Neutral Citation Number: [2012] EWHC 3269 (Ch)

Case No: HC-12-E03229

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/11/2012

IN THE MATTER OF THE PENNINES RBS THE MENDIP RBS THE MALVERN RBS

Before:
MR JUSTICE BRIGGS

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Between:

DALRIADA TRUSTEES LIMITED	**Claimant**
- and -	
(1) PETER JOHN GWILLIAM **(2) JOHN LAWRENCE WOODWARD** **(3) JENNIFER DORIS ILETT** **(4) PITMAN TRUSTEES LIMITED** **(5) GILES ORTON**	**Defendants**

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Mr Andrew Spink QC (instructed by **Pinsent Masons**) for the **Claimant**
Mr Thomas Seymour for the **First Defendant** and **Mr Jonathan Hilliard** for the **Fifth Defendant** (instructed by **Eversheds LLP**)

Hearing dates: 5, 12, 13, 14 November 2012

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Approved Judgment

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

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MR JUSTICE BRIGGS

Mr Justice Briggs :

Introduction

1. This is a *Beddoe* application by Dalriada Trustees Limited ("Dalriada") in relation to pending proceedings in which it is the claimant relating to the affairs of two occupational pension schemes, the Pennines RBS, and the Mendip RBS (together "the Schemes"). I will refer to them as the main proceedings. Dalriada was appointed an independent trustee of the Schemes by the Pensions Regulator on 28 March 2012, pursuant to its special powers under section 7 of the Pensions Act 1995. Pursuant to section 8 (4)(b) of the Act the Regulator's order provided that the claimant should exercise powers as trustee of the Schemes to the exclusion of all other trustees. Dalriada was appointed with exclusive powers as trustee because of the Regulator's concern, after investigation, that the manner in which the Schemes were being run by the existing trustees gave rise to a risk to members' benefits.

2. This *Beddoe* application has taken the form of the first hearing of a Part 8 Claim Form, in which the existing trustees of the Schemes, John Woodward and Jennifer Ilett have been joined as second and third defendants. Pitman Trustees Limited has been joined as a fourth defendant due to an apprehension that it may have been appointed a trustee of one of the Schemes. None of those defendants have taken any active part in this application.

3. The aggregate membership of the Schemes was in March 2012, and remains, some 476 in number and the Schemes were funded by £19m of transfers-in from other registered pension schemes. The first defendant to the *Beddoe* proceedings is a Mr Peter Gwilliam, a member of one of the Schemes, and an order is sought that he be appointed to represent all the members of both Schemes.

4. The main proceedings were issued at the beginning of April 2012, against Mr Woodward and Ms Ilett, as first and second defendants, and against three companies ("the Hedge companies") in which, by March 2012, the whole of the Schemes' funds had been invested, save for £1m, still held in cash by the existing trustees pending investment. The Hedge companies are respectively Hedge Capital Investments Ltd ("Investments"), the third defendant, Hedge Capital Investment Group plc ("Group"), the fourth defendant and Hedge Capital Limited ("Limited"), the fifth defendant.

5. The relief primarily sought in the main proceedings is the recovery by Dalriada as trustee of all sums paid to the Hedge companies, or the proceeds of the application of those sums by the Hedge companies, upon the ground that the transactions pursuant to which those payments were made were all, for a number of cumulative reasons, void in equity. An account is also sought against the first and second defendants as trustees on the basis of wilful default, upon the ground that their procuring the making of the impugned payments amounted to a breach of trust.

6. Dalriada's claims arise out of the modus operandi of the Schemes which, as between Dalriada and the Hedge companies on the statements of case in the main proceedings, is not substantially in dispute. It may be summarised as follows:

   (a) Members' incoming transfer payments were used by the defendant trustees, to the nearest £1,000 per

member, for subscribing for preference shares in Group, the balance being retained by the trustees in cash.

(b) Group made a secured loan of most of its subscription receipts to Investments.

(c) Investments then retained a proportion of the loan proceeds for investment, on-lending the balance, again on security, to Limited.

(d) Limited used the sums lent to it by Investments for making unsecured 25 year loans to Scheme members, usually at a fixed interest rate of 5 per cent per annum, in amounts estimated to be capable of being repaid by those members from the lump sums payable to them by the Schemes on retirement.

7. That *modus operandi* is described in the Particulars of Claim as:

> "A form of 'pensions liberation', meaning a transaction or a series of transactions with the aim and purpose of procuring the release of funds from a registered pension scheme to a member of that pension scheme prior to retirement."

The Hedge companies do not in their defence challenge that general description of the *modus operandi* of the Schemes as a form of pensions liberation. But they vigorously deny that it was unlawful or in any way a breach of trust.

8. Dalriada asserts four main grounds for its claim that the Schemes' *modus operandi* rendered the transfers of monies to the Hedge companies void in equity. They may be summarised thus:

(1) The structure involved the making of unauthorised payments to members, contrary to Part 4 of the Finance Act 2004, to the prejudice of the Schemes' status as registered schemes, contrary to provisions in the Schemes' trust deeds prohibiting conduct adverse to that registered status: ("the unauthorised payments claim").

(2) The making by the trustees of payments to the Hedge companies by way of pensions liberation (to fund loan payments to members prior to retirement) was contrary to the sole purpose of the Schemes, namely to provide pension benefits, and therefore a fraud on the trustees' powers: ("the improper purpose claim").

(3) The deployment of substantially the whole of the Schemes' funds in the subscription for preference shares in Group was a breach by the trustees of the Occupational Pensions Scheme (Investments) Regulations 2005 ("the 2005 Regulations"), because of a total failure to diversify or to consider diversification, and because of a failure to invest predominantly in listed securities: ("the investment claim").

(4) In authorising the payments, Mr Woodward acted subject to a conflict of interest due to his status as owner and director of Limited: ("the conflict claim").

9. The purpose of the *Beddoe* proceedings is for Dalriada to be authorised to continue the main proceedings, and indemnified against all costs and liabilities of and incidental to those proceedings out of the assets of the Schemes. The more limited purpose of this particular application within the *Beddoe* proceedings is to obtain authority to continue the main proceedings up to disclosure and the exchange of witness statements, with the possibility of making a summary judgment application in the meantime, and to obtain indemnification in relation both to costs incurred to date, and costs going forward including, in both cases, indemnification in respect of any contingent liability for the defendants' costs.

10. The application is, in the usual way, supported by a confidential joint opinion of leading and junior counsel instructed by Dalriada, Mr Andrew Spink QC and Mr Fenner Moeran. Mr Gwilliam was afforded the assistance of independent solicitors and experienced Chancery counsel, Mr Thomas Seymour. Mr Gwilliam was one of those Scheme members to whom a loan has been made by way of pension liberation.

11. Thus far the *Beddoe* proceedings might appear superficially to be relatively straightforward. In fact, as will appear, they are nothing of the kind. The reasons for this will appear from the following summary of the development of the main proceedings and of the *Beddoe* proceedings.

12. Dalriada's inherited perception that the security of members' funds could be at risk led it to the obtaining of a without notice freezing order against all the defendants from Arnold J on 2 April 2012, with an upper limit of £12m. Asset disclosure by the defendants pursuant to the freezing order revealed that the first and second defendants were of no significant means. More importantly they showed that, at that stage, the Hedge companies' assets were, in summary, as follows:

(a) Limited had the benefit of loans of £6.4m to members, and retained the balance of the £7.64m lent by Investments, save for payments to brokers of £233,000 odd.

(b) Investments had the benefit of its loan to Limited, and had made a small number of miscellaneous investments, amounting in total to a face value of some £2.75m, most of which appeared to be illiquid and of very uncertain value. The largest investment of £1.8m odd consisted of a lawsuit relating to land in Florida purchased by Investments' agents without authority. In addition, Investments held less than £1m in cash from the aggregate of more than £11m lent to it by Group.

(c) Group held the benefit of its loan to Investments, together with a substantial cash balance retained from the preference share subscriptions by the Trustees which had amounted in aggregate to more than £18.4m.

13. Thus, in summary, ignoring inter-company receivables, the proceeds of the Trustees' subscriptions for preference shares in Group were, at the commencement of these proceedings, represented by Hedge company assets in the form of unsecured loans to members, illiquid investments of uncertain value, and a substantial amount of cash amounting in aggregate to £7.9 million. In addition, Group had received approximately £1m, again by subscription from preference shares, from a series of self-invested pension schemes ("SIPPs") having no connection with the Schemes. Apart from that, the Hedge companies appeared to have no business or assets derived otherwise than from the Schemes.

14. The freezing order did not, either in its original form or when renewed by application on notice, prohibit the Hedge companies from using their assets for the obtaining of legal advice and representation. Fortified by that large resource, the Hedge companies applied on 14 May for defendants' summary judgment and on 23 May for security for costs. Those applications came on for hearing before the Chancellor over two days at the end of May, together with Dalriada's on-notice application for the continuation of the freezing orders.

15. By a reserved judgment handed down on 15 June the Chancellor dismissed the Hedge companies' summary judgment application, adjourned the security for costs application and continued the freezing order with an increased upper limit. He refused Dalriada's application that the Hedge companies should be deprived of their liberty, thus far, to use their assets for the defence of the main proceedings, but made provision enabling Dalriada to challenge the reasonableness of legal fees which the Hedge companies sought to discharge pursuant to that liberty.

16. The Chancellor ordered the Hedge companies to pay Dalriada's costs of the summary judgment application and of the application to extend the freezing orders. An interim payment by the Hedge companies of £140,000 on account of those costs is held by Dalriada's solicitors pursuant to undertakings pending the outcome of this *Beddoe* application.

17. The Chancellor also adjourned to the *Beddoe* judge the further hearing of the Hedge companies' security for costs application including, by amendment, an application that Dalriada's cross-undertaking in damages be fortified, while acknowledging that the *Beddoe* judge might decline to deal with it, as indeed I have. He refused an application by the Hedge companies for permission to appeal.

18. Nothing of significance has occurred in the main proceedings since then. The parties' attention became focussed upon the *Beddoe* application. Its issue was delayed until 14 August, almost two months after the Chancellor's judgment, because of Dalriada's need to negotiate litigation funding arrangements with its legal team, it being perceived that the Schemes' cash available to Dalriada for that purpose would be insufficient to enable Dalriada to see the main proceedings through to trial, while obtaining the necessary *Beddoe* relief, if solicitors and counsel had to be paid as the work was done.

19. Following issue, the *Beddoe* application suffered further delay while the representative Scheme member originally identified as suitable found it necessary to withdraw. Eventually an order for expedition of the hearing of the *Beddoe* application was made on 15 October and it was listed for hearing before me on 5 November.

20. Most unusually, the Hedge companies were not prepared to allow the *Beddoe* proceedings to take their course between the normally appropriate parties to them (i.e. the trustees and the beneficiaries of the relevant trusts or their representatives). They made strenuous efforts to intervene in the *Beddoe* proceedings and, for that purpose, obtained an order from Newey J also on 15 October that they be at liberty to file written submissions in the *Beddoe* proceedings and also to apply at their hearing for permission to make oral submissions. The result was that I was presented on 5 November not merely with skeleton arguments from Mr Moeran for Dalriada, Mr Seymour for Mr Gwilliam, the whole of the 12 lever arch files of evidence on the application before the Chancellor together with further substantial evidence, but also a 47 page skeleton argument from leading and junior counsel for the Hedge companies (Alan Steinfeld QC and John Stephens), a supplementary skeleton and a further skeleton about why they should be given permission to make oral submissions. Those skeletons were supported by witness statement evidence on the Hedge companies' behalf. The hearing was also attended by a Mr Howard Davies, a member of one of the Schemes, and the brother of John Davies, the CEO of Group. I was also presented with a 58 page bundle of written observations from other members of the Schemes, for the most part responding to invitations to express their views circulated to them either by one of the defendant trustees or by representatives of the Hedge companies. Mr Howard Davies made a written statement on behalf of himself and ten other members of the Schemes, as well as two members of the SIPPs which had also invested in Group by way of preference shares.

21. The general gist of the written observations of the Scheme members, both in the bundle of members' comments and Mr Howard Davies' statement, was one of utter dismay at the existence of these proceedings, a belief that, regardless of the outcome, the Scheme members would be the losers and the legal profession the winners, and a desire that I should do everything within my power to bring the proceedings to a stop at the earliest possible opportunity.

22. I did not find it necessary, and therefore did not permit, Mr Stephens for the Hedge companies to make oral submissions on their behalf. Nonetheless I have carefully considered their written submissions, which echoed and elaborated upon the members' observations. They submitted that, win or lose, it was inevitable that all the costs of both Dalriada and the Hedge companies incurred in the main proceedings would fall to be paid from funds originally derived from the members' transfer payments into the Schemes, and that even the most favourable outcome of the main proceedings (from Dalriada's perspective) could not possibly justify the imposition of that cost upon the members' funds, on any reasonable cost benefit analysis.

23. Besides copious submissions on the merits of the main proceedings, the Hedge companies' written submissions contained two additional and most serious allegations. The first was that Dalriada could not be trusted to advance the interests of the Scheme members in the main proceedings. Rather it was, as an appointee of the Pensions Regulator, pursuing the main proceedings as part of the Regulator's stated objective (for example on its website) "to co-operate with the pensions industry, other government agencies and law enforcement agencies to ensure liberation is prevented, deterred and disrupted." Reference is made in the written submissions to statements by Dalriada of a perceived difference between members' personal interests and "what is correct legally for the administration of pension schemes" and between the desires

of members and their best interests. The Hedge companies draw attention to the history of Dalriada's trusteeship of the Ark schemes (see *Dalriada Trustees Limited v Faulds* [2011] EWHC 3391 (Ch)) in which it obtained a decision from Bean J that payments made by those Schemes were void because they constituted unlawful pension liberation, and to the subsequently published statements by Dalriada of its intention to seek early recovery of loans made to members of those schemes, subject to giving consideration to the financial circumstances of particular members. The inference which the Hedge companies seek to draw from Dalriada's trusteeship of the Ark schemes is that, if successful in the main proceedings, Dalriada will similarly seek to recover loans made to members in advance of their due dates for repayment (or the members' receipt of lump sum payments under the Schemes) upon the basis that all the transactions by which Schemes' funds eventually became lent to members, including the loans themselves, were void in equity. Reference is made to the financial circumstances of persons who are said to be typical members for the purpose of demonstrating that such a campaign, however disruptive of pensions liberation, could not possibly be for members' benefit.

24. The second serious allegation made by the Hedge companies in their written submissions is that Mr Gwilliam's legal team could not be trusted properly to represent the interests of the scheme members at the hearing of the *Beddoe* application, and in particular the interests and views of those members adamantly opposed to the continuation of the litigation at their expense.

25. It was apparent to me on 5 November, having pre-read the written submissions and part of the evidence, that because of the need to exclude representatives of the Hedge companies, and also Mr Howard Davies (due to his relationship with John Davies and Group) from the bulk of the hearing of the *Beddoe* application, that I would indeed not receive submissions directed to persuading me to the view of those members wholly opposed to the continuation of the litigation. This is mainly because Mr Gwilliam, perfectly properly in my view, instructed his solicitors and counsel to take a balanced and independent view of the commercial, financial and legal merits of the main proceedings, rather than to espouse any particular desire of members that they should or should not continue. Although it is the overwhelming desire of those members who have in fact responded to invitations to comment on the main proceedings that they should not continue, I bear in mind that they are, collectively, no more than about one-tenth of the membership of the Schemes as a whole.

26. I therefore considered that it was appropriate that a person be appointed to represent those members opposed to the continuation of the main proceedings. I was persuaded by Mr Moeran for Dalriada that it would in practice be very difficult to find a representative opposed member who could, if permitted to attend the whole of the *Beddoe* hearing, then be trusted (or even reasonably expected in the real world) to keep those proceedings and their outcome wholly confidential from any representative of the Hedge companies or the existing trustees. In those unusual circumstances, as Mr Seymour sensibly submitted, it was appropriate therefore to appoint a professional person to represent members opposed to the continuation of the litigation, and Mr Giles Orton (a partner at Eversheds) was appointed. He duly instructed Mr Jonathan Hilliard to attend at the adjourned hearing of the *Beddoe* application (which commenced on 12 November) to argue against the continuation of the main proceedings, and generally to advance the case of those members wishing to bring

them to as early an end as possible. The court is very much indebted to Mr Hilliard for the speed and diligence with which he prepared detailed written and oral submissions and to the good sense with which he presented what turned out to be in many respects a difficult case. I am satisfied that everything that could reasonably be said in support of directions requiring the discontinuance or early settlement of the main proceedings has been said by Mr Hilliard, and that the desires of those Scheme members opposed to the continuation of the main proceedings have been fully ventilated by experienced counsel, with sufficient access to the relevant material with which to advance that case.

27. The court's task on a *Beddoe* application is, reduced to its barest outline, to decide whether to authorise the making by trustees of an investment of their time, and the trust's property, in adversarial litigation. Investment in litigation is an unusual form of trustee investment, if for no other reason than because of the inherent risks and uncertainties as to outcome. It is not merely an investment which may (in the language of the markets) go down in value as well as up. It may prove to be a hugely expensive investment yielding a nil return.

28. Considerations which the court will ordinarily have to bear in mind include, of course, the merits of the proposed proceedings, the value of the objectives to be achieved thereby, necessarily discounted by the risk of failure, the amount of the trust's funds to be put at risk, and the effect of the application of that part of the trust fund upon the state of investment, and liquidity, of the fund as a whole. Viewed in the round, the process is essentially one of cost benefit analysis.

29. Where the court is first approached for *Beddoe* relief after proceedings have been commenced (as in the present case) then it is necessarily deprived of the ordinary opportunity to consider whether the trustees should sue or not sue. The question becomes, in outline, whether to continue or discontinue; i.e. whether to invest further in litigation so as, in part, to protect the value of the litigation chose in action in which an investment has already been made, but without the court's authority. In place of the superficially simple choice, to sue or not to sue, there arises a menu of choices, whether to continue (and if so how and for how long) to discontinue and/or, as a constantly variable alternative option, to seek to settle and if so by what means, including the use of mediation or other forms of ADR. Nonetheless, the process is no less one of cost benefit analysis, merely because it occurs during rather than before commencement of litigation.

30. In forming its own view, the court will pay primary regard to the views of the trustees, provided that they have been reached by a reasonable process of research and analysis, and to the opinion of its chosen counsel on the merits. But the governing criterion is, from start to finish, the court's perception of the best interests of the beneficiaries, subject only to the trustee's right, if it acts properly, to an indemnity for its own liabilities out of the trust fund.

31. In particular, the interests of the beneficiaries are not to be displaced by a perception that the restoration of the administration of a trust to full statutory compliance, regardless of cost, is an overriding criterion. As Mr Hilliard correctly submitted, it is not. By that I do not mean that the court should authorise, still less instruct, trustees to act unlawfully. But where trustees inherit a non-compliant state of affairs (such as, in the present case, a complete failure to comply with the 2005 Regulations), it may

be entirely appropriate for the court to conclude that the cost of litigation designed to restore a pension scheme to full compliance is wholly disproportionate to the complete achievement of that objective, and on balance adverse to the beneficiaries' interests.

The Merits

32. The Chancellor's judgment in June establishes that Dalriada has a real (as opposed to fanciful) prospect of success on its claim, on each of the four ways in which it is put. Mr Spink and Mr Moeran's joint opinion is that Dalriada has strong prospects of success under all four headings.

33. For Mr Gwilliam, Mr Seymour broadly agreed in relation to the investment claim, at least in respect of subscriptions made after each Scheme's membership attained 100, which occurred very early in January 2012, following which subscriptions of at least £9m were made by the existing trustees. In short, for pension schemes with 100 or more members, the 2005 Regulations require that the assets of the scheme must consist predominantly of investments admitted to trading on regulated markets, and that the assets of the scheme must be properly diversified in such a way as to avoid excessive reliance on any particular asset, issuer or group of undertakings. Since substantially the whole of the Schemes' funds were invested in preference shares in Group, the case that this was a breach of trust in relation to schemes with more than 100 members appears unanswerable. Nonetheless, since Group gave value for the subscriptions in the form of the preference shares, it is necessary for Dalriada to defeat a bona fide purchaser without notice defence. Again, Dalriada's advice points to the fact that, from mid-December 2011, the Hedge companies were aware of advice that investment in preference shares appeared to run contrary to the 2005 Regulations, once the schemes had 100 members or more. Accordingly Mr Spink and Mr Moeran advised, and Mr Seymour broadly agreed, that a bona fide purchaser defence looked unlikely to succeed.

34. There was a difference of view as to the strength of the investment claim in relation to subscriptions made before each Scheme acquired 100 members, in circumstances where the 2005 Regulations require only that the pension trustees have regard to diversification, and because the bulk of the subscriptions made before the Schemes each acquired 100 members were made before legal advice was obtained as to the requirements of the 2005 Regulations. Nonetheless, the case is well arguable, with a reasonable prospect of success, even in relation to the earlier subscriptions. Perhaps more importantly, since £9m was subscribed after the Schemes both acquired 100 members, an *in personam* judgment against the Hedge companies for knowing receipt would prima facie be sufficient to catch all the cash still likely to be held by the Hedge companies on the earliest date when judgment could be obtained, so that it would prima facie be sufficient to enable Dalriada to achieve its main commercial objective in the proceedings.

35. Mr Hilliard could offer no persuasive submissions to the contrary in relation to the merits of the investment claim. Mr Spink and Mr Seymour both agreed (and Mr Hilliard did not demur) that since this part of the claim depended essentially upon the legal analysis of facts which are not in dispute, it was prima facie suitable for summary determination, with a substantially better than even prospect of success at that stage.

36. The improper purpose claim was, counsel all agreed, the next best in Dalriada's list in terms of prospects of success. It would if successful impugn all the preference share subscriptions, rather than only those made in and after January 2012. Nonetheless, as it seems to me, the bona fide purchaser defence advanced by the Hedge companies may constitute a more significant obstacle to this claim than to the investment claim. This is, in particular, because although the Hedge companies appear to have known the relevant facts upon which the improper purpose claim is based, it is unlikely to be possible to show, at least prior to the trial, that they knew, or should have known, of the legal consequences: see *Sinclair Investments (UK)Ltd v Versailles Trade Finance Ltd* [2012] Ch 453, per Lord Neuberger of Abbotsbury MR at paragraphs 102-108. Nonetheless it seems to me that, at trial, it is likely to prove difficult for the Hedge companies to displace a conclusion that, before embarking upon a major business structured for the specific purpose of pension liberation, its directors ought to have obtained some legal analysis of the question whether pension liberation formed any part of the purposes of the Schemes, from the funds of which the Hedge companies were to derive almost the whole of their incoming working capital.

37. The conflict claim was not made the subject of detailed submission or analysis during the hearing. Its potential obstacles appear to lie more in the establishment of an unbreakable link between the allegation of breach of trust and the invalidation *vis a vis* the Hedge companies of the preference share subscriptions. It was not suggested that this would be likely to succeed on an application for summary judgment but, conversely, neither Mr Seymour nor Mr Hilliard advanced any reasons why it ought now to be withdrawn, if the main proceedings are otherwise fit to be pursued to trial.

38. There was much sharper disagreement between counsel about the unauthorised payments claim. Buoyed up perhaps by their success in the *Faulds* case, Mr Spink and Mr Moeran advised again that this was a strong claim. By contrast Mr Hilliard provided detailed technical reasons for describing it as weak, broadly similar to those advanced on behalf of the Hedge companies in Mr Steinfeld's and Mr Stephens' written submissions. More seriously Mr Hilliard, with some support from Mr Seymour, submitted that the pursuit of the unauthorised payments claim to trial was tantamount to the Scheme members shooting themselves in the foot, because it would be likely to bring down upon their heads serious adverse tax consequences, including an increased risk of de-registration of the Schemes under section 158 (1)(d) and (e) of the Finance Act 2004.

39. It is unnecessary for me to rehearse either the detailed submissions on the merits of the unauthorised payments claim or the equally detailed analysis of the possible tax consequences of its success at trial. It is sufficient for me to conclude, as I do, that it contributes nothing of its own to the strength to Dalriada's claims as a whole, that the tax consequences of its pursuit to trial are very uncertain, but that its removal by amendment at this stage, as a result of a direction given on this application, would provide undesirable comfort to the defendants to the main proceedings, if Dalriada's claim would otherwise be fit to be continued.

The Objectives of the Main Proceedings

40. The central objective of the main proceedings is, by having declared void the transactions by which the Schemes' funds were transferred into, and between, the Hedge companies, to unlock a proprietary and personal claim against the Hedge

companies for the recovery of the Scheme's funds and their proceeds, so as to enable them to be secured from further misapplication to the members' dis-benefit in the future, and re-invested so as to maximise the pensions and lump sum benefits eventually payable to members under the Schemes. I shall for brevity refer generally to the cash and investments held by the Hedge companies (save for the £1m attributable to the SIPPs) as the Schemes' funds, although it assumes that which Dalriada must prove, namely that the transactions by which the Schemes' funds were transferred to the Hedge companies are indeed void or voidable in equity.

41. I must first deal with the submission made on behalf of the Hedge companies that a real objective of Dalriada's claim is to create a platform for the recovery of the loans already made to members, by way of implementation of the Pensions Regulator's policy to disrupt pensions liberation, *pour encourager les autres*, rather than for the benefit of the members of these Schemes. While I can understand the reason for that apprehension, I make it clear that Dalriada has unequivocally denied that it has any such objective. It has (at least now) accepted that, even if successful in the main proceedings, those loans will have to be left in place, so that no part of the objectives of the main proceedings include the securing, or recovery for reinvestment, of the principal amounts of those loans, although of course Dalriada wishes to secure the receipt for the purposes of the Schemes of the substantial amount of interest payable on them by the borrowing members. Apart from that Dalriada wishes, for good reason, both to prevent the further misapplication of, and recover for reinvestment, the remainder of the Schemes' funds not already applied in the making of loans to members. At the outset of the proceedings, they included just under £10m in cash although, of that, about £1m had been subscribed by the SIPPs and just over £1m represented cash still in the hands of the trustees.

42. Subject to dissipation in the payment of litigation costs, fees and expenses, the freezing order obtained in April 2012 has prevented further mis-investment of that cash by the Hedge companies, and success in the main proceedings would, for the reasons already given, lead both to a personal and rather more complicated proprietary claim for the recovery of the remaining cash by Dalriada. The proprietary claim is complicated by the mixture of the Schemes' funds with the subscriptions made by the SIPPs.

43. The single biggest threat to the achievement of that objective lies not in the risk of failure in the litigation, but in the dissipation of the cash funds in paying the costs of both sides likely to be incurred between now and judgment (whether summary or at trial). This is indeed the main thrust of the Hedge companies' written submissions, the main concern of those Scheme members who had expressed a view about the matter, and a main feature of Mr Hilliard's submissions.

44. That process of attrition has, thus far, proceeded at a truly frightening rate. Dalriada's best current estimate is that costs already incurred to date (whether or not billed or paid) by both sides amount to some £1.83m. These include the costs of and occasioned by this *Beddoe* application, but not the additional costs incurred by the Hedge companies in seeking (thus far unsuccessfully) to have set aside the Pensions Regulator's appointment of Dalriada as trustee. It is possible that these will be sought to be recovered from funds in the hands of the Hedge companies, but it has yet to be tested whether they are within the legal expenses exception conferred by the freezing order. The results are first, that the cash remaining in the hands of Dalriada as trustee

has now been reduced virtually to zero, and the cash available for recovery within the Hedge companies to approximately £7.7m (inclusive of the SIPPs' contribution of £1 million). That process of attrition is likely to continue at a similar rate until the main proceedings are concluded by judgment or compromise. Dalriada's best estimate is that it will involve another £1m by way of attrition to take the shortest route to a successful outcome at summary judgment, and £2.675m if an attempt were made now to go for a speedy trial. If summary judgment were to be followed by a trial, then the attrition would, plainly, be substantially higher. I note in passing that in my view Dalriada may have slightly over-estimated the level of attrition up to a speedy trial because they have not discounted the likely future legal expenditure of the Hedge companies by reference to the 25 per cent disallowance which has thus far been achieved by subjecting their costs claims to court adjudication under the procedure set out in the freezing order, as amended by the Chancellor in June. That over-estimate may be as much as £120,000 but, in the greater scheme of things, it cannot be said with any confidence that the rate of attrition up to trial, or summary judgment, could not substantially exceed Dalriada's current best estimates.

45. Taking a necessarily broad brush, the quantum of the realistic objective of these proceedings in terms of safeguarding and recovery of the Schemes' cash funds for reinvestment is approximately £6.6m, upon success at summary judgment, and £5m upon success at a speedy trial. If a failed summary judgment were to be followed by a successful trial, then the quantum of the recovery would obviously be less.

46. Even then, recovery of those amounts may not be straightforward. The Hedge companies may go into an insolvency process if Dalriada succeeds in the main proceedings, not least because of the competing claims of the SIPPs (which have not thus far been litigated, although some of their members are aware of what is happening). Again, the practical enforcement of a successful proprietary claim is not itself straightforward, due again to the competing claims of the SIPPs. The best outcome is that the SIPPs' claims would be merely as preference shareholders, and therefore postponed, but an insolvency office holder of the Hedge companies might conclude that, if Dalriada succeeds, then so should a trustee for the SIPPs.

47. The only remaining objective attainable by success in the main proceedings is the gaining of control over the unsatisfactory portfolio of investments thus far made by the Hedge companies (otherwise than in loans). It will be apparent from my brief summary of those investments that the value of them, even if control is obtained over them, can only be regarded as highly speculative.

Cost benefit analysis

48. This is not a case in which the question for the court is whether to authorise, or not to authorise, contemplated proceedings. They have been started, run for nearly eight months, and have incurred costs of £1.8m already. After thorough discussion during the hearing, it is evident that there are four alternative avenues available to Dalriada, namely:

(1) Proceed to trial.

(2) Seek summary judgment, and proceed to trial if unsuccessful.

(3) Seek an early settlement.

(4) Discontinue.

It is necessary to conduct a comparative cost benefit analysis in relation to each, although not even Mr Hilliard submitted, otherwise than purely formally, that discontinuance would come out on top.

49. It is convenient to deal with discontinuance first. It would involve the discharge of the freezing order, leaving the Hedge companies to continue with a process of investing the remaining cash received from the Schemes as they thought fit. Their investment track record to date leaves the court with no confidence that the cash would be sensibly invested, not least because the largest single 'investment' to date appears to have consisted of the misapplication by agents of the Hedge companies of no less than £1.8m in a wholly unauthorised land purchase in Florida, in respect of which the Hedge companies' only asset consists of a lawsuit. Not even the Hedge companies' counsel's written submissions advanced any remotely cogent defence of the Hedge companies' investment track record to date.

50. Furthermore, the present investment of the Schemes in the Hedge companies consists of preference shares with a coupon which, although supposedly guaranteed, depends upon the availability of distributable profits, and with no rights of redemption for the purposes of making transfer payments, pension or other benefit payments to members, and the Schemes' own cash in hand has now been reduced almost to zero. It is true that the Hedge companies have protested a willingness (albeit without any legal obligation) to make redemption payments as and when monies are required to be paid out to members, but that is small comfort in the light of the present improbability that the Hedge companies will be profitable in the short or medium term (if ever) and in the light of the risk that a continuation by them of their presently lamentable investment track record will reduce the assets available to fund redemption, over time, to a substantially greater extent than the presently estimated incidence of costs between now and trial.

51. It follows in my judgment that, if necessary, the main proceedings ought to be continued to trial if necessary, if there is no shortcut which yields a significantly better prospect of achieving a sufficient part of Dalriada's legitimate objectives, at a proportionately less damaging cost. The available shortcuts are summary judgment and compromise. They are not strictly alternatives, but each needs to be separately assessed.

52. Mr Spink readily acknowledged that there was no obvious choice between summary judgment and the immediate pursuit of a speedy trial. I agree. I consider that a speedy trial would be likely to be ordered if application were made for that purpose. All the parties to the main proceedings have publicly lamented the devastating consequences of litigation costs upon the members' interests and I would expect the case-management judge to have no difficulty in concluding (in the absence of an application for summary judgment) that an order for a speedy trial would be the best way of bringing the costs attrition to an early end. It may be that there is not a large amount of disclosure still to be made (having regard to the extensive documentation produced by the Hedge companies on the summary judgment application) and there appears to be no reason to permit expert evidence. Much of the facts are agreed, and

the evidence deployed for the Hedge companies' summary judgment application will serve as a convenient basis for the preparation of witness statements at trial. Nonetheless, Dalriada's estimates show a likely cost attrition attributable to a decision to go for a speedy trial some two and a half times higher than would be occasioned by seeking, and obtaining, summary judgment.

53. I consider that it is only the investment claim which has a substantially better than even prospect of success on an application for summary judgment, and only in relation to the period after the Schemes each attained 100 members. Nonetheless this would appear likely to produce a judgment *in personam* against the Hedge companies in an amount sufficient to capture the whole of the cash likely to be available by then, namely about £6.5m.

54. After sensible mutual discussion, all counsel before me were eventually agreed that the summary judgment route was preferable to the speedy trial route. Their reasons included the following: it was cheaper, and a judgment would bite on a larger fund of cash in the hands of the Hedge companies. It was a quicker way of bringing the proceedings to, or towards, an end. It would bring an earlier end to continuing spending by the Hedge companies on legal and other business expenses. It would impose immediate pressure on the Hedge companies to settle. It would finesse the question whether to pursue or abandon the unauthorised payments claim.

55. Against those undoubted benefits, counsel recognised of course the greater risk of failure at the summary judgment stage, albeit to some extent compensated by the ability, if unsuccessful, nonetheless to proceed to trial thereafter. In my judgment they may have under-estimated that risk to some degree, not least because an application now for summary judgment would appear to depend upon no materials beyond those available before the Chancellor in May and June, yet no such application was made then.

56. Nonetheless I recognise that this is a finely balanced question of judgment. It is not for the court to impose its own view contrary to a consensus reached after anxious consideration between the trustees and the beneficiaries' representatives, unless their combined view is plainly misguided. In my judgment it is not, so that I am in principle minded to authorise the making by Dalriada of a summary judgment application relying essentially on the unauthorised investment claim, although I would not be minded to prohibit the inclusion of the improper purpose claim if, after anxious thought, counsel were minded to consider that it would not be a potentially damaging distraction.

57. I turn finally to compromise. The evidence shows some preliminary discussions about a possible compromise between the hearing of the Hedge companies' summary judgment application in May and the handing down of judgment in June. It appears that the Hedge companies were in principle prepared to contemplate being placed under a regime designed to enable Dalriada to satisfy itself that the Hedge companies were making prudent investment of their funds, but without in any way disturbing the preference share structure separating Dalriada from control of the monies transferred to the Hedge companies. It appears that these negotiations foundered upon what may be described as the rock of the preference shares, since Dalriada regarded their continuing existence as a fatal obstacle to the management of the Schemes' funds in the future. There is some indication in the available evidence that this was then

regarded by Dalriada as an insuperable legal objection (since it would forever prevent the Schemes' funds being invested in accordance with the 2005 Regulations). However that may be, at the *Beddoe* hearing Mr Spink made it clear that Dalriada's objection was practical rather than legal. There were produced calculations (later supported by some evidence) tending to show that the long-term management of the Schemes would be more expensive, by more than £2m, than the cost of management if the preference share structure was removed, so that the proceedings were worth continuing to summary judgment or even trial, with all the attendant immediate costs, if the long-term management of the Schemes could thereby, without the impediment constituted by the preference shares, be conducted at greatly reduced cost. The result is that Dalriada maintains its stance that a settlement which left the Hedge companies in control of the funds, and the Schemes' investment limited to the preference shares, would be less beneficial to the members' interests than the pursuit of the main proceedings to their final outcome. The result was that, since Dalriada did not perceive any realistic prospect of an agreement by the Hedge companies to settle on terms involving the breaking up of the preference share structure, and the return of control over cash and existing investments to Dalriada, there was no prospect that the single-minded pursuit of a compromise was either preferable to the speedy pursuit of an application for summary judgment, or even worth pursuing during a consensual stay for negotiations.

58. On this point both Mr Seymour and Mr Hilliard disagreed. Their submission was that the serious pursuit of any reasonable compromise ought to be imposed upon Dalriada with no pre-condition that the destruction of the preference share structure was a *sine qua non*. They suggested that it was an appropriate time to consider mediation or some other form of structured ADR, rather than merely to consider settlement as an unlikely possibility along the way to an early hearing of an application for summary judgment. They both agreed nonetheless with Mr Spink that the issue of an application for summary judgment in advance of settlement negotiations was worthwhile so as to maximise Dalriada's bargaining position, and impose a more tangible form of pressure upon the Hedge companies than a mere threat of it.

59. On this issue, I agree with Mr Seymour and Mr Hilliard. In particular I agree that the main proceedings are, now, suitable for an attempt at mediation. This is not a case in which major uncertainties are likely to be resolved by disclosure or by the exchange of witness statements, so that mediation might otherwise be regarded as premature. The inevitability that the prolongation of litigation will damage the members' interests, because of the attrition caused by both sides' costs, means that from their perspective the case cries out for the exploring of every possible avenue towards early settlement. I consider that an experienced chancery mediator would offer real advantages to the parties, both (as Mr Seymour submitted) because of his or her ability to find out their respective bottom lines on a confidential basis, and because of the mediator's ability to think laterally, that is to identify possible routes towards compromise which the parties have thus far failed to appreciate.

60. I do not regard as reasonable a view that proposing mediation is a sign of weakness, and I do not see how the Hedge companies could sensibly refuse to co-operate in a mediation, since it is they who have made the most of the adverse effect of costs upon the members' interests, and of the alleged disinclination of Dalriada to contemplate compromise. I make no finding that this allegation by the Hedge companies is true,

but its mere existence is sufficient in my view to make it unlikely that the Hedge companies would refuse mediation if it were proposed.

61. Mr Spink submitted that Dalriada no longer has funds with which to pay its share of a mediator's fee, so that a mediation could only take place if the Hedge companies agreed to permit a limited redemption of preference shares for that purpose. Even if that were so, I would not expect the Hedge companies to prevent mediation by refusing to do so. But I bear in mind that Dalriada's solicitors are holding £140,000 received by way of payment on account for Dalriada's costs of the Hedge companies' summary judgment application, so that there appears in fact to be a fund from which a share of the mediator's fee could easily be paid.

62. I agree with the common view of counsel that it would be sensible for Dalriada to issue an application for summary judgment without further delay, on the basis that it be heard not later than the adjourned hearing of the Hedge companies' application for security for costs and fortification of cross-undertakings. I regard the prospect of having it heard earlier than the Hedge companies' applications as remote.

63. I also agree with Mr Seymour and Mr Hilliard that Dalriada should not in any negotiations treat the destruction of the preference share structure as an absolute *sine qua non*, however desirable it may be in increasing the effectiveness, and reducing the cost, of the ongoing administration of the Schemes. I note that this part of the cost benefit analysis was very much of an afterthought by Dalriada. Indeed the *Beddoe* application had to be adjourned for a day, in part to enable Dalriada to make the point good by adducing evidence. I also consider that Dalriada may have under-estimated the ongoing cost of the administration of the Schemes even if the preference share structure is dismantled. Nonetheless the point is in essence a good one, and the dismantling of that structure is plainly an objective well worth striving for. But Dalriada may be offered a structure which goes a long way towards that objective, for example one which includes proper rights of redemption for the trustees and independent management of the Hedge companies' funds, which might just swing the cost benefit analysis against continued costly litigation.

64. The final question therefore is whether Dalriada should propose a continuation of the current stay (agreed to last until the outcome of this *Beddoe* application) so as to enable mediation or other form of ADR to take place otherwise than under the potentially distracting pressure of the need to prepare for a hearing of the summary judgment application. I consider that, while the existence and the issue of the application may be a valuable stimulus towards settlement, it would be better for settlement negotiations to take place within the *cordon sanitaire* of a modest continuation of the present stay, if that can be agreed. Again, I do not regard it as a sign of weakness for Dalriada to propose such a continuation.

Costs to date

65. The final part of Dalriada's application is to obtain, after the event, confirmation of its entitlement to its costs incurred to date, and to an indemnity in respect of any costs consequences of the proceedings having been instituted and pursued thus far without protection of *Beddoe* relief. The general rule is that trustees should attain such relief before embarking on potentially expensive and hostile litigation and that, if they do not, they litigate at their own risk. In the present case however, I consider that

Dalriada was plainly justified in focussing its immediate attention, after appointment, upon the obtaining of a freezing order, so as to prevent further misapplication of the Schemes' funds by the Hedge companies, and indeed Mr Hilliard did not criticise Dalriada for having done so without seeking *Beddoe* relief in advance.

66. Nor can Dalriada sensibly be criticised for not having sought *Beddoe* relief before the determination of the Hedge companies' summary judgment application. This coincided with the necessary return date of Dalriada's application for a freezing order on notice, and Dalriada and its legal team were fully engaged in both matters until, at least, the end of May and may reasonably have delayed instituting *Beddoe* proceedings until after the handing down of the Chancellor's judgment in mid-June.

67. Mr Hilliard's criticism lay in the failure of Dalriada to institute a *Beddoe* application promptly thereafter, or until mid-August, or to have it brought on for hearing more quickly. He said that, had this been done, the parties might by now be in serious settlement negotiations, with a view to putting a stop to the attrition of costs.

68. In my judgment there is some force in this criticism. But Dalriada's need to achieve a funding arrangement with its own legal team in view of its rapidly diminishing cash resources justified some delay, and the difficulties it thereafter encountered in identifying a suitable representative beneficiary can hardly be laid at its door. All in all, I am not prepared to visit any adverse consequences upon Dalriada for its speed of advance in the prosecution of this *Beddoe* application, and I have concluded that its application, albeit retrospectively, in relation to the litigation thus far, and the costs thus far incurred, ought to succeed. It has acted reasonably in the face of unusual obstacles and persistent, better funded opponents. It cannot be doubted that the obtaining and maintenance to date of a freezing order has been of benefit to the Schemes' members.

Directions

69. I therefore propose to authorise Dalriada to continue the main proceedings and, if thought fit, to issue an application for summary judgment. I am satisfied that, if summary judgment is not obtained, the proceedings should be continued to trial, but I direct that if the summary judgment application fails, the *Beddoe* proceedings be restored at the earliest possible opportunity, before me if available, for further consideration.

70. I also direct that, after issue of the summary judgment application, and before obtaining a date for its effective hearing (rather than case management) Dalriada propose a short extension of the currently agreed stay to enable settlement negotiations to be undertaken, by means of mediation or some other formal process of ADR. I make it clear that I consider that the main proceedings are appropriate for mediation now, and I cannot envisage (and nor could Mr Spink) any later time at which it would be more appropriate for that process to be undertaken. If the summary judgment application is made first and fails, then Dalriada's negotiating position will, it seems to me, be worse than it is now. I do not propose to direct Dalriada as to its attitude towards any particular offer of settlement, but it should bear in mind the contents of this judgment in forming its own settlement policy.

71. I will hear counsel, if necessary, as to the form of an appropriate Order.