN: Well, and that, my Lady, is why I emphasises "or in any case", "any case", and, of course----

MRS JUSTICE ASPLIN: No, no, no, Mr Moeran. "Or in any case where the member does not have such a right".

MR MOERAN: And we say that the "case" in this particular – in this particular phrase is in relation to the contingent assets, and we would – we would plead in aid of that construction the very well-known principle that, you know, a pension scheme should be construed so as to give a reasonable and practical effect to the scheme. It would be, we say, more practical to allow flexibility here than to more narrowly constraint it. It's – it's a question of construction of those words. There is something to be said for they say what they appear to say and either you read it one way or you don't. I don't have any other particular material on which to add to that particular construction point but if I – if I can't persuade your Ladyship that "in any case" applies to the contingent assets as part of the case rather than the member as the case, then I will fail on this point.

MRS JUSTICE ASPLIN: I'm going to ask Mr Bryant to make submissions, but I'm very concerned about this because, as a matter of practicality and as a matter of fairness, and in the circumstances in which the trustees and the members find themselves, it seems to me that staggered payments of some form are likely to be necessary and are likely to be the only way of properly and fairly providing the member with the proper value of their benefit. I'm not convinced that either the regulations, under regulation 7C, or 18.2, get you there but I wonder whether we ought to leave this question aside for now and whether it may be that there are more and different submissions that could be made, because I certainly don't want to reach what I feel is quite an unpalatable conclusion this afternoon. I'm going to ask Mr Bryant to say what he would like to say first, but at the moment, rather than reach that conclusion, I would prefer this matter to be reconsidered and represented, even if it's represented on paper. Mr Bryant?

MR BRYANT: My Lady, I'm in your hands as to how we proceed on this issue.

MRS JUSTICE ASPLIN: Yes.

MR BRYANT: This is one of those issues where it is impossible to say at the moment where my client's personal interests, in fact, lie or, indeed, where the interests of probably most, if not all, the members lie. I imagine one or two may have made transfer requests but one simply can't say. So, as with various other questions, I am approaching this in a purely representative capacity and my duty is to argue against Mr Moeran. The bare bones of the argument you probably have already. Mr Moeran concedes that the statutory approach is a once and for all. That doesn't help. The rule 18.2 is where he then goes. There are a number of submissions one can make on the construction of this rule. One is that he relies on any terms the trustees impose to enable the trustees effectively to value on one basis at the time of transfer and then re-value at a different basis – on a different basis when circumstances change and, in my submission, that is stretching the wording of the rule to breaking point.

But the principal submission is the very point your Ladyship has made. One only gets into the realms of trustee concession is one does not have, as a member, entitlement by law to a transfer of assets. So anyone who has a statutory right, once and for all, does not even get into the realms of the part of the rule that Mr Moeran needs to get him home on this point. If your Ladyship is minded not to reach a view on this and to allow – I was going to say "us" – I think principally Mr Moeran to go away and re-think and re-cast the point, then I certainly wouldn't have any objection to that. I can see the sense in it.

MR MOERAN: I'm grateful for that. It might actually work quite well by coincidence to do that, not least because I'm clearly needing to make some further submissions if I'm going to win this point. The – Your Ladyship may have noticed in the evidence there's a comment – a couple of comments about other questions that are not before the court. One of the other questions is about late transfers in and whether or not those late transfers in are held on the trust of the schemes or whether they're just held on some sort of resulting trust or trust to be paid straight on, and, effectively, whether or not we're going to transfer them on. That has been prepared, although the relevant – we haven't actually got the relevant proceedings on foot yet, we're very, very close to doing so. There's been matters that your Ladyship does not need to know about that have complicated it. It does ultimately, I suppose, somewhat deal with questions of transfers out and it may well be sensible, therefore, to come back to this, first, as your Ladyship suggested, first of all, probably on paper, but if it turned out to need to not be on paper then we could possibly bolt it on to the second part.

MRS JUSTICE ASPLIN: Let me say, first of all, I can quite see Dalriada's desire, in order to be fair to the members, to have a staggered approach.

MR BRYANT: Yes.

MRS JUSTICE ASPLIN: At present, sitting here, I don't see how that can be achieved on the basis of cl.18.2. I also am concerned about whether there are any tax ramifications. It seems to me, therefore, both the length and breadth of the submissions and the factual basis may be – it may be necessary to elaborate on both. On that basis, I certainly don't wish to make any decision today which will damage the position of the members and, therefore, I decline to deal with question 13 today and it seems to me that you may, now I'm thinking about it, it may be only by way of analogy that you might like to think about the *BT* decision, which had, I think, a situation in which there were staggered payments, which may have been of a different kind but you might want to think about that. And it seems to me probably, despite the fact I said that this could be perhaps dealt with on paper, it seems to me relatively unlikely that that would be suitable and it would be much better to be rolled up in a further set of proceedings. But if it were sufficiently compact, I would be willing to deal with it on paper but it seems to me that it might be quite bulky and unsuitable. So I don't want to encourage you to do it on paper but I don't want to preclude you from doing so. I'll do it that way. I think, in order to be as fair to the members as possible and to have the chance therefore to decide if I would like to decide, I'm not going to do so now.

MR MOERAN: I'm very grateful for that indication and for the assistance. We will work out an appropriate word of order for that – for that adjournment of the question.

MRS JUSTICE ASPLIN: Yes. I know that you've got a draft order. I imagine that you're actually going to distil quite a lot of other matters----

MR MOERAN: Yes.

MRS JUSTICE ASPLIN: -- into a draft order, so I wonder, rather than discuss the matters which were raised yesterday, whether it's best if both of you see if you can agree a draft order and submit it to me perhaps with some sort of commentary, to the extent it's necessary?

MR MOERAN: Can I ask – That's fine. Can I flag up – can we ask or just discuss two points that occurred to us as questions? The first is, in terms of the Beddoe relief – and these are both in terms of Beddoe relief on the recovery of the MPVAs. The first is, in terms of the Beddoe relief that has been granted to take preliminary steps. In the draft we've got it in square brackets "[and/or issue statutory demands]". Now, we're not – it's quite clear, if we're going to go for bankruptcy we should come back for further directions. The question is whether before coming back for further questions we could issue statutory demands. Now, I should flag up, it's probably not a big question because statutory demands, I think, have a four month time limit during which you're supposed to issue your bankruptcy petition outside of which you have to start again and, of course, if you issue a statutory demand and then you're coming back for Beddoe relief, and so on, it's probably, in practical terms, not that useful to have it permitted before further Beddoe relief, but it wasn't absolutely clear when we were going through it as to whether or not that would be covered.

MRS JUSTICE ASPLIN: Mr Bryant, do you want to say anything about that?

MR BRYANT: My Lady, we take the view that statutory demands fall onto the bankruptcy side of the line rather than the write a letter where there's a standstill in place or wait for a defence where proceedings have been issued. It's sort of into stage two, as I think we called it yesterday.

MRS JUSTICE ASPLIN: It seems to me that, from a practical point of view, issuing statutory demands would not be a sensible process in any event because, as I said, no steps should be taken in relation to bankruptcy without further direction of the court. So not only on a practical basis but also I have to say that I agree with Mr Bryant that statutory demands are part of the bankruptcy process, and therefore I would delete those words from the draft order. But also because I had envisaged that the evidence was that in all cases now contact has been made with the individuals and that there are – there are, therefore, protocol letters or some kind of correspondence which is underway, and that that, together with taking steps in relation to standstill agreements and down to defence, was what I had in mind.

MR MOERAN: Thank you. Another practical point, permission to apply to – we're suggesting judge or Master. Given the complexity of this, I think it's looking likely that actually it would be an application to the judge although the minutiae might be the sort of thing that a Master does. Can we ask to have, if it is an application to judge, have it reserved if possible to your Ladyship? One always has to ask for that but, in light of your Ladyship having already got to grips with what is quite a complex background, and obviously only if your Ladyship is available.

MRS JUSTICE ASPLIN: First of all, despite the fact that you've pointed out to me that there is Beddoe relief is now considered something that Masters should do, I consider that this matter is of sufficient importance, given the number of people involved and their position in relation to this very unfortunate set of circumstances, and also given the complexity of the matter, that it is best heard by a judge----

MR MOERAN: Thank you.

MRS JUSTICE ASPLIN: -- and that also, although I will not reserve it to myself, if, and to the extent that I'm available, I am happy to hear it and will do so if that suits those who list these matters.

MR MOERAN: My Lady, the last point is – and we are very, very grateful for that indication – that last point is, your Ladyship indicated, I want to put it quite carefully – as I understand it, your Ladyship indicated for anybody who's got MPVAs of less than £5,000 we just shouldn't be pursuing; it's just not worth powder nor shot, and that's fine.

MRS JUSTICE ASPLIN: There are only two of those.

MR MOERAN: And there are only two of those. And then your Ladyship suggested – put it in less absolute terms up to about £9,000 and what we propose putting in the order is just saying quite clearly, "Don't pursue litigation for those people with less than £5,000, the two people with less than £5,000", but we're not going to mention or refer to the £9,000. Now, I'm saying that now deliberately because it could be that with the initial correspondence there's a quite clear, "Yes, yes, liable, fantastically rich individual member and quite happy to pay up". Obviously, and the reason I'm mentioning it now is I'm stressing that at the second stage, if there are disputes for somebody of whatever quantum but with particular reference to people under £9,000, given your Ladyship's comments, that will be a matter taken into account by Dalriada in determining whether or not it was – it's appropriate to even ask for permission to carry on. I just wanted to flag that up as an appropriate way because otherwise what could be seen as happening is it ends up with an exclusion of the

possibility of recovery for those things where it might be unnecessary to exclude. That's all we – I would say that for.

MRS JUSTICE ASPLIN: Mr Bryant?

MR BRYANT: I don't think I have anything to say.

MRS JUSTICE ASPLIN: The way in which I intended my comments to be taken was that it was absolutely clear in relation to the person who was lent £2,500 that they fall below the cost benefit line. In relation to the person who was lent, I think, £4,950-odd that was so close to the line as drawn on the basis which, in fact, is probably a fast basis or a less costs than is likely actually to be incurred, but also, in my judgment, it was not appropriate or would not be reasonable in that regard also to pursue that sum – that person. I then went on, as you rightly say, to say that it may be that, in fact, £9,000 is a cut-off point. I am not in a position to determine whether it is or it isn't because I don't have the real numbers in relation to what the costs really might be on an individual, or even on an averaged out individual basis, for doing other than pursuing the statutory demand and bankruptcy route. Therefore I did not, or did not intend, to say anything specific bright line in relation to the £9,000 but it does seem to me in general terms that may be something which might be a threshold and might be something which, when you were actually carrying out a proper cost benefit analysis, with the proper figures or closer to the proper figures available to you, you might find is a realistic benchmark. I said, or intended to say, no more than that.

MR MOERAN: My Lady, that's what we took it as and I'm grateful for that indication. With that we can go away and present a complete draft minute of order with commentary – Ah, yes. And I'm reminded by my instructing solicitor one practical point. Transcripts. I don't think I need to do anything special today but I will be putting a provision in the order about transcripts. Because – because Tuesday and Wednesday both had private parts, I'll be putting in some provisions about the provision of transcripts not to being anybody third party who wasn't part of the private and so on.

MRS JUSTICE ASPLIN: And you will also need, I think, to specifically ask, as a matter of urgency, for the transcripts of my rulings to be available so that I can approve those and that you can make them available – have them and make them available to the extent that it's necessary to the membership.

MR MOERAN: And that was the second part that I was going to be saying. There will be – I'm not sure whether I do that by means of the order or I do that by means of a letter of request. I'll make sure----

MRS JUSTICE ASPLIN: I don't think you do that by the order.

MR MOERAN: -- I'll find out which – I'll find out however I do it and I'll do it by your – by your clerk. I think, my Lady, that just leaves us to thank your Ladyship for the great deal of assistance and help that your Ladyship has provided us with.

MRS JUSTICE ASPLIN: I'm only sorry you have no more questions (inaudible). I'd like to thank you both. I would also like to suggest how complex and difficult this situation is and, therefore, it's only proper and right that these questions have been aired in the way that they have. I thank both you, Mr Moeran, for arguing in a representative capacity on one side, as I stress again, to save (inaudible) not having another party, and also to Mr Bryant for doing the opposite job, which is also absolutely essential in order that the court is properly apprised of all the wrinkles and possibilities in a situation like this. And I must also stress that the conclusions which I have come to in this regard are on the basis, of course, of the appropriate legal tests in relation to the parameters of what would be a reasonable exercise of discretion of the trustee in the light of the law and in the light of the terms of the trust deeds, etc., and also in the extremely unfortunate circumstances which arise in this case and it's not to be assumed that any of the conclusions that I have reached I have reached with other than a very heavy heart, and that it is a case of trying, at least when fitting within the parameters of what a reasonable trustee would do, what the least worst options are and that has been fully in my mind throughout. But there are unfortunately no winners here and there is no means by which I can achieve a miracle for any sector of the membership or the membership at all, and I am very – I have to say very sorry that that is the case, but you will understand the exercise which I have carried out. I just wanted to make that clear. And I'm afraid my sympathy is with all of the people who were caught up in this particular strategy. Thank you very much to you both.

MR MOERAN: My Lady.

3:02p.m.

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civil@opus2.digital

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

[2017] EWHC 1864 (Ch)

No. HC-2016-002391

Rolls Building

Thursday, 22nd June 2017

Before:

MRS JUSTICE ASPLIN DBE

IN THE MATTER OF (1) THE LANCASTER PENSION SCHEME (2) CRANBORNE STAR PENSION SCHEME (3) GROSVENOR PARADE PENSION SCHEME (4) TALLTON PLACE PENSION SCHEME (5) WOODCROFT HOUSE PENSION SCHEME (6) THE PORTMAN PENSION SCHEME

B E T W E E N :

DALRIADA TRUSTEES LIMITED
(as trustee of the above named pension schemes) — Claimant

- and -

KIM ANNETTE GOLDSMITH
(as representative beneficiary) — Defendant

MR F. MOERAN QC (instructed by Pinsent Masons LLP) appeared on behalf of the Claimant.

MR K. BRYANT QC (instructed by Trowers & Hamlins LLP) appeared on behalf of the Defendant.

J U D G M E N T

MRS JUSTICE ASPLIN:

1 The submissions which have been made relate to para.11(i) of the Part 8 claim and they relate to the recovery costs in relation to pursuing MPVAs. The question arises how to allocate those costs between the six schemes in a way which is least unfair. I think I will put it that way. As Mr Moeran pointed out, and I am sure Mr Bryant does not dissent from what was said, the issue here is not whether there is a power to do any of these things but the trustee comes to court for assistance and directions as to what it may do or what it should do. It is open to me to take the same graduated approach to the options as counsel have. I have to decide what reasonable trustees would do in these circumstances, having taken account of all relevant factors and ignored all irrelevant factors. As I have said, that might mean that I too put forward a shaded scale in relation to those options.

2 I do all of this, first, on the basis that I am, as I say, considering what reasonable trustees would do, taking into account the proper issues. I also do so against the background that, in fact, this is a very unfortunate situation and one way or another there is no perfect solution. It is, in some respects, a rough and ready approach necessarily, despite the fact that tables and figures have been produced which are intended to assist in this process. It is nevertheless, and inevitably, rough and ready and inevitably prejudice is going to be suffered. The way forward is on the basis of the information which is available, and I accept what Mr Bryant says about that. This is not a perfect world and we do not have all of the information to analyse here. Inevitably it is not going to be a perfect solution.

3 I am going to take the options in this regard in what, for Mr Moeran, would be reverse order and for Mr Bryant would be going forwards rather than backwards. Mr Bryant started with what is option 4, which is equal division of the cost of recovery between the six schemes. He says, in effect, to a great extent, members had no control over which schemes they went into and, in effect, that this was a strategy. There were six schemes. It seems they were probably filled up one after the other as a matter of timing and so, therefore, it is simple and cheap to divide the cost between the six schemes, He offers, as an alternative, a "tweak", as he calls it, which would be that the four larger schemes, who have more members and had more monies paid into them in the first place, should take a fifth of the cost each and the two small schemes, which are quite considerably smaller and have fewer members, should divide up the last sixth between them, i.e. they should pay one-tenth each.

4 I understand the desire for simplicity. I understand that that would be a cheap option and that that is not something which should be sneered at, given that the cost of administration of these schemes, in the circumstances that have arisen, must be high, and that is of no benefit to any of the members. However, it seems to me that, in fact, taking an equal "hit", if I can call it that, is unfair to almost everyone and is the least best option. That is not an elegant way of describing it but it seems to me that it is much too rough and ready. It does no justice to anyone and therefore, as a result, one has to conclude that everyone should bear, in effect, the same pain. It seems to me that that is a very blunt instrument and, although it is not for me to say in round terms, it seems to me that although it is possible that that is within the parameters of what reasonable trustees might do in the circumstances, I consider it to be right on the edge of that spectrum. I would almost go as far as to say I am not convinced that reasonable trustees would take that approach. So I put that at the bottom of my spectrum of possibilities.

5 Working upwards from the bottom, or from the top as far as Mr Bryant is concerned, what Mr Fenner Moeran would call the third option is that the cost of recovering of MPVAs be borne pro rata in accordance with the value of the assets held by any one scheme. There are two alternatives within that; that is, on the basis of what was transferred in at the beginning

or (b) on the basis of what is within the schemes now, there having been some considerable recoveries, and that would have to be assessed on a regular basis. In relation to transfer in, Mr Moeran says that is simple and it is, in fact, what I think has been done to date. In relation to an annual valuation, he says that is expensive and brings up questions of how one assesses values and ought not to be preferred.

6 Mr Bryant says that obviously transfer in is a cheaper option, but actually he says one ought to prefer the annual valuation route because there have been significant recoveries and much time has passed and, therefore, one should not be stuck in the past in relation to what the various schemes' assets are.

7 I come to my conclusion in this regard having looked at the figures both in the table at p.365, to which I was referred, which is MPVA loans between the schemes, and also the table at p.363 of file 2A, which is headed "Summary of MPVAs by scheme". Taking those matters into consideration, and then looking at this issue in relation to pro rata in relation to value of the assets, it seems to me that to take such an approach is perfectly reasonable and sensible to be adopted by reasonable trustees taking all of the relevant issues into account and ignoring all irrelevant material. I too, like Mr Bryant, consider that, at least henceforth, the preferable version of this option would be on the basis of an up-to-date valuation of assets, because considerable time has passed and also there are, to some extent, considerable recoveries and therefore to continue to adopt the option (a), which is what was paid into the scheme, is now an historic basis. It seems to me that, in fact, the kind of valuation exercise which would be required by sub-option (b) is not as complex as might be suggested. It would be much fairer to bring matters up-to-date and, in any event, trustees have to have a grip on the valuation of their funds. Therefore, I consider that it was perfectly reasonable and proper to have taken the view that Dalriada has taken until now and I do not in any way suggest that it is necessary to overturn that approach which was adopted, which in these terms one would call option (iii)(a), but henceforth one of the reasonable options which could be adopted would be (iii)(b), which is on the basis of up-to-date valuations of the assets of the different schemes.

8 I then come to option (ii). That is that the costs of the exercise of recovering MPVAs should be borne by each scheme on the basis of its recoveries. As you will appreciate, Mr Moeran says that that would create a complex situation and also that one loses the mutual insurance element which one might otherwise have in relation to these costs and that there is a disparity in some circumstances between the size of the scheme and the number of MPVAs which were made, and one is in a land of complete uncertainty in relation to what the recoveries might be.

9 In this regard, Mr Bryant says that it was completely out of the control of the members as to which scheme they were allocated to in the first place and then whether that scheme made MPVAs and how many they made, and then there is a further uncertainty as to how much may or may not be recovered.

10 It seems to me that this option, in fact, creates a great deal of "skewing", as it has been put, between the schemes and between the members and between how costs ought to be allocated in the light of all of the factors to which I have been referred. It seems to me that it also loses all element of mutual insurance which, to some extent, is an important factor given the very nature of the entirety of the strategy of the number of schemes. Although I would not say that it is something which should not be adopted by the trustees, I think that it comes close to the boundary of what reasonable trustees might do. Therefore I do not favour it. I put it that way. I consider that the trustees should view it in that way.

11 That brings me back to the first option, which is para.11(i) of the Part 8 claim, is that costs of recovery of the MPVAs should be borne by the schemes on a pro rata basis as to how many were made and the extent of the MPVAs made by that scheme (option (a)) or (b) as to recoveries made. I am slightly concerned about whether I have missed out Chief Master Marsh's suggestion but I am sure I will be told about that in a moment.

12 In relation to recovery at least, Mr Bryant says that that is all but untenable. It is anomalous, he says, and would be extremely unfair. It does not seem that Mr Moeran views it a great deal more favourably. He says one would have to wait until the very end of the whole process in order to be able to allocate costs, which is almost untenable. It was outside the control of all as to which schemes the members were allocated to and what MPVAs were to be made by that scheme. I entirely agree. That is in relation to option (i)(b), the recovery option, and therefore I would say that that would not be an option which reasonable trustees would adopt. It seems to be that that is unfair on everyone in every way.

13 That leaves one with (i)(a) which is pro rata on the basis of the actual MPVAs which were made by each scheme. Mr Moeran says that that is the fairest option and he took me to the figures in the tables and to the percentages in that regard. As I say, Mr Bryant says that that is anomalous too.

14 It seems to me that that is an option which a reasonable trustee, considering all relevant matters and ignoring all irrelevant matters, could adopt and therefore I accept and conclude that that is the case. I leave it there.

LATER

15 The second question which arises under para.11 of the Part 8 claim relates to how to apportion the costs of the tax appeals. This is, of course, the costs to be incurred by the trustees in seeking to appeal the Revenue's assessment as to the charges to be made against the schemes for the unauthorised payments. There is, as Mr Moeran has acknowledged, some uncertainty about the way in which the matter is put by the Revenue and the way in which it will be necessary to put it on behalf of the schemes, mostly because the Revenue is seeking, I think, to argue its position in numerous ways.

16 The alternatives in this regard which are put forward are, first, that once again the costs should be allocated equally between the schemes, and I am sure Mr Bryant also would put forward his "tweak" as to the two smaller schemes in this regard. I think that the issues are identical to those which arose in relation to the costs of recovery of the MPVAs and, therefore, not only the arguments but also my conclusions are identical in that regard. I concluded that, given that in fact that would be unsatisfactory across the board and would be a very blunt instrument, that actually it comes right at the boundary of reasonableness for reasonable trustees considering what to do taking into account relevant factors and ignoring irrelevant factors.

17 In relation to whether one apportions these costs on a pro rata basis, on the basis of monies transferred into the schemes, my view, yet again, is the same as in relation to the MPVA recovery costs because there is no distinction which needs to be made. Therefore, I consider that that was a reasonable approach to take and is a reasonable approach to take and that, therefore, it was reasonable to do so to date.

18 The next alternative is that costs be apportioned on a pro rata basis based on the annual valuation or the up-to-date valuation of the scheme assets. My conclusions are the same here again as they were in relation to MPVA recoveries, which is that such an allocation would be within the parameters of a proper exercise of discretion by reasonable trustees acting reasonably and, as I said before, I consider that that is certainly on the scale of reasonableness. It is a better option, a fairer and therefore better option, than the transfer in basis.

19 The last suggested option, which was raised by Mr Moeran in his skeleton, was whether the costs ought to be allocated on a pro rata basis by reference to the MPVA sums paid out. He says that that would have a correlation with the way in which the tax charges would be calculated and would fall. Unfortunately, as Mr Bryant pointed out, the uncertainty about the way in which the Inland Revenue intend to run their arguments on such an appeal is such that I cannot see that, at present at least, that would be a reasonable option to adopt because it is impossible to tell. Therefore, at least at present, I conclude that that would not be what reasonable trustees would do. That does not preclude it becoming an option which might be within the range of what is reasonable in the future when more detail is elicited from the Revenue.

LATER

20 The third question which arises under para.11 of the Part 8 claim relates to how to deal with the costs of recovery, it is said "and management of" (but I do not understand what additional cost of management there would be) of assets of the schemes that are not related to the MPVA loans. The options which are suggested are that they should be borne equally been all the schemes or that they should be borne on an individual basis, but in the sense that costs of recovery on an asset should be borne by the scheme whose asset it is but, to the extent that an asset is held jointly, then the costs should be apportioned pro rata in accordance with the extent to which that asset is held by that scheme.

21 My conclusions in relation to bearing costs equally, which I have voiced in relation to the first element of para.11, and also in relation to the second element of para.11, remains the same in relation to this third element. Despite what Mr Bryant says, it seems to me that equal apportionment is a very blunt instrument and is the least fair to the members of all the options. I come therefore to the same conclusion under this head as I have under the previous two heads, namely that it is an option which, in these circumstances, comes right at the edge of the reasonable steps which a trustee acting properly, and taking all relevant matters and no irrelevant matters into consideration, could decide to take.

22 I therefore conclude that in this regard, and in relation to these costs, that it is the option which a reasonable trustee acting properly would take and, in fact, it is much preferable that the costs of recovery of an asset should be borne by the scheme which is going to benefit by that recovery and which owns that asset. To the extent that an asset is jointly owned, then the costs should be attributed to each of the schemes to the extent and in relation to the interest that that particular scheme holds. So, although I do not say in so many words that (b) is the only way in which a reasonable trustee could proceed, it seems to me that there is a real bias, as far as I am concerned – and the use of "bias" is not to suggest that I am in any way biased or that the trustees are, in its favour. It seems to me, the best of the two options by a long way.

LATER

23 I do think that this situation is slightly different because these are, for example, the costs of determining legal issues which had to be dealt with in relation, for example, to the very nature of the payments made in relation to the trust deed and deeds and rules. However, I am afraid that I do accept Mr Bryant's reluctant submissions in this regard. It does not, in my judgment, drag back the equal apportionment argument very far from the rim. As I have described before, I consider that it is on the very rim, the very edge, of what would be reasonable. In this regard I can see that it might move very slightly away from the very rim but remains there, and it seems to me that the logic of my conclusions in relation to the other elements of para.11 hold good, in fact, in relation to these costs too. Therefore, the preferred approach, which I consider that reasonable trustees could take, would be pro rata in relation to up-to-date valuation and the other options come after that, as I say, with equal apportionment in this case falling slightly within the rim rather than at the very edge.

LATER

24 Question 12(i) concerns how to allocate profits and losses in relation to scheme assets between the member accounts. In this regard I was helpfully taken to the relevant provisions of the trust deed. It is accepted, of course, that the trustees were the same in the case of each of the funds. I was taken in particular to clause 10, to clause 8 in relation to investments, cl. 8.2 in relation to investment facilities, and then to the definitions in the rules of "investment facilities" and "member's account". I mention that because there is reference to "investment facilities" in the sense of being given options about what funds contributions might be invested in. In reality that did not take place. "Member's account" is defined in rule 2 of the rules in the following way:

> "… an account under the Scheme referable to the Member which account may comprise or include any contributions, payments or transferred-in amounts and any investment profit or loss."

Mr Moeran says, and I do not think Mr Bryant dissents from it, that, in fact, this is a non-segregated scheme, that members were not given the opportunity, which they thought they were going to have to be able to choose within a band of investments, and that that is the relevant background to this question.

25 There are three options which are put forward in this regard and, in accordance with the representation orders, Mr Moeran has argued one way down the list and Mr Bryant back up the list in the opposite direction. The first option is that investment profits or losses, to put it that way, should be dealt with and attributed on a pro rata basis on the basis of what was transferred in, in relation to what was transferred into a scheme as a whole. Mr Moeran says that is the cheapest, most efficacious, clear, simple and fair way of moving forwards and it also means that one does not have the difficulty, for example, of having to value the MPVAs. Mr Bryant, on the other hand, reserves his position in relation to that but it is his least favourite option.

26 The second, and middle, point in the alternatives has been described by Mr Moeran as being a "unit trust basis", whereby each member and member's contribution would be treated pro rata as against the scheme assets at the date on which there was that transfer in. So Mr Moeran says very unfair results would arise, it would be very unreal, and it would be dependent upon timing and that would be unfair. He also said that it would be very difficult to work out, it would be expensive and, in some respects, random.

27 It seems to me that Mr Bryant, although he was seeking to do his duty to the court, did not really dissent from that. He understands and agrees that it would be extremely difficult to value the assets and that it would be a difficult and expensive road to tread.

28 The third option, which is Mr Moeran's least favoured and Mr Bryant's most favoured, has been called nominal segregation and it is not disputed that the trustees have the power to do this. In fact, Mr Bryant does not suggest that what has been done in the past should be undone, but for the future he says that the members should be given the option to choose within bands of investment because that is what they thought that they were going to be entitled to do. In any event, it is not doubted that the trustees have power to do this under the trust deed and rules. The effect would be, Mr Moeran says, that it would be necessary effectively to trace each member's contribution, in the sense of their transferred in funds, through to the investments made and then seek to attribute profits and losses for each investment accordingly against a member's account.

29 I accept that there is power to give members the option to choose various investments or various classes of investment. In fact, in reality that has not happened to date and it seems to me, on that basis, to take the third option of what has been called nominal segregation would be entirely unreal and inappropriate and, I go as far as to say in the circumstances of this case, would not be a reasonable approach to take by reasonable trustees in a proper exercise of their discretion. I say that also on the basis that it would lead to an extremely complex and expensive process of seeking to try to trace members' contributions as against the investments. It would also, it seems to me, produce a very arbitrary and unfair result as between members and, therefore, I consider that that is not a reasonable exercise of the discretion of the trustees.

30 Working backwards, what about (b) or the middle option? The middle option, as I have said, has been dubbed "the unit trust basis", and that is that one takes any profits and losses and deals with them pro rata in relation to each member's transfer in but taking it in accordance with the date that that money comes in. It seems to me, and I agree in this regard with Mr Moeran, that that also produces a very arbitrary, unfair and unreal result, given the realities and the background circumstances to this matter and the way in which each of these members became members of these schemes. It is also, as Mr Moeran points out, an expensive way of seeking to deal with this issue and, in some respects, would produce random results.

31 So I come to the conclusion that that would not be an option which I would favour but I would go so far as to say it would not, in all the circumstances of this case, be the exercise of discretion by a reasonable trustee.

32 That leaves me, therefore, with option (a) and that is that these profits and losses be attributed on a pro rata basis between transfer in and the amounts transferred in as a whole. It seems to me that that is the fairest and most sensible option. It is also cheap to administer and does not give rise to any other issues, for example, in relation to the valuation of MPVAs. In the circumstances, it seems to me that it is the only way in which reasonable trustees exercising their discretion properly could proceed.

LATER

33 These questions arise under para.12(ii) of the Part 8 claim. They relate to the schemes' costs, including but not limited to those identified in para.11 above, and how they should be, or may be, attributed to the member accounts.

34 In this regard there are, again, a number of options. The first is that such costs should be paid by the fund generally, which, in practical terms, results in them being paid pro rata in accordance with the value of the transfer in as against the value of the fund. Mr Moeran says that that is consistent with cl.10 of the trust deeds and that cl.10(d) of the trust deed only provides a power for the trustee to take a different view and apply a different regime. Mr Bryant accepts that in practical terms option 1 is probably the same as what has been described as option 3, and I think Mr Moeran takes the same view. Option 3 is that those costs be borne pro rata on the basis of what is the value of what has been transferred in.

35 The second option, which is put forward by Mr Moeran, is that these costs be borne equally by the members' accounts. Mr Bryant says that that seems to be contrary to cl.10 and would also create unfairness because some accounts are very much smaller than others.

36 Mr Bryant's favoured option is the least favoured by Mr Moeran because of the form of the representation orders. That is that costs which are specific to a member should be attributed to that member's account. Mr Bryant points out that that is within Dalriada's powers in cl.10(d) and, if there is specific conduct of any kind which is attributable solely to the member, the costs should be borne by that member. Mr Moeran says that in general that is unlikely to be the case.

37 First of all, I should say that it seems to me that if there were a cost which was specific only to an individual member, not in the general sense mentioned by Mr Moeran of an administrative step which arises in relation to a member because he is a member, but something much more relevant and direct in relation to the individual, then I consider that it would be entirely within the powers of the trustee and would be a reasonable and proper exercise of the powers of the trustee, and the discretion of the trustee, to attribute that cost to the specific member account. But I should not be taken, having said that, to sweep up in that, the kind of administrative steps which Mr Moeran was concerned about, which would be, for example, the provision of a transfer value. That seems to me to be part of the natural fretwork of a scheme as a whole. It would have to be something very specific. In any event, as Mr Bryant pointed out, that would be for a specific item and it would be necessary, in any event, to have an underpin in relation to costs as a whole.

38 It seems to me that both options 1 and 3, as they are presented to me by Mr Moeran, are not only reasonable conclusions for trustees to arrive at, having exercised their discretion and their powers properly, but also are very likely to be the way in which such a trustee ought to act as the underpin after having the power, to which I have referred, if there were some unusual and specific item or event which needed to be attributed to the individual member. It seems to me that that is entirely consistent with cl.10 of the trust deeds that either 1 and 3 be adopted.

39 It seems to me, however, that option 2, which is to divide those costs equally between accounts, is not consistent with cl.10, nor, it seems to me, is it also really fair. In those circumstances, I would go as far as to say that I do not consider that it would be within the proper exercise of discretion by a reasonable trustee.

40 So that is my conclusion in relation to these further set of questions.

LATER

41 Paragraph 12(iii) of the Part 8 claim is concerned with the difficulties which have arisen in relation to what was called the "transfer fees". These were amounts of five per cent of incoming transfer payments made by other third party schemes to the schemes. The transfer fees had been the subject of a paragraph in the documentation given to potential members and they had had to agree to this amount being paid. In fact, it seems in practice that certain sums were transferred out of the scheme funds to LLPs run by or on behalf of Mr Tweedley and others and they were paid in bulk. It has been very difficult to reconcile those bulk payments with the individual transfers in in relation to individual members. However, I am told by Mr Moeran that ninety per cent of those transfers in and attributable transfer fees have been located and traced. That leaves, of course, ten per cent which it is not possible to trace and, of course, that is in part because the paperwork which Dalriada inherited is far from complete.

42 The amount in question as a total is £1,083,415 and, unfortunately, only a very small amount of these fees have been recovered; something in the region of £20,000. That is why this question arises. How is the loss to be attributed?

43 Mr Moeran says that quite clearly these sums were paid out of a non-segregated fund in breach of trust and therefore they were lost to the trust fund and ought to be dealt with, therefore, across the board. That would lead to a situation in practice in which they were borne pro rata by each member account in accordance with how much it is worth in relation to the amount transferred in as against the value of the funds as a whole. He says that that is consistent with cl.10 of the trust deeds to the extent that this can be characterised as a "cost" or "expense" and that it would not be appropriate to exercise the discretion in cl.10(d) to attribute a particular cost to a particular member account.

44 Mr Bryant, on the other hand, is required to argue that, in fact, to the extent that those fees can be attributed to specific members and member accounts, then where they have been identified they should be paid accordingly. Also, to the extent that they have not been able to be attributed, that is the ten per cent, he argues that they be divided in terms of amount outstanding amongst those accounts which are left on a pro rata basis.

45 It seems to me, once again, that this set of circumstances throws up difficult and unpalatable situations. This is in part, of course, because so little of these transfer fees have been recovered. I accept entirely what Mr Moeran says, that although each of the members may have signed documentation which included reference to these transfer fees, that that cannot be seen in any way as them having waived any breach of trust or agreed to it. They cannot be said to have had any or sufficient knowledge to attribute such a waiver to them in relation to what seems to me inevitably to be a breach of trust.

46 So what is the most equitable and fair way of dealing with this matter which is also in accordance with the law and in accordance with the specific provisions of the trust deeds and rules? Also what, having determined those things, would a reasonable trustee do when exercising his discretion in a way which is proper in these circumstances? It seems to me overall that these sums were, in fact, sums which were taken from a non-segregated fund in breach of trust; and that no knowledge, acquiescence or a waiver – and I use all of those terms very loosely and widely – can be affixed to any particular member because they signed or did not sign the appropriate documentation. In fact, these are losses to the fund, which it seems to me ought to be borne by the fund, and that that also would result in an outcome which would be consistent with my conclusion, for example, in relation to para.12(i) of the Part 8 claim form. It also seems to me that overall, in the circumstances,

that would be the fair and proper way to deal with this matter. I also conclude, therefore, that that is certainly a preferred option.

47 I am not saying that the other option, which is to attribute to the individual accounts to the extent that those fees have been attributed to individuals, would be an unreasonable way to behave. However, it would leave the remaining ten per cent which cannot be attributed. In those circumstances I also consider that it would not be unreasonable to adopt the approach which Mr Bryant suggests, although I am concerned in that regard about how one would shoehorn that in to the various powers of the trustees. Therefore my strong preference is for the first option rather than the second.

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(Incorporating Beverley F. Nunnery & Co.)
Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

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