1. Claimant
2. Benjamin Allen Fairhead
3. First
4. Exhibit BAF1-2
5. 6 June 2016

Claim No: ________________

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

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

BETWEEN:

DALRIADA TRUSTEES LIMITED

Claimant

- and -

KIM ANNETTE GOLDSMITH

Defendant

FIRST WITNESS STATEMENT OF

BENJAMIN ALLEN FAIRHEAD

I, BENJAMIN ALLEN FAIRHEAD, a solicitor and partner of Pinsent Masons LLP, 30 Crown Place, London, EC2A 4ES, SAY AS FOLLOWS:

1. I am a solicitor and partner of Pinsent Masons LLP. I have conduct on behalf of the Claimant in these new proceedings. I am duly authorised by the Claimant to make this witness statement and application (explained in more detail below).

2. Save where indicated to the contrary, the facts and matters stated herein are derived from my own knowledge obtained through my conduct of the case on behalf of the Claimant or from documents within my control, which are identified in the Witness Statement and/or based on information and instructions provided to me by the Claimant.

3. In this Witness Statement I refer to a number of copy documents, which are marked exhibits BAF1 and BAF2. All page numbers are references to page numbers of BAF1 unless stated otherwise.

A. PURPOSE OF THIS STATEMENT/OVERVIEW OF CLAIM AND APPLICATION

4. This statement is made in support of an application by the Claimant, the trustee of certain pension schemes, for directions including Beddoe type directions.

5. The Claimant is a professional independent trustee company and a trust corporation. On 31 May 2011, the Claimant was appointed by the Pensions Regulator ("**the Regulator**") as independent trustee of 13 pension schemes, pursuant to the Pensions Act 1995 s.7. These proceedings relate to 6 of those schemes, which are Revenue registered, occupational pension schemes (the "**Schemes**"), with a total membership of 486 members and funds of originally approximately £27 million, a total made up of sums representing individual members' pension benefits transferred into the Schemes from other registered occupational pension schemes ("**the Completed Transfers**"). As at 13 June 2011, the accounts for the Schemes held £9,415,630.53. The Claimant has, since then, taken steps to recover monies into the Schemes as set out further below. A total of £6,126,648 has been recovered since the Claimant's appointment.

6. It is worth noting that, although there are 486 members now, the position was not clear at the time of the Claimant's appointment, given, for example, there were approximately 170 transfers at that time that were at various stages of completion. These ranged from those where paperwork had been completed but no payment made to those where bank transfers were already in progress or cheques had been posted. Some of those have proceeded (and therefore form part of the Completed Transfers) and the monies received have been retained in the account for the relevant scheme unless payment has been made by cheque, in which case the cheques have not been banked.

7. The Schemes operated something called a 'Pensions Reciprocation Plan' ("**PRP**"). By way of a brief summary, the PRP was conceived as a way of getting members access to their pension capital prior to retirement and, more significantly, prior to the usual minimum retirement age of 55, but without intending to breach rules of HM Revenue and Customs or trigger tax charges. (As explained below, this was seen by the Regulator as a form of "pension liberation".) The details are set out at paragraphs 44 to 53, but, at the heart of

the PRP model was a structure called a "Maximising Pension Value Arrangement" or "**MPVA**", whereby (at least in theory):

7.1 Scheme Y would loan funds to a Member B of a different Scheme Z; and reciprocally

7.2 Scheme Z would in turn 'lend' money to Member A of Scheme Y.

8. Upon its appointment, the Claimant sought advice from Leading Counsel, Andrew Spink QC, on the validity of the MPVA loans. That advice was legally privileged and reference is made here solely to explain the course of action taken by the Claimant, without any waiver of privilege intended. Counsel advised that there was a strong possibility that the MPVA loans were void. On receipt of that advice, the Claimant alerted Scheme members to the conclusion of the advice, which it did by way of an announcement to members on 14 June 2011 (pages 98 to 99) and brought Part 8 proceedings (see paragraphs 70-78 below) for the Court to determine the issue. Mr Justice Bean found that the MPVA loans were 'unauthorised payments' within the meaning of the Finance Act 2004, as well as being 'frauds on the power' and void in equity.

9. This statement is made in support of the following:

9.1 the Claimant's Beddoe application for directions from the Court in relation to recovery of the MPVA loans;

9.2 the Claimant's Beddoe application seeking sanction for the Claimant to pursue an appeal against any prospective scheme sanction charge levied against it/the Schemes by HM Revenue and Customs; and

9.3 the Claimant's application for directions regarding certain administrative matters concerning the Schemes such as apportionment of costs/assets between members and between Schemes.

10. Each of these applications is considered in more detail below.

11. A separate witness statement has been prepared by Ian Hyde, a partner at Pinsent Masons who specialises in tax litigation. I have, where appropriate and necessary, referred to that witness statement here.

12. Whilst the normal approach is obviously for the evidence in support of a Beddoe application to be private and not disclosed outside of the proceedings, both this and Mr Hyde's statements are intended to contain information that the Claimant is prepared to share with the wider membership of the Schemes.

13. However, I have also prepared 2 further witness statements as follows:

13.1 a statement containing confidential materials that cannot appropriately be put into the public domain but which will be shared with the representative beneficiary on condition of her and her legal representatives not sharing or disclosing the contents of that statement more widely, and on the basis of such statement not being made available from the Court file (my "**Second Witness Statement**"); and

13.2 a statement containing limited further information pertaining to the Beddoe application in relation to the recovery of the MPVA loans, which, given the nature of that application (i.e. involving potential action against members of the Schemes) cannot appropriately be seen by the representative beneficiary, who could prove to be a defendant to the prospective action by the Claimant, and which will instead be provided to the Court purely for its attention (my "**Third Witness Statement**").

B. THE FACTS AND RELEVANT BACKGROUND INFORMATION

(1) The Schemes

14. The Schemes are defined contribution (aka money purchase) occupational pension schemes. The Schemes were all registered with HM Revenue and Customs ("**HMRC**") under Part IV of the Finance Act 2004 (to which I return below), and were contracted out of the State Second Pension. They are non-sectionalised, i.e. the funds are held generally, with no member having a right to any particular asset or money. (This is significant for tax purposes, as explained below.)

15. The trust deeds and rules for the Schemes are all identical. Copies, referring to the Schemes as occupational pension schemes, are at pages 1 to 94.

16. 2 of the Schemes – the Lancaster Pension Scheme and the Portman Pension Scheme – were established on 12 May 2010. The other 4 schemes were established on 26 January 2011.

17. The sole director of the respective employers to the schemes that were established on 12 May 2010, the Lancaster Pension Scheme and the Portman Pension Scheme, was in both cases Andrew Isles. The sole director of the respective employers to the schemes that were established on 26 January 2011 was in each case Ms Rebecca Tweedley (who is the daughter of Mr Craig Tweedley – see below).

18. Whilst the Schemes all have principal employers, these were incorporated only shortly before the Schemes were established. Indeed, this was less than 1 month prior to the establishment of the relevant scheme in 4 cases, and in the other 2 cases (Lancaster Pension Scheme and Portman Pension Scheme), the schemes were established apparently before the principal employer was incorporated (although the presence of the company registration number in the trust deed for the Lancaster Pension Scheme suggests that the deed was back dated and Mr Craig Tweedley (see below) has stated that this was an administrative error). The Regulator identified that the principal employers had not filed any documentation with Companies House to indicate they were trading, and they appeared to be dormant. There is no evidence of any of the Schemes having any employee-members (i.e. members who actively contributed); the Scheme members all transferred in from other schemes.

19. Since the Claimant's appointment, 4 of the employers have been dissolved, leaving just Lancaster TC Limited and Portman TC Limited as active companies, with both filing annual returns on 9 June 2015 (pages 156 to 161). A table setting out the details of all 6 employers, including current directors, is at pages 154 to 155.

(2) Dramatis Personae

The Claimant/the Regulator's original concerns

20. As mentioned above, the Claimant is a professional trustee company and trust corporation. It was appointed as a trustee of each of the 6 Schemes to which this application relates (as well as to other schemes) pursuant to the Regulator's special procedural powers under section 7 of the Pensions Act 1995.

21. On 31 May 2011, the Determinations Panel of the Regulator met to consider the application to appoint the Claimant and duly granted the application. The appointment did not remove the existing trustees of the Schemes. However, pursuant to an order of the Regulator under PA 1995 s.8(4), the Claimant is entitled to exercise all the powers of the trustees to the exclusion of the other trustees. Effectively it therefore acts as a sole trustee in this matter and has done so in the time since its appointment.

22. The Regulator's reasoning behind seeking the appointment of the Claimant as independent trustee is set out in its request to the Determinations Panel to

make a determination using the special procedure under section 97(2) of the Pensions Act 2004 ("**the Warning Notice**") (pages 163 to 178).

23. The Regulator's primary concern arose out of the PRP. More specifically, its 6 *"key concerns"* were stated to be (pages 169 to 170):

23.1 an apparent systematic breach of trustee investment duties by the Original Trustees (as defined below) in terms of (i) the statutory duty of diversification, contained within the Investment Regulations and (ii) the common law duty to exercise their investment powers prudently;

23.2 the Original Trustees were not exercising their powers of investment for the purposes for which those powers were granted, constituting a fraud on the power of investment, since the investment power seemed to be being exercised for the purposes of providing loans (the MPVA's) and not being used for bona fide investment purpose;

23.3 by restricting each of the Schemes to 99 members, the Original Trustees were pursuing a deliberate strategy to avoid the provisions contained within Regulation 4 of the Investment Regulations;

23.4 high fees involved for a prospective member wishing to transfer to one of the Schemes;

23.5 irregular transfers from the Schemes to a travel agent and to an overseas company that was not registered; and

23.6 the inconsistencies between the information provided by the Original Trustees to the Regulator and that provided to their bankers.

24. Whilst the term 'pension liberation' was not used in the Warning Notice, the PRP model was effectively seen as a form of just that. The term 'pension liberation' is becoming increasingly well-known although it will be explained further in Counsel's skeleton argument. In simple terms, it entails members of pension schemes accessing part of their pension funds outside of conventional means, usually prior to the age of 55 at which point there is, in any event, an entitlement to a lump sum payment, and in a manner that gives rise to a risk of tax charges. This is often achieved through loans being made to members from funds originating from their own pension scheme assets. It does not necessarily involve illegality or criminality although this may become an issue if members are not informed, or misinformed, of the tax and investment risks and/or high charges.

25. The original Determination Notice of the Determinations Panel dated 7 June 2011 is at pages 179 to 195. The Claimant's appointment was subjected to the usual review by the Determinations Panel. The Determinations Panel met on 28 July 2011 and duly confirmed the Claimant's appointment as set out in its Final Notice on 10 August 2011 (pages 196 to 223).

26. The Claimant was, in addition, appointed trustee to a further 7 schemes by the Regulator. Those schemes, described as 'corporate pension trusts' (the "**CPT Schemes**"), resulted in monies being paid back to companies via investments in preference shares. It may be that funds were then invested/lent to members. The Claimant does not, as part of this application, seek directions from the Court in relation to the CPT Schemes.

Other trustees/parties involved

27. The original set up and trusteeship of the Schemes involved a number of individuals and entities detailed below. For ease of reference and understanding, a graphical representation of the relationships is at page 162.

28. The other trustees to the 6 Schemes are:

28.1 Athena Pension Services Limited ("**Athena**") (previous sole trustee of the Cranborne Star Pension Scheme, Grosvenor Parade Pension Scheme and Lancaster Pension Scheme); and

28.2 Minerva Pension Services Limited ("**Minerva**") (previous sole trustee of the Portman Pension Scheme, Tallton Place Pension Scheme and the Woodcroft House Pension Scheme)

(together the "**Original Trustees**").

29. Athena and Minerva were also trustees of some of the CPT Schemes, along with a third trustee company, Oracle Pension Services Limited ("**Oracle**"). All 3 companies had the same registered office of Whitby Court, Abbey Road, Shepley, Huddersfield, HD8 8ER. They all changed their registered office to c/o Stead Robinson Ltd, Scotgate House, 2 Scotgate Road, Honley, Holmfirth, HD9 6GD. Athena changed it on 28 August 2012. Minerva and Oracle changed it the following day on 29 August 2012. Stead Robinson is a firm of accountants.

30. Given the Claimant's exclusive powers as trustee, the Original Trustees should be seen as trustees only nominally and have not been included as parties to this application.

31. The sole director of the Original Trustees (and Oracle) was originally Craig Tweedley. Mr Tweedley's directorship of all 3 companies was terminated in July 2011, after which their sole directors were Andrew Hields (Athena) and Carl Hanson (Minerva and Oracle). Mr Hields and Mr Hanson were the directors at the time of the Claimant's appointment. However, on 23 November 2011, those directorships were terminated and Mr Tweedley was reappointed as sole director of the Original Trustees and Oracle.

32. Mr Tweedley was originally (and remains) sole shareholder of the Original Trustees and Oracle.

33. The administrators to the Schemes, for the purposes of the Finance Act 2004, are stated in each of the trust deeds to be whichever of the Original Trustees is identified in the trust deed as being the trustee of the particular scheme.

34. However, it is apparent that 3 entities, Ark Business Consulting LLP ("**Ark BC**") (incorporated on 7 April 2010), Ark Commercial Pension Planning LLP ("**Ark CPP**") (incorporated on 11 March 2010) and Ark Commercial Retirement Planning LLP ("**Ark CRP**") (incorporated on 11 March 2010) (together the "**Ark LLPs**") have been involved in the administration of the Schemes. The Ark LLPs are partnerships, all of which have purportedly carried out certain administrative or other functions on behalf of the Schemes and/or the Original Trustees. It also appears that they introduced prospective members to the Original Trustees with a view to such persons transferring their existing occupational pension entitlement into one of the Schemes pursuant to the PRP business model, in the development of which model Ark BC and Craig Tweedley specifically appear to have been involved. All of the Ark LLPs share the same registered address, which is the same as above for the Original Trustees and Oracle.

35. A further connection exists between Ark BC and the Original Trustees in that Messrs Hields and Hanson were also members of Ark BC, along with Mark Tweedley (understood to be Craig Tweedley's brother), Rebecca Tweedley (understood to be Craig Tweedley's daughter) and Amanda Clark. These were all terminated as members on 23 September 2011 (after the Claimant's appointment) with members since then being simply Craig Tweedley and Waddling Duck Limited (a company owned and controlled by Craig Tweedley).

36. Craig McMillan Tweedley LLP was a corporate member of Ark BC until 28 June 2010. The Claimant is aware that Craig Tweedley represented Ark BC in a meeting with HMRC in February 2011 concerning the Schemes.

37. Sovereign Corporate Management Services Limited ("**Sovereign**") went into liquidation on 19 September 2014 but it was a company whose registered office at the time of the Claimant's appointment was 34 Bond Street, Wakefield, WF1 2QP. That changed (on 28 June 2011) to The Continuum Moderna Business Park, Moderna Way, Mytholmroyd, Hebden Bridge HX7 5QQ. It was changed back to 34 Bond Street on 31 January 2013 but then changed again on 20 November 2013 to the Scotgate House address now used for the Original Trustees. Sovereign's original name was McMillan Tweedley Corporate Services Limited (changed to its current name on 19 April 2002), and its sole director until liquidation was Craig Tweedley although, at the time of the Claimant's appointment and until 28 February 2012, it was Sarah Michelle Tweedley (believed to be Craig Tweedley's wife). Until 13 August 2010 (and prior to his subsequent run as director) Craig Tweedley was also a director of Sovereign.

38. From 2004 to 2006, Craig Tweedley and Sarah Tweedley each held 50% of the 4 issued shares in Sovereign, i.e. 2 shares each. In the year ending 30 September 2006, they both transferred their shares to *"SCMS FURBS"* with the address of 34 Bond Street, Wakefield, WF1 2QP. A "FURBS" is a *"Funded Unapproved Retirement Benefit Scheme"*. In the circumstances, the Claimant believes that the shareholding of Sovereign was held on trust for Craig Tweedley and/or Sarah Tweedley.

39. Sovereign was a member of Ark CRP and Ark CPP from 11 March 2010 to 23 September 2011. The current members of both are Craig Tweedley and Waddling Duck Limited.

40. A further Sovereign company, Sovereign Administration Services LLP ("**Sovereign Admin**"), was formally called Bond Street Chambers LLP before it changed its name on 29 June 2012. It changed its name again to its current name of Selby Administration Services LLP on 23 September 2014. Its registered office was at 34 Bond Street, Wakefield, WF1 2QP before changing to Unit 17 Moderna Business Park, Moderna Way, Mytholmroyd, Hebden Bridge HX7 5QQ on 28 June 2011. It then changed it back again on 12 March 2013 to 34 Bond Street, before changing on 19 November 2013 to Bents House, 21 Belmont Street, Huddersfield, HD1 5BZ. Its address was changed again on 26 June 2014, this time to the Scotgate House address. Its members include Sarah Kowalczyk (since 6 April 2008), Rebecca Tweedley (since 8 June 2007), and Elizabeth Tweedley (since 30 June 2010) (believed to be a further

daughter of Craig Tweedley). Sovereign (since 6 April 2008) was also a member until its liquidation. Further, between 6 April 2008 and 30 July 2010, Craig Tweedley was a member of Sovereign Admin.

41. Whilst the directors/members of some of the parties above have since changed, the structure attached reflects the position as at the time of the Claimant's appointment to the Schemes, and thereby highlights the close involvement of entities related to Craig Tweedley as well as members of his family. Indeed, if anything, the changes since then have underscored Mr Tweedley's involvement with these entities. The position in May 2011 though was as shown in the diagram at page 162.

Representative beneficiary

42. Mrs Kim Goldsmith is a member of the Lancaster Pension Scheme. She has agreed to act as a representative beneficiary for all Scheme members. Mrs Goldsmith was selected by the Claimant following an invitation to members to put their names forward as prospective representative beneficiaries for these proceedings. This was done by way of announcement issued on 10 November 2014 (pages 135 to 140). It was made clear in this announcement that the process was intended to be consultative rather than a vote. As it happens, Mrs Goldsmith had the support of the group known as Ark Class Action, and the Claimant has had the benefit of meeting Mrs Goldsmith and determining that she appears to be an appropriate member to take on this role.

43. The proposed role of the representative beneficiary for the purposes of this application is detailed further below.

(3) The PRP and MPVA's

44. One of the defining features of the Schemes was the use, as summarised above, of the business model known as the *"Pensions Reciprocation Plan"*/PRP. The member obtained a loan (described in the PRP documentation as a *"financial instrument"*) against the value of his or her pension but one that was not directly taken from that particular member's pension fund. Rather, it was taken from one of the other Schemes. As mentioned above, these loans were known as "Maximising Pension Value Arrangements" or "MPVA's".

45. The literature prepared in relation to the PRP bears the name of Ark BC. The document that appears to have been used by way of primary marketing for the PRP concept entitled *"Maximising Pension Value"* (pages 224 to 227) sets out how the concept works.

46. The PRP was intended to operate as follows:

46.1 An individual (Member A) with a pension pot in another, unrelated pension scheme was 'introduced' to one of the Schemes (Scheme Y).

46.2 Member A obtained a transfer of his benefits from his original pension scheme to Scheme Y.

46.3 There was a 5% *"standard fee"* from the transfer sum, and the remaining 95% of Member A's transfer value was to be used as follows:

46.3.1 Up to 50% of Member A's funds in Scheme Y was to be 'lent' to a member (Member B) of one of the other Schemes (Scheme Z) pursuant to an MPVA loan.

46.3.2 A reciprocal MPVA loan of equal value was then to be made by Scheme Z to Member A, using Member B's funds.

46.3.3 The remaining funds of both schemes were then invested in other assets.

47. A graphical representation (with additional explanatory notes) of how the PRP concept was intended to operate was provided by Mr Craig Tweedley in the earlier Part 8 proceedings (see his witness statement and exhibit at pages 254 to 295 and, in particular, paragraphs 15 to 21 inclusive of the statement and pages 1 to 2 of Exhibit CMT1).

48. It is worth noting at this juncture that Mr Tweedley stated, at paragraph 31.3 of his statement, that it was the intention that the Schemes would be matched but not the members.

49. On maturity the MPVA loan would, of course, have to be repaid. The PRP envisaged that, because MPVA's would not be due for repayment until the member had reached the age of 55 or later, the member would use his or her tax free Pension Commencement Lump Sum ("**PCLS**") (Finance Act 2004, s.166) to repay the MPVA. The intention was that there should be 3% simple interest paid per year albeit rolled up and paid at the same time as the MPVA.

50. The Schemes' financial modelling (to ensure the PCLS payable on retirement to, for example, Member A from Scheme Y would be sufficient to repay Member A's MPVA loan from Scheme Z) assumed an average rate of return on the non-MPVA investments of between 8% and 9% over a 25 year period. The basis for assuming that the non-MPVA investments would yield such high returns and that the PCLS would be used to repay the MPVA appears to have been a

comment made by Mr Hanson to Mr Tweedley that anyone purchasing property in the London market in any given year since 1973 would, over a 25-year period, have made at least a 9% return on his/her initial investment without needing to spend further money on the property (paragraph 41 of Mr Tweedley's witness statement). However, as events have turned out, not all of the investments were property-related and those that were have largely concerned properties outside London and/or overseas (see further below).

51. The PRP also provided for fees to be charged, in particular a 5% fee to be applied against any amount transferred into one of the Schemes (the "**Transfer Fee**"). Under the heading *"PRP Illustration"* (in the *"Maximising Pension Value"* marketing document mentioned above, at page 225), this is stated to be *"to discharge initial setup costs, member matching and issue of MPVA, final year fees, administration and introducer commission".* Under the heading *"Comparison Chart"*, reference is also made to an ongoing 1% annual administration charge. The fees were paid to the Ark LLPs and form the subject-matter of Part 7 proceedings brought by the Claimant (see below).

52. The remainder of the Schemes' funds (after loans and deductions of Transfer Fees) were intended, according to the Ark literature, to be invested in other assets by the Original Trustees. Under the heading *"Trustee Investment Approach"*, it is stated that the trustees will *"adopt an investment strategy which will take into account a number of factors, including the MPVA period."* It adds that *"the trustees of the MPS [Master Pension Scheme – one of the Schemes] are able to invest in the Entrepreneurs Property Fund (EPF) which is a specialist investment portfolio of property and other asset backed investments. The EPF is not available to other pension schemes or to the general public."*

53. I have addressed the Claimant's investigations into the investments below but note for the moment that they do not appear to be consistent with the strategy set out here.

(4) Action taken by the Claimant in respect of the PRP fees – Part 7 proceedings

54. In the light of concerns about the payment of the Transfer Fees and the apparent lack of justification for such an arbitrary percentage being deducted from transferred funds and simply paid to the Ark LLPs seemingly by way of introducer fees, the Claimant commenced Part 7 proceedings in June 2011 against the Ark LLPs. The Claimant alleged that the Transfer Fees (amounting to £1,083,415) were paid out by the Original Trustees in breach of trust as they

were not investments, trustee charges or scheme expenses. It was further alleged that the payments were received by the Ark LLPs, who must have known of that breach (the individuals having been intimately involved in the setting up of the Schemes, and also, in 2 cases, being the directors of the Original Trustees). As such, the Ark LLPs were asserted to be liable for knowing receipt of monies paid out in breach of trust. Allegations of dishonest assistance and conflicts of interest were also pleaded.

55. Given a fear of dissipation of assets, the Claimant took urgent action to apply for a freezing injunction against the Ark LLPs without notice. It obtained this before Mr Justice Henderson on 17 June 2011. Thereafter, on 20 June 2011, the proceedings against the Ark LLPs were formally issued and served. The parties attended before Mr Justice Henderson for the return date hearing on 24 June 2011, and the Ark LLPs agreed to the injunction continuing.

56. The Ark LLPs subsequently served a Defence and Counterclaim, and the Claimant served a Reply and Defence to Counterclaim.

57. Thereafter, the proceedings have not been progressed, in part because greater priority has been placed on determining the status of the MPVA's and awaiting the outcome of original proceedings and subsequent appeal in that regard, as well as discussions with HMRC and steps being taken to recover the investments made (see below). The Claimant will, however, now be looking to deal with these proceedings, albeit it will need to issue a separate Beddoe application first.

58. The proceedings are mentioned here for completeness and in order to ensure that the Court has the full picture and background of the other actions being taken by the Claimant to recover funds on behalf of the Schemes in the context of considering this application.

(5) Action taken by the Claimant in respect of investments

59. After allowing for the funds paid out by way of MPVA's and Transfer Fees, the Original Trustees paid out further sums by way of 5 main investments.

*South Horizon Trading Limited ("**South Horizon**")*

60. The largest sum invested by the Schemes was a total of £4m paid to South Horizon, a Cypriot company, for an option to buy shares in a company that owned a plot of land with planning permission to build apartments near Larnaca.

In January 2013 agreement was reached to cancel the investment and the £4m was returned to the Schemes, together with interest of £325,000.

*Entrepreneurs Capital Holdings Limited ("**ECH**")*

61. £1m was used between 4 of the Schemes to purchase shares in ECH, a British Virgin Islands company. Eventually, the Claimant established that the monies had been (i) loaned for a property development transaction, albeit without any details provided; (ii) a non-disclosure agreement had been signed as part of the transaction; and (iii) the loan was £1m, paying interest at 5.5% per annum, the interest being rolled up and the repayment date of the loan and interest being 11 October 2013. Repayment was supposed to result simply in monies coming back into the fund, with ECH not able to be wound up until the fifth anniversary of its incorporation, 9 March 2016. However, after some considerable effort, the Claimant persuaded ECH to transfer the monies back to the Schemes, resulting in payment of the £1m plus £112,777 by way of interest in April 2014.

*Hyper Active No.1 Limited ("**Hyper Active**")*

62. £1,030,000 was paid collectively by 4 of the Schemes between March and May 2011 pursuant to subscription agreements purportedly to purchase units in the Hyper Residential Sub Trust of the High Yielding Property Enhanced Recovery Master Unit Trust (based in Jersey). In fact, what the Schemes ended up with was something different, 1,030,000 ordinary shares in a Guernsey-based company called Hyper Active. It remains unclear how this conversion from one type of investment to another took place. Hyper Active owns 2 subsidiaries, Hyper (Derby) Limited and Hyper (Hackney) Limited, companies registered in England and Wales. Those subsidiaries in turn own properties in Derby and Hackney respectively. The Claimant has been asked to take a formal transfer of the shares in Hyper Active but has been pressing, through my firm, for more information regarding the change in nature of the investment as well as up-to-date details of the properties and values of the 2 subsidiaries so that it can decide what steps to take. Discussions are now well-advanced in terms of looking at a way to release cash from this investment, albeit the precise sum that might be returned to the Schemes is presently unclear.

Freedom Bay, St Lucia

63. £700,000 was paid across just 2 of the Schemes to purchase fractional ownership shares in Freedom Bay, a luxury hotel and apartment villa complex in St Lucia. The money was paid to Malgretoute Hotel Development Company

in 2011. Development was originally due to be completed in December 2013 but the date has since been extended first to December 2014 and now seemingly November 2016. Interest is contractually due to be paid annually on the funds at 6% whilst the villa development is being built. However, the 2013 interest was significantly delayed. The Claimant would have expected the 2013 interest payment to have been made before 6 April 2014 but it was not until the end of May 2015 that payment of £85,130.48 was eventually received. The Claimant continues to monitor this investment but does not currently have any obvious means of taking steps to exit early from it, at least not prior to completion of work.

*Air Parade Limited ("**Air Parade**")*

64. £500,000 was paid out between 2 of the Schemes to an entity called Air Parade, which the Regulator identified, prior to the Claimant's appointment, as being a high street travel agent. These funds were repaid, together with interest of £30,000 on 6 May 2011, not long before the Claimant's appointment. Notwithstanding the repayment, the investment does not appear to have borne any resemblance to the investment strategy set out in the Ark literature and nor is there any evidence of any investment advice having been sought in relation to it.

Summary

65. The table below shows the sums paid out by way of purported investments and the sums since recovered. As can be seen, a very substantial proportion of the investments have been recovered – and, primarily through efforts made by the Claimant, given that, save for Air Parade (a short term investment), none of those recovered to date have seen out anything like the intended full period of investment:

Investment	Sums invested	Amounts recovered
South Horizon	£4,000,000	£4,325,041
ECH	£1,000,000	£1,112,777
Hyper Active	£1,030,000	-
Freedom Bay (including 2 smaller related payments made)	£700,000	£158,830

Air Parade	£500,000	£530,000
TOTAL	£7,230,000	£6,126,648

(6) The Claimant's concerns regarding the MPVA's

66. On appointment, the Claimant was immediately concerned about the MPVA's. For the PRP concept to work, all MPVA's would have to be repaid on maturity – this was crucial to the working of the Schemes generally, as they were supposed to be an integral part of the investments of the Schemes, and therefore to the repayment of the MPVA's themselves. The Claimant was concerned that there was no adequate system, structure or plan in place to ensure repayment.

67. The Schemes assumed that repayment would be made from the PCLS but there was simply no power in the Schemes for the trustees to make a direct payment from the PCLS or to require a member to use the PCLS for the repayment. Further, no provision was made for what would happen:

67.1 if a borrowing member died prior to the Maturity Date;

67.2 if a borrowing member wanted to transfer his/her fund to another pension scheme (which the member would usually have a statutory right to do, under the Pension Schemes Act 1993); or

67.3 if a member's MPVA were to fall due for repayment after the date he/she retired (the lump sum would in those circumstances, of course, have already been paid to the member).

68. Leaving the practical problems to one side, there was also a concern that the MPVA's were invalid and void for the following reasons:

68.1 First, they were expressly prohibited by the terms of the Schemes as being *"unauthorised member payments"* within the meaning of the Finance Act 2004, Part IV;

68.2 Secondly, even if they were not unauthorised member payments, they were simply not within the terms of the power of investment that they were purportedly made under because they were not genuine investments;

68.3 Thirdly, even if they were 'investments' within the terms of the power of investment, the power was not actually exercised; and

68.4 Fourthly, even if they were 'investments', and the power was purportedly exercised, then it was an excessive exercise of the power in that it was outside the scope or purpose of the power, and/or they were a fraud on the power because the power was exercised for a purpose other than that which it was intended for.

69. The last 3 reasons overlapped to a large degree, as they all turned (at least partially) on the purpose of the transaction. The arguments were based on the real purpose of the MPVA's not being investments for the Schemes, but rather as them being a means to facilitate reciprocal loans to their own members.

(7) Part 8 proceedings regarding the validity of the MPVA's

70. Accordingly, the Claimant brought Part 8 proceedings against Mr David Alexander Faulds (as a representative beneficiary representing all members in whose interests it was to argue that the MPVA loans were, and could in future be, valid) and the Original Trustees.

71. The Claimant asked the Court to determine whether the MPVA 'loans' that were made were (i) validly made in that they were valid exercises of the Original Trustees' powers of investment or any other powers (and, if so, which powers); or (ii) alternatively, invalidly made in that they were made in breach of trust by reason of (a) being a fraud on the power purportedly exercised in making them; (b) falling outside the terms or scope of the Original Trustees' power of investment or such other power as was purportedly exercised in making them; (c) being unauthorised payments within the meaning of Part IV of the Finance Act 2004; and/or (d) some other reason (and, if so, what).

72. Aside from Mr Faulds' participation, the Original Trustees were not obliged to take part in the proceedings but chose to do so and served evidence purportedly supporting the argument that the MPVA loans were valid as well as in respect of purported amendments to each of the Schemes' power of investment and power to meet expenses. The Original Trustees were represented at the hearing.

73. HMRC were also invited to participate in the proceedings but declined to do so. Copies of the correspondence in this regard are at pages 329 to 331.

74. The proceedings came before Mr Justice Bean on 29 November 2011 and were heard over a period of 4 days. Judgment was handed down on 16 December 2011. The learned Judge concluded that the MPVA loans were unauthorised

member payments as defined by the Finance Act 2004 and void in equity. The judgment is at pages 296 to 315.

75. In summary, Mr Justice Bean found that section 173 of the Finance Act 2004 was decisive. He stated that when Scheme Y (of which A is a member) makes an MPVA payment to B (the member of Scheme Z), he does so in the sure and certain hope that a corresponding payment is going to be made by Scheme Z to A; the payment to B *"is used to provide"* a benefit to A; and, on receiving that benefit in the form of the loan from Scheme Z, A is to be treated as having an unauthorised payment.

76. That finding was determinative of the issue before the Court. However, Mr Justice Bean also went on to find that:

76.1 the MPVA's were, in any event, not true 'investments' and were thus outside the scope of the investment power in each Scheme's Trust Deed on the basis that an unsecured personal loan (as the MPVA was) was incapable of being an 'investment' within the meaning of the Scheme's investment power;

76.2 they were not made (notwithstanding the 3% rolled-up interest) for the purpose of obtaining a return for the lender (such as member A in Scheme Y), whether by way of income or capital gain. Rather they were made to a member of another Scheme for the purpose of procuring a reciprocal long-term loan from that Scheme to A; and

76.3 the MPVA loans constituted a fraud on the power of investment. The powers of the trustees to make 'investments' were set out in each Trust Deed (in identical terms). The MPVA loans were beyond the scope of their powers and made for an ulterior purpose.

77. Consequently, Mr Justice Bean declared that the MPVA's were void in equity; that the trustees were not estopped as against the members from denying the validity of the loans; and that further MPVA loan payments from the Schemes could not lawfully be made.

78. As regards the purported amendments to the Schemes, Mr Justice Bean held that those could not validate unauthorised payments prospectively or retrospectively. This followed from the overriding requirement in clause 16 and Appendix 1 of each trust deed that nothing must be done to infringe the Scheme's registered status under the 2004 Finance Act.

(8) Appeal of the decision of Mr Justice Bean/application to join Deborah Oades

79. After Mr Justice Bean's judgment on 16 December 2011, there was an unusually long period during which it was not clear whether an appeal would be pursued against the decision. That period lasted until November 2013, and for the sake of completeness, its duration is explained in this section.

80. When judgment was handed down on 16 December 2011, the Original Trustees immediately sought leave to appeal. This was declined by Mr Justice Bean.

81. Subsequently, the Original Trustees issued an Appellant's Notice at the Court of Appeal on 5 January 2012 seeking permission to appeal. Notwithstanding the limited role of the Original Trustees in the original trial, they sought to appeal the entirety of Mr Justice Bean's decision. The solicitors on the Court record for the Original Trustees during the original trial ceased to act, and the Original Trustees engaged a different Counsel to the one engaged during the original trial and did so on a direct access basis to prepare the Appellant's Notice.

82. Grounds of appeal were filed with the Appellant's Notice, which indicated that a skeleton argument and appeal bundle would follow within 14 days. The Original Trustees did not produce those documents within that timeframe, but the Court of Appeal, treating them effectively as 'litigants in person', granted several extensions of time in order for them to comply with the filing requirements. This meant that the permission hearing was significantly delayed.

83. Eventually, in April 2012, after the Court of Appeal listing office had referred the appeal to the dismissal list, some of the outstanding documentation was provided but further delays followed as a result of other documentation remaining missing from the appeal bundle.

84. On 29 June 2012, DWF LLP ("**DWF**") went on the Court record for the Original Trustees in relation to the appeal. My firm eventually received, on 12 July 2012, an Amended Appellant's Notice and Grounds of Appeal. DWF had instructed new Counsel.

85. My firm sent the Court of Appeal a letter dated 27 July 2012 (pages 316 to 319) drawing attention to the fact that the Original Trustees did not have any standing to bring an appeal, given that exclusive powers as trustee were vested in the Claimant following its appointment by the Regulator. This was copied to the other parties. Thereafter, the Court of Appeal listed the matter for a hearing on 24 October 2012. An application was issued on 19 October 2012 by the Original Trustees not long before the scheduled hearing seeking:

85.1 permission to appeal the order of Mr Justice Bean of 16 December 2011, alternatively that a member, Mrs Deborah Oades, be joined to the proceedings, and that she be granted permission to appeal;

85.2 an order that the Original Trustees, alternatively Mrs Oades, be appointed to represent the interests of the members pursuant to CPR 19.7(2)(d); and

85.3 a prospective costs order for the appeal.

86. On 24 October 2012, the Original Trustees' application was heard by the Court of Appeal. At that hearing, the Court of Appeal made it clear that it did not consider that the Original Trustees had *locus standi* to bring the appeal. It also indicated that the applications for joinder, representation and prospective costs orders should be brought before the Court of first instance, and preferably, if practicable, to be heard by Mr Justice Bean. A copy of the Court of Appeal's order is at page 320. The Original Trustees undertook *"to issue an application to join Mrs Oades to the proceedings or to be substituted as a party to the proceedings within 14 days of this order".* It was also ordered that the Original Trustees' applications for prospective costs and representation orders were remitted to the High Court.

87. As matters turned out, Mrs Oades herself made the joinder/substitution application, seeking joinder of herself to proceedings; substitution of herself for the Original Trustees for the purpose of seeking permission to appeal (and the appeal itself); a representation order; and a prospective costs order. The application, served on 22 November 2012, was listed for hearing on 1 February 2013 before Mr Justice Bean.

88. The Claimant objected to the application, and, save for the straightforward matter of joining Mrs Oades to the proceedings, it was dismissed by Mr Justice Bean. A transcript of the ex tempore judgment is at pages 321 to 328.

89. In summary, Mr Justice Bean agreed that this was not an appropriate case for a prospective costs order to be granted with no special circumstances applying to change that stance. The Original Trustees and Mrs Oades had consistently made clear that the appeal could not be prosecuted without a prospective costs order in place. However, the learned judge considered the other applications and stated that he would have had doubts about substituting Mrs Oades for Mr Faulds as the representative beneficiary. In this regard, Mr Justice Bean made clear there were no grounds for removing Mr Faulds plus noted the close links between Mrs Oades and the Original Trustees.

90. The Original Trustees were ordered to pay the costs of the Claimant and Mr Faulds, those costs being offset against an order obtained by the Original Trustees for payment of their own costs from scheme funds in relation to the original Part 8 proceedings before Mr Justice Bean. The balance of those costs has, however, still not been met by the Original Trustees.

91. Mr Justice Bean refused permission to appeal his decision but stated that it was of course open to Mrs Oades to renew that application before the Court of Appeal.

92. A further period followed during which it was not clear whether Mrs Oades was intending to pursue an appeal or not. Eventually steps were taken to have the appeal dismissed, but it was not until November 2013 that the appeal was properly dismissed and an order for costs made against the Original Trustees by Lady Justice Arden including an interim payment of £14,000 plus VAT to be paid within 21 days. No payment was, however, made within that timeframe or subsequently.

93. The Court should note that during this period between February 2013 (Mr Justice Bean's decision on the issue of representation on an appeal, and permission to appeal) and November 2013 (final dismissal of the appeal), a further issue arose that was of more primary significance to the Schemes – namely their status as occupational pension schemes - which is dealt with in the next section of this witness statement.

(9) Doubt cast over the Schemes' status as occupational pension schemes

94. In May 2013, an issue arose regarding the validity of the Claimant's appointment as trustee of the Schemes by the Regulator as a result of events occurring in relation to unrelated pension schemes where the Claimant had been similarly appointed.

95. I do not propose to address this in detail here but note in summary:

95.1 In May 2013, the Regulator appointed the Claimant and another trustee company, Pi Consulting (Trustee Services) Limited ("**Pi**") over a number of putative occupational pension schemes allegedly involved in pension liberation.

95.2 Pi raised a question as to whether the pension scheme to which it had been appointed was an 'occupational pension scheme' for the purposes of the Pension Schemes Act 1993 section 1. This was significant because the Regulator's powers to appoint trustees is only in relation to such schemes.

95.3 The question was considered in 2 sets of proceedings instigated by the Claimant and Pi in relation to those putative occupational pension schemes. The proceedings were expedited and heard together, but the trial exceeded its estimated time and, having commenced on 16 July 2013, was adjourned part-heard to be concluded in October 2013.

95.4 Given the uncertainty as to the status of the Regulator's appointment, the Claimant and Pi had taken the precautionary step of seeking orders to be appointed trustees of their respective schemes under the Court's inherent jurisdiction. This was to provide the necessary protection to enable the trustees to take steps in relation to the administration of the schemes and safeguarding of assets. Orders were granted accordingly.

95.5 The question over the status of these particular schemes as occupational pension schemes related to whether the schemes were ever intended to be used to provide benefits to the employees of an establishing employer. It was considered possible that, if those schemes did not constitute occupational pension schemes, the Schemes (i.e. the PRP schemes) might not be either. This would have had several effects on the Schemes, including arguably rendering the Claimant's appointment as trustee of them invalid, as well as potentially impacting on their tax status.

95.6 Once it became apparent that the trial determining the issue was going to be delayed significantly, the Claimant decided to take the precautionary step of seeking a similar appointment under the Court's inherent jurisdiction to ensure that it was comfortable undertaking continuing work in relation to the Schemes pending completion of the trial.

95.7 An application was made and listed in the interim applications list, heard on 30 July 2013 by Mr Justice Morgan, the same judge determining the then part-heard proceedings brought by the Claimant and Pi. An order was duly granted.

95.8 Ultimately, judgment in the proceedings brought by the Claimant and Pi was handed down on 21 October 2013 by Mr Justice Morgan, with the schemes in those proceedings determined to be occupational pension schemes for the purposes of the Pension Schemes Act 1993.

(10) Tax law background

96. This case concerns, in large part, the tax treatment of the Schemes and the MPVA's. As such, the Court may find a brief summary of the tax background to be of assistance. This is covered in the witness statement of Ian Hyde, and the

Court might find it helpful to refer to that part of Mr Hyde's statement before considering how communications have developed between the Claimant and HMRC.

(11) Discussions with HMRC/HMRC's approach to taxation of MPVA's

97. As stated above, HMRC declined the opportunity to participate in the original High Court proceedings pursued by the Claimant in order to determine the validity of the MPVA's. However, they maintained an interest in the proceedings and the subsequent appeal.

98. HMRC certainly made it clear (after the hearing before Mr Justice Bean and after he gave his initial judgment) that they considered that the outcome of the MPVA's being determined to be unauthorised payments could and should have been reached by virtue of a different analysis of the Finance Act 2004. This was raised in an email of 11 December 2012 from Alan Bush of HMRC's Counter-Fraud and Avoidance Team to the Claimant (page 332 with some text redacted given it relates to a different issue, not relevant here).

99. This email suggested that the analysis HMRC might seek to employ would, if adopted, potentially be even worse from the members' perspective in terms of tax consequences than those potentially liable to follow if the decision in *Dalriada v Faulds* were simply upheld. Specifically, HMRC suggest that the tax should be charged on the whole of the value of the MPVA's made, rather than the difference between the rate of interest on the MPVA's and the 'official rate' (see below). This was, in fact, another reason why the Claimant did not consider the pursuit of the appeal against that decision to be in the interests of the Schemes.

100. Since then, as the appeal appeared to be coming towards a conclusion, the Claimant liaised with HMRC regarding a possible meeting to discuss the approach HMRC were likely to take towards taxation of the members and the Schemes in relation to the MPVA's. The detail of subsequent contact with HMRC has been set out in my Second Witness Statement (and therefore visible only to the representative beneficiary and the Court) since it has not been clear to what extent discussions and correspondence are being treated as confidential by HMRC. Notwithstanding that, the substantive conclusions reached by HMRC about the method of taxation, as well as the development of thinking regarding the way in which multiple tax assessments can be dealt with procedurally, are not confidential having, to some extent, been addressed by

HMRC in their FAQs for members (see below), and they are also addressed below and/or in Mr Hyde's statement.

(12) Lancaster/Portman – purported deed amendments

101. A further issue that has arisen in relation to just 2 of the Schemes, the Lancaster and Portman Schemes, concerns a purported attempt by the employers/sponsors for those schemes to amend the trust deed in each case.

102. This followed correspondence from 2 members who had sought disclosure of legal advice received by the Claimant, as well as minutes of trustee meetings and details of costs incurred. Letters were sent dated 2 October 2012 by Mr Isles, then director of Lancaster TC Limited and Portman TC Limited (although since replaced) (pages 333 to 340). These were identical, to the point of the letter on Lancaster TC Limited headed paper referring to the directors of Portman TC Limited. The letters stated that the employer/sponsor in each case had decided to effect an amendment to the trust deed and duly enclosed purported deeds of amendment dated 27 September 2012 (pages 334 to 336 and 338 to 340).

103. The deeds purported to (i) insert a new clause 3.5 requiring the trustees to provide within 7 days of a request *"true, complete and accurate"* copies of all minutes, notes and records of trustee meetings as well as informal meetings; (ii) insert a new clause 9.3 requiring the trustees to deliver to a member details of any *"financial circumstances"* of the scheme as sought by a member with reference to a particular date; and (iii) to replace clause 18.2 regarding transfers out, seemingly to make it more difficult for the trustees to decline transfer requests.

104. The Claimant sought legal advice regarding the validity of those amendments given they were likely to be administratively burdensome - even arguably impossible - to comply with. The Claimant does not waive privilege over the substance of that legal advice but it is merely mentioned here in order to explain the subsequent action taken by the Claimant, which was to write to the employers/sponsors and ask why they were purporting to make these amendments.

105. Correspondence followed initially between the Claimant and the employers/sponsors and subsequently between my firm and the employers/sponsors. The Claimant has never been satisfied though that this attempt at amendments has a genuine purpose other than to create problems

for the Claimant in the administration of the Schemes and, indeed, it is unclear why they would want to do this, the issue seemingly being generated originally by Mr Isles, who is no longer the director of the relevant companies.

106. There had been no further correspondence regarding the purported amendments until recently when Mr Isles raised the issue with the Schemes' auditors, and it may be that the outcome of the various matters to be determined by this application will move the focus away to other areas. As such, the Claimant has not seen fit to incur costs in raising this with the Court, which was considered to be a fall-back option in the event that the employers/sponsors persist in asserting that the amendments should be adhered to. This remains an option going forward.

C. THE APPLICATIONS BY THE CLAIMANT

(i) BEDDOE RELIEF FOR POSSIBLE ACTION AGAINST MPVA RECIPIENTS

(1) Introduction

107. In the light of the clear judgment of Mr Justice Bean, the Claimant is now contemplating bringing claims against member recipients of MPVA's for money had and received under a mistake of law by the Original Trustees.

108. I understand that there is a possibility that some MPVA recipients may wish to raise defences to the contemplated claims (possibly by way of a 'change of position' defence) but, until pre-action letters have been sent out, it is impossible for any meaningful assessment to be undertaken.

109. As can be seen from the final section of this statement concerning representation for the various elements of this application, whilst the trustee would ordinarily be neutral, it is proposed that the Claimant positively puts forward the case for steps being taken to pursue recovery of the MPVA's. However, the Claimant is effectively neutral and adopts this position in order to make proceedings more cost-effective. The opposing view would be taken by Mrs Goldsmith, and both parties would be subject to a representation order.

(2) The Claimant's concerns and its reasons for seeking this initial Beddoe relief

110. The sum of money that the Original Trustees 'loaned' in MPVA's is of the utmost concern to the Claimant. The total sum 'lent' by all the Schemes together is £9,767,895. This represents a major loss (or potential loss) for a group of 6 pension schemes that originally had, between them, £27,237,568.67: effectively slightly more than a third of the Completed Transfers.

111. In addition, having the MPVA's outstanding renders administration of the Schemes more complicated. If a member reaches retirement age and seeks payment of his/her tax free cash lump sum and/or an annuity, or if he/she simply wishes to transfer benefits to another registered pension scheme, the Claimant will have to value the assets of the Scheme in question so as to determine the value of the member's interest. With the MPVA's outstanding, this is likely to prove to be extremely difficult, with uncertainties as to future recoverability of these highly unusual loans affecting that valuation. In extremis, the Claimant may be obliged to value the MPVA's at 'nil', which could potentially penalise such members.

112. Furthermore, it remains unclear whether recouping these payments might assist with the prospective tax consequences for members (and the Schemes). Certainly the Claimant had originally anticipated that HMRC might give consideration to not levying (or at least reducing) a tax charge for those members who were seen to be repaying the MPVA's. This was also alluded to by HMRC themselves originally at an early stage of discussions.

113. Subsequently, HMRC's position appears to have become more entrenched in that they are intent upon levying tax charges against the members/schemes considered to have been making the MPVA payments rather than against those receiving them. One consequence of that seems to be (largely) to remove one incentive members might have had for repaying the MPVA loans given that, to the extent HMRC might take a more flexible approach on taxing members where MPVA loans have been repaid (which does not appear to be likely in any event), the benefit in that regard would be enjoyed by the member who notionally made the payment. As such, a member of Scheme Z (Member A) and recipient of a loan from Scheme Y might still find, irrespective of repaying his/her loan to Scheme Y, that the recipient of the loan that he/she (notionally) made (from Scheme Z) has not repaid and therefore still left Member A liable to a tax charge.

114. There would remain a small incentive arguably for repayment given the possibility that HMRC succeed on their alternative (and much less preferred) argument that the members should be taxed on the 'benefit in kind' basis (section 173 Finance Act 2004) and thereby be taxed in relation to the loan received. Repayment would reduce the ongoing annual tax charges, albeit those would be very small to start with. It would also avoid the scenario envisaged as one of the examples given by HMRC in their Frequently Asked

Questions whereby the loans are actually written-off by the Claimant, giving rise to a full tax charge on the loan received (see FAQ at pages 145 to 153, which were issued to members together with an announcement on 10 November 2014).

115. Notwithstanding HMRC's stance, there is, of course, always scope for the First-tier or Upper Tribunal to find that repayment does make a difference to HMRC's ability to tax/the extent of the tax charges. Certainly, whilst the Claimant would not wish to preclude or prejudge any arguments that might mitigate the tax liabilities, one defence might well be to recover the monies paid out.

116. At this stage, the Claimant is seeking relatively limited directions to initial enquiries and sending pre-action letters and basic commencement of action to recover the MPVA loans through issuing statutory demands where defences are not put forward. The Court might well ask why such limited directions are being sought now in what appears to be a relatively straightforward case, where there has been such a large loss. The reason is that the Claimant has significant concerns about the impact of even such limited action on the members, and how they will respond.

117. To put this into context, the Claimant is acutely aware that it will be seeking repayment of MPVA loans made by the Original Trustees to beneficiaries of closely related schemes. Although each scheme is governed by its own trust deed, and the actions of the Claimant qua trustee of one scheme are governed by the interests of the members of that scheme alone (rather than the members of the other schemes), the reality is that the Claimant will be seeking to recover money from its own beneficiaries (albeit under another trust) and that such action will be effectively predicated on equivalent attempts (by itself) to recover money from its own beneficiaries under the original trust. In other words, the Claimant will, in broad terms if not strictly accurate, be seeking to recover money from its own beneficiaries. If it were not for the fact that some members will be more adversely affected by non-recovery than others (as well as the possibility that repayment might help with the tax consequences), the Claimant might well have decided to leave the MPVA's outstanding. However, it appears impossible to do so without prejudicing at least some, and quite possibly all, of the members. This point is explained below, particularly with regard to the lack of proper matching between members and schemes.

118. It is also worth emphasising at this stage (although this point will be developed by Counsel in submissions) that any suggestion (as has been made by some

members) that those members who did receive MPVA loans simply have those payments deducted/offset against their remaining pension funds would be both difficult in practice, because the loans came from a different scheme, and also expressly prohibited by section 91 of the Pensions Act 1995.

119. Further, the Claimant recognises that there is no doubt that a requirement to repay MPVA's will cause significant hardship to some beneficiaries. As was acknowledged by Mr Tweedley in the original Part 8 proceedings, many of the applicants to join the PRP were by their very nature in financial difficulties to start with. To seek to recover funds from such people may well place them under significant financial and emotional hardship. This has also been reflected in the written and verbal communication the Claimant has had with numerous members.

120. I include below a flavour of some of the more concerning details of certain specific members' predicaments. These are now a few years old but are examples cited in previous proceedings. For reasons of confidentiality, names and personal details have been redacted in the exhibited emails and anonymised for the purposes of this statement:

120.1 Member A sent an email to the Claimant on 15 June 2011 (page 341) referring to the fact that he was *"getting suicidal"*. He explained that he had been paying into his pension for over 30 years and was already close to receiving a lump sum as he would have been entitled to at age 55 but decided to enter into an MPVA in order to repay debts earlier. Member A added that he was prepared to forfeit his pension in order to stop him from committing suicide. The Clamaint obviously responded to this email but is limited in the type of advice it can give or the level of support it can offer. Member A's response on 16 June 2011 (page 342) still referred to the fact that he was a *"shattered nervous wreck"*. Member A has since died.

120.2 Member B, an individual who had entered into an MPVA but not received the MPVA amount prior to the Claimant's appointment by the Regulator, showed similar signs of distress in his email of 10 June 2011 to the Claimant (page 343). Again, typically, his reasons for requiring the money included the need to clear debts. Like Member A, Member B referred to possible suicide and has raised concerns about losing his home in the absence of payment.

120.3 Member C has similarly referred to the prospect of losing his home as a result of not receiving the expected MPVA amount, as can be seen from the letter sent to the Claimant dated 17 June 2011 (pages 344 to 345).

120.4 Member D was in a different situation of seeking documentary guarantees that her pension would be paid to her family when she dies, since she had been diagnosed with terminal cancer, as explained in her email to the Claimant of 11 June 2011 (page 346). She has since died.

120.5 Member E sent an email on 15 June 2011 (page 347) indicating that the MPVA amount she had received had been all spent, partly to pay back debts accrued several years ago. Member E added that she had no house and no means of repayment.

121. There are many other emails and records of telephone calls from other members expressing similar concerns. The above are merely a selection of some of the more concerning communications received.

122. It should also be noted that, in terms of the age of members, there are already 93 who are 55 or over and therefore potentially eligible to request payment of their pensions (nearly 20% of the membership). There are a further 176 who are aged between 50 and 54. This means that nearly half the membership of the Schemes is already aged 50 or over, underscoring the need to progress clarification of matters as quickly as possible. Indeed, whilst the youngest member is 33, the average age of members is 54.

123. A further issue to note is that some MPVA's were issued as long ago as September 2010 so there will be limitation period concerns if action is not commenced in the relatively near future.

124. The Claimant has issued announcements to members keeping them informed of what steps are being taken. A full set is included for completeness at pages 95 to 153. From the outset, these announcements have made clear that there were concerns about the MPVA loans. For example:

124.1 The first announcement was issued on 10 June 2011 (pages 95 to 97) and informed the members of the Claimant's appointment and the reasons for that appointment. At that stage, the Claimant was not in receipt of all documentation and membership records and stated that, until further notice, no contributions or transfers-in would be permitted. In addition, no MPVA or similar payments would be made to any Scheme members. The announcement added that the

Claimant was seeking to clarify the basis on which the Schemes would be administered and managed before any further financial transactions take place.

124.2 A further announcement was issued to members on 14 June 2011 (pages 98 to 99). This updated the members on the Claimant's investigations. In particular, it stated that the Claimant had been obtaining legal advice on various issues including the legal status and enforceability of the MPVA's. It noted that the Claimant had been advised by Leading Counsel that there was a strong possibility that these arrangements were void. The announcement proceeded to state that the Claimant wanted to give members the earliest possible notice that, if this were the case, it would be likely that the Claimant would be required to seek repayment of the money that had been paid to members under the arrangements. It added that the Claimant strongly recommended that members arranged their financial affairs on the basis that they might be required to repay all of the money that they had received under any MPVA. Furthermore, the announcement stated that this advice reinforced the decision not to make any further MPVA payments.

124.3 Some of the subsequent announcements have also reiterated the need for members to be aware of the possible need to repay their MPVA loans (for example the ones dated 2 August 2011 and 16 December 2011).

125. Given the above background, the Claimant considers that there is certainly some basis for looking at the use of Scheme funds to support action being taken to recover the MPVA payments. I move on though below to set out some further analysis of the data surrounding the MPVA's as well as the costs/benefit position.

(3) Data analysis and costs/benefit analysis

126. In determining whether or not to give the directions sought by the Claimant, the Court will wish to have some understanding, at least at a high level, of the figures involved - the number of MPVA's made to members, their values and their putative terms. The Court will also wish to see a costs/benefit analysis of the proposed course of action. Obviously, given that the directions being sought at this stage are so limited - merely pre-action letters, analysis of figures and issuing of statutory demands in some cases - the costs/benefit analysis should be relatively straightforward. However, it will set the scene for the process overall.

127. Accordingly, to assist in preparing for the original Part 8 proceedings, the Claimant and my firm undertook an extensive assessment of the documentation available to analyse the MPVA loans. The assessment is captured on the spreadsheets exhibited to this statement as BAF2 ("**the Original Part 8 Spreadsheets**"). Some of this information originated on a database created by the Ark LLPs. An extract of the database prepared by the Ark LLPs (and provided to the Claimant by email on 6 June 2011) is included at pages 348 to 356 but with personal details redacted in order to protect identities (the "**Ark Database Extract**"). However, those reviewing the documentation undertook a verification exercise in relation to that information. The assessment of the documentation was carried out independently of consideration of the bank statements of the Schemes' accounts, which were, at the time of preparation of the original Part 8 proceedings, in the process of being reconciled with the documents.

128. Given that exercise was since completed, I also exhibit to this statement the subsequent spreadsheet compiled by the Claimant, redacted to remove member personal information, which sets out details of the MPVA payments as reconciled with the bank statements (pages 357 to 360). I will refer to this as the "**MPVA Spreadsheet**". The ID column reflects the number given to each member by the Ark LLPs although it is important to note that the MPVA Spreadsheet only includes rows for those individuals receiving MPVA's, who totalled 348 (not all of the members of the Schemes).

129. The Claimant has prepared a further summary spreadsheet showing the total identified MPVA payments made by each scheme and how the total sum of £9,767,895 is broken down. I will refer to this as the "**Reconciliation Spreadsheet**" (page 361). The adjacent columns show how the totals break down between the first, second, third and fourth MPVA's. (There are in fact 5 payments that the Claimant has not been able to explain totalling £150,955 that might also be MPVA payments but without evidence of written MPVA's to explain them. These have been excluded from the figures in the Reconciliation Spreadsheet.)

(a) Summary of findings

130. Having conducted this analysis, and mindful of the requirements in the CPR Part 64 Practice Direction B at 7.2, the Court should be aware that:

130.1 There are 348 members who received at least one MPVA from another scheme - and therefore potentially 348 defendants. This underscores that there are 138 members who have not received MPVA's - and therefore a large number of individuals in whose interest it will (unarguably) be (absent an alternative fair way of acknowledging the prejudiced value of their pension funds) for the MPVA loans to be repaid. (It is arguable, as set out below, that it will be in the interests of other members too, but the case for those is less clear-cut and more controversial, given their separate relationship with the Claimant as a recipient of an MPVA from a different scheme.)

130.2 The MPVA's span a date period of 13 September 2010 to 1 June 2011.

130.3 The amounts 'loaned' totalled at least £9,767,895.

130.4 The MPVA's ranged in size from as small as £500 to as large as £230,000. However, the smallest total amount received by any member by way of MPVA's (i.e. split across more than one) was £2,500. The highest total amount received by a member was £423,500. Based on the figure of £9,767,895 divided across 438 MPVA's, the average MPVA was worth £22,301.13 although the average paid across the 348 recipients was slightly larger at £28,068.66.

130.5 The estimated costs of initiating the process of pursuing recovery of the MPVA's would be relatively small. My firm's approach would be to send a pre-action letter to each of the individuals in receipt of MPVA's, the contents of which would be standard save for the specific personal details and amount received for each individual, using information that is readily available from the Claimant's member records already. Once a template letter had been prepared, my firm would charge a fixed fee per letter and collate details of the responses in a spreadsheet, charging £25 per letter where there is a response, and £15 where there is none. At most, therefore, the cost of collating responses to 348 letters would be £8,700 (net of VAT).

130.6 Thereafter, the cost of dealing with the prospective claims becomes more difficult to determine at this stage. An assessment would need to be made after assessing the responses as to the precise steps to take. However, in the event of an absence of any response, it is proposed that, subject to checking that an individual is not bankrupt (which can be done very quickly), the Claimant would take steps to serve a statutory demand (without immediately returning to Court for further Beddoe relief). My firm would estimate costs of £250 (net of VAT) for preparing a statutory demand but there might be scope for reducing that figure

per person if the number of statutory demands to be prepared were significant, for example in excess of 50. The cost of serving a statutory demand by process server would be in the region of £100 (plus VAT), and it would be difficult to reduce that unless, again, an accommodation could be arranged on the basis of multiple instructions. One caveat to this approach would be holding back initially to the extent there are unresponsive individuals who are based overseas: there would be merit in assessing at that stage what additional cost would be entailed in taking action against such individuals.

130.7 In cases where there is no response to the statutory demands, the Claimant proposes simply issuing a bankruptcy petition at this stage, and, if uncontested, take the matter to a hearing. The costs of a petition are:

130.7.1 £825 for Official Receiver's fees;

130.7.2 £280 Court fee;

130.7.3 £10 search fee;

130.7.4 Process server's fees in the region of £87.50 to £135 plus VAT (depending on location of individual being served and level of urgency). There might be scope for negotiating the cost down if there are a large number of petitions to serve;

130.7.5 Fees for preparing the petitions would similarly be capable of reduction with volume. Fees for an initial petition would be in the region of £1,000 plus VAT but with subsequent petitions costing a minimal amount in fees (perhaps £50 to £100 plus VAT) provided the original template required limited amendment save for identity and details of the intended recipient and the sum at stake. Costs might be marginally higher if any correspondence is received that needs to be addressed.

130.8 In a straightforward case, where a petition is uncontested, the Claimant proposes taking that to Court to a hearing of the petition. Costs of the hearing will depend on location but fees of junior counsel are likely to be in the region of £400 plus VAT, with some additional solicitor fees required to instruct and liaise with counsel, perhaps in the region of £800 plus VAT. However, costs of both counsel and solicitors are likely to be reduced in the event of multiple bankruptcy hearings, albeit use of the same counsel will depend on location.

130.9 At that stage, the Claimant envisages returning to Court for further directions.

130.10 Given the directions sought at this stage, the Claimant/the Schemes will not be liable for any costs incurred by other parties in responding to the pre-action letters. There is a small costs risk as regards individuals who are served with statutory demands and seek to set them aside. There is also a small costs risk as regards individuals who are served with statutory demands, fail to seek to set them aside, but defend the bankruptcy petitions made against them.

130.11 A sample of some of the evidence supporting the Claimant's concerns regarding the means of the recipients of the MPVA loans is set out above. This position, the Claimant acknowledges, might have become worse over time with the MPVA's paid out more than 4 years ago but with progress of this application delayed by the appeal against the *Dalriada v Faulds* decision as well as through trying to establish what HMRC's position is. This delay might, however, have worked the other way and enabled some members who would not have been financially able to repay their MPVA loans 4 years ago now to be in a position to do so. A further consideration arising out of the financial position of members is the likelihood that HMRC will be pursuing their own action to recover tax. This now seems almost inevitable even if there is repayment of an MPVA loan. That has to be taken into account when assessing the means of an individual to pay, and the likely recovery the Claimant might make given the competing claims. That said, HMRC would not, I understand, be a preferential creditor, and the Claimant's claims will always be larger than those of HMRC (given the latter are a percentage of the former).

131. There are also practical difficulties to consider, given the number of potential defendants. At this stage, it is impossible to predict what approach might be sensible but the Claimant expects, if the Court ultimately directs that proceedings should be issued, that a Group Litigation Order may be required (on the basis that the claims will give rise to common or related issues of fact and law) or that there be some sort of GLO-equivalent case management process. However, the Claimant considers that the prospect of an actual GLO being used is extremely unlikely.

132. It is also possible (subject to the contents of the responses received) that the costs of issuing proceedings for repayment of (relatively) small loans might not represent a good use of Scheme funds. However, that is a decision that the Claimant believes should not be taken at this early stage, until further information has become available as to the likely overall make-up of the group of potential defendants.

133. Therefore, to summarise the costs, risks and potential benefits of the proposed (initial) steps on an individual member basis:

Costs	Risks	Potential benefits
Initial letter: £15 to £25 (net of VAT) Statutory demand: £350 (net of VAT) Bankruptcy petition (excluding initial template preparation): Court fees of £1,115 plus Other fees £137.50 - £235 (net of VAT) Uncontested bankruptcy hearing: £1,200 (net of VAT) **TOTAL (Max): £2,925 (net of VAT)**	If statutory demand and/or bankruptcy petition issued, some small costs risks if application to set aside the statutory demand or defend the petition made.	Between **£2,500 and £423,500**

134. And to summarise the maximum costs, risks and potential benefits on a scheme-wide basis (i.e. assuming all 348 recipients proceed on a 'worst-case' scenario basis, not repaying and forcing bankruptcy action):

Costs	Risks	Potential benefits
Initial letter: £8,700 (net of VAT) Statutory demand: £121,800 (net of VAT) (albeit if there were 348 statutory demands, we would expect this rate to be reduced) Bankruptcy petition: Court fees: £388,020 Other: £81,780 (but again with scope for this to reduce given the volume of petitions)	As above	**£9,767,895**

TOTAL: £600,300 (net of VAT)		

135. I have excluded from the above the additional cost of 348 uncontested bankruptcy hearings given the prospect of that is extremely slim. The figures would, in any event, be misleading, given there would inevitably be scope for reducing fees significantly, both for counsel and for solicitors, in the unlikely event that such a large number of hearings took place.

(b) Detailed explanation of analysis and spreadsheets

136. The Original Part 8 Spreadsheets listed information regarding every individual in relation to whom documentation has been found. The documentation came in the form of paper files handed over by Craig Tweedley after the Claimant's appointment. It consists of the application forms headed *"Membership Consideration Form"* (the Claimant has located such a form for approximately three-quarters of the members of the Schemes), the *"Pension Transfer Application Form"* (which provides details of the member's transferring scheme and included a declaration for each of the applicant and the transferring scheme) and the MPVA documentation. Some members have a complete set of documentation, but, for some members, only some of the above documents have been located. Examples of each of these are included at pages 228 to 239, but these have been redacted to protect confidential details of the members concerned.

137. The first of the Original Part 8 Spreadsheets listed all members, and there are separate spreadsheets for each Scheme with details for its members listed underneath as well as a final spreadsheet detailing all unidentified members. In each case, the information recorded for a member runs to 2 A3 sheets across. The sheets are ordered so that those 2 sheets appear together (for example pages 368 and 369).

138. Every single MPVA and Membership Consideration Form and Pension Transfer Application Form was checked to identify any inconsistencies amongst the documentation. Any discrepancies in the wording used in the spreadsheets arises out of the fact that, given the scale of the task of reviewing the documentation, it was undertaken by different individuals. However, they were all checking the same points in the documentation, and it is therefore possible to identify trends and draw conclusions.

139. Some of the information from the spreadsheets was summarised in the table exhibited at page 365 and previously exhibited to the Claimant's evidence prepared for the original Part 8 proceedings. It has since been possible to verify these figures by reference to bank statements as well, resulting in modifications to the figures reflected in an updated table at page 363 to 364, which I will call the "**Updated Summary Spreadsheet**". The Updated Summary Spreadsheet includes some additional data not included in the table prepared for the Part 8 proceedings. To summarise:

139.1 The number of members across the Schemes range from 59 as the smallest to 95 the greatest. There were 486 members identifiably allocated to one scheme or another. 138 other individuals identified in paperwork have been confirmed not to have transferred any funds into the Schemes.

139.2 In addition, the table shows the number of MPVA's entered into per scheme, which is not the same as the number of members, given that some members did not enter into an MPVA at all and others entered into 2 or even 3 separate MPVA's (and 5 entered into 4 MPVA's), each relating to different transfers of funds.

139.3 It can be seen that the greatest discrepancy between the number of members of a scheme and the number of members who had entered into MPVA's arises in the Woodcroft House Pension Scheme (66 members as against 11 members receiving MPVA's). Given the more recent dates of the documentation (starting from 4 May 2011 as the earliest MPVA) relating to members for that scheme (as against the date of the Claimant's appointment on 31 May 2011), this appears to have been the last scheme to which the Ark LLPs were allocating members at the time when the Claimant was appointed. As such, the discrepancy is probably explainable on the basis of that scheme being a 'work in progress', rather than through members actively choosing not to enter into MPVA's.

139.4 As can be seen, there were also members who either received MPVA payments but for whom there is no evidence of a written MPVA (30 between all Schemes); or who entered into written MPVA's but did not receive payment (just 4 between the Schemes).

139.5 It is also interesting to note that the proportion of funds paid into the Schemes by way of transfers-in that was then paid out by way of MPVA's varies significantly from one scheme to another. 50% of the funds received into the Lancaster Pension Scheme were paid out by way of MPVA's, whereas, at the

other end of the spectrum, just 15% of the funds transferred into the Grosvenor Parade Pension Scheme were paid out.

139.6 The final 2 rows detailing the number of completed forms for members for each scheme have not changed from when the original analysis was carried out.

140. The wording of the MPVA's is generally very similar although they can essentially be classed as 2 types, one version that tended to be used initially and a later version, arguably with clearer drafting.

141. As can be seen from the example at pages 240 to 246, this early version of an MPVA provides for an *"MPV Amount"* (the amount being extended to the member) in clause 1.1 of £20,000. However, clause 2 refers to the MPV Amount being £35,000. It is possible that the intention was for the sum of £20,000 to be loaned and the sum of £35,000 to be repaid after the *"Maturity Date"* (at least 25 calendar years from the date of the MPVA in this case). This is not clear from the drafting though as it is provided in clause 4 that the *"MPVA Participant"* (i.e. the member of the Scheme entering into the MPVA) shall make payment of an amount equal to the MPV Amount, without specifying whether that is £20,000 or £35,000. This approach was used in a total of 70 of the MPVA's (approximately one-fifth).

142. Later versions of the MPVA's had a different form of wording. By way of example, the version at pages 247 to 253 had a defined MPV Amount of £25,000 but also a defined *"MPV Discharge Amount"* of £43,750, which, according to clause 4, is due for payment at the Maturity Date (again at least 25 calendar years from the date of the MPVA).

143. In each case, the Original Part 8 Spreadsheets record, in relation to the MPVA's, the date it was entered into, whether it has been signed, the MPVA Amount, the MPVA Discharge Amount (if defined separately), the term of the loan and any variations in the wording from standard form.

144. The Original Part 8 Spreadsheets (as well as the MPVA Spreadsheet) also record the scheme from which a member's loan was to be paid. There was a general pattern of pairing of schemes with the consequence that the vast majority of loans made to members of the Lancaster Pension Scheme were paid out of the Portman Pension Scheme and vice-versa. Similar pairings existed between the Woodcroft House and Grosvenor Parade Pension Schemes and between Tallton Place and Cranborne Star Pension Schemes.

However, this was far from neat and conclusive since a small number of loans have been made in a manner inconsistent with the above pairings.

145. Taking this a stage further, nowhere in the paperwork would you be able to determine which 2 specific members were supposed to be matched (if that were indeed the intention). The only place this is suggested is the above-mentioned database prepared by Craig Tweedley/the Ark LLPs. The attempt at matching is not recorded on the exhibited spreadsheets for reasons of confidentiality. In any event, it was not consistently applied or considered reliable enough by the Claimant to be trusted.

146. Even leaving aside purported specific member to member matching, there is far from perfect matching between schemes. Despite the identified pairings above, the sums loaned from one scheme certainly do not match those loaned from the supposed paired scheme. The table attached at page 365 shows how much was "loaned" from one scheme to another. This shows some considerable disparity between sums loaned from one scheme in comparison to what the receiving scheme members loaned back. There are also some anomalies where, seemingly as a result of administrative errors, members of a scheme have received loans from their own schemes. This can be seen with both the Lancaster and Portman schemes although the sums in each case are relatively small.

147. The imperfect pairing is very significant in the context of the current application for Beddoe relief. The reasons for this are:

147.1 As noted above, in terms of the age of members of the Schemes, there are already 93 who are 55 or over and therefore potentially eligible to request payment of their pensions. There are a further 176 who are aged between 50 and 54. Clearly pension commencement lump sums may well start having to be paid out by the Schemes very soon – and well before the MPVA's become nominally due in 20 to 25 years' time.

147.2 If the Claimant fails to recover the MPVA's in the short term, whether through litigation or otherwise, then, by the stage the MPVA's fall nominally due, the members in question may well be dead, or otherwise unable to repay them (whether from the pension commencement lump sum or otherwise).

147.3 The non-matching of the Schemes means that those Schemes with the greater (proportionate) exposure to MPVA's will very probably suffer more than those with less.

147.4 Moreover, those members who retire later might suffer more than those who had already retired, when the non-MPVA assets were used (possibly exhaustively) to pay out their benefits. Obviously the Claimant would seek to mitigate any such impact by accounting for potential future non-recoveries, but that would be an exercise of judgement rather than necessarily accurate.

148. A further point to note about the MPVA's is that they have almost all been signed and by the correct trustee on each occasion (i.e. the trustee of the scheme making the loan). There are, however, about 25 instances where the trustee name on the front sheet contains an error, for example described as *"Athena Pension Services Limited Minerva"* (the *"Minerva"* at the end being superfluous). Nonetheless, there does not seem to be much room for debate as to the identity of the trustee that is the intended party to each MPVA.

149. In addition, the Original Part 8 Spreadsheets record whether an individual member has signed a Membership Consideration Form (see example at pages 228 to 235), the date of such form and the amount intended to be transferred. This looks like it might have been no more than an arbitrary form-filling exercise, partly given my observation above that only about three-quarters of members appear to have completed one. Moreover, the forms were very rarely signed by either of the Original Trustees, which is perhaps a further sign that not too much weight was attached to them. There was also a separate declaration from the *"occupational pensions specialist"* (or non-regulated introducer), which does not appear to have been completed in the majority of cases.

150. The general picture is also that the vast majority of members overall entered into MPVA's. Those for whom there is no record of an MPVA being entered into (138 in total) either appear to have had their pension funds transferred into one of the Schemes only at a very late stage (over 100 after 1 May 2011) and therefore did not advance to the stage of completing an MPVA or, alternatively, in a very limited number of instances actively chose not to enter into an MPVA, notwithstanding the very rationale of the Schemes appearing to have been the ability to obtain an upfront payment of a member's pension through entering into an MPVA.

151. The Claimant has located 438 MPVA's. The term before the Maturity Date was almost exclusively 25 years after the date of the MPVA although it was 20 years or 5 years in a much smaller proportion of cases (3 and 17 respectively). In a very small number of cases (8), the term for the Maturity Date was left blank.

(4) The Claimant's practical solution

152. The approach proposed by the Claimant is to send out pre-action letters to all recipients of MPVA loans, assess the responses and return to the Court for further directions where necessary. In appropriate cases where responses have not been provided or give no suggestion of a defence, the Claimant, as explained above, proposes that it serve statutory demands on the relevant members before returning to Court. Furthermore, where there is no response to a statutory demand, the Claimant proposes that it should have permission to proceed directly to issuing a bankruptcy petition without the need for further Beddoe relief – obviously subject to concluding that such action is not appropriate depending on what has occurred in the intervening period of time, for example if there are responses to all bar one statutory demand. I would respectfully suggest that even if a defence were raised at the petition stage, given the failure to respond to the statutory demand, the Claimant would be hopeful of having its costs of the petition paid by the debtor in any event.

153. The Claimant is also aware that there may well be offers to settle made by the members who received MPVA loans, and that each such offer will have to be judged on its merits. In particular, the Claimant is very aware that 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. As such, it wishes the Court to be aware that it may be that it will decide to exercise its powers of compromise (in particular but not limited to the Trustee Act 1925 section 15[1]) 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 is merely noting it for the Court's attention in the interest of clarity, and to avoid any suggestion in future that it was in any way seeking to 'hide' such settlements. 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.

[1] The Claimant being a sole acting trustee, which is authorised by statute to execute the trusts and powers reposed in it.

154. The Claimant respectfully requests that this matter is reserved in the first instance to a specified Master with leave to apply to another Master if the matter is urgent and the original Master is unavailable. I am aware that Beddoe applications are sometimes reserved to a particular Master on the basis of the claim number but raise this for the sake of completeness.

155. I also respectfully request that the Claimant has liberty to apply on paper for minor variations or extensions to the proposed directions. The Claimant suggests that this would certainly be an appropriate approach in any case where the consent of the representative beneficiary has been obtained, but also may be appropriate where such consent has not been obtained but where the Claimant considers that the Court could and should still give a ruling on paper. Needless to say, in the latter type of case, it would be open to the Court to require attendance of the parties if, on a review of the paper arguments, a decision on paper without oral argument did not seem appropriate to the Court. The reason the Claimant seeks this order is that it seems very likely that there will be multiple further applications for Beddoe directions on this matter, and the Claimant would like, so far as is possible, to minimise costs.

(ii) BEDDOE RELIEF FOR POSSIBLE APPEAL AGAINST SCHEME SANCTION CHARGE

(1) Introduction/reasons for seeking Beddoe relief

156. As stated above, the scheme sanction charge is calculated by reference to the unauthorised member payment charge. In other words, the amount of tax the Schemes face is a function of the amount of tax the members face.

157. It is clear that the imposition of scheme sanction charges against the Schemes could have a very significant impact upon the remaining assets. Given that £9,767,895 has been paid out in MPVA's, the worst-case scenario for the Schemes, in the event that individual members do not meet their unauthorised member payment charges at all, would be scheme sanction charges totalling 40% of the MPVA's (i.e. £3,907,158). Even allowing for full payment of the tax by members, the scheme sanction charges would be levied at 15% of the MPVA's (i.e. £1,465,184.20).

158. As the Court will be aware, the procedure for disputing the level of tax imposed is broadly as follows:

158.1 HMRC issue an assessment;

158.2 The tax payer lodges an appeal against that assessment in the First-tier Tribunal.

159. Accordingly, where this witness statement refers to an appeal on the scheme sanction charge, it is effectively referring to the initial litigious dispute between HMRC and the Schemes.

160. The Claimant has finalised Notices of Appeal (one in respect of each relevant tax year per Scheme), together with grounds of appeal, which have been lodged with the First-tier Tribunal. The appeal process will already therefore be partially underway by the time this application is heard. This was considered preferable by the Claimant, given that, at this stage, costs incurred in commencing the appeal are relatively small, and, as explained in Ian Hyde's witness statement, this commencement might assist in speeding up HMRC in determining the appropriate test cases to pursue.

161. As with the element of the application dealing with recovery of the MPVA's, this being a Beddoe application, the Claimant ought to be taking a stance on this and positively advancing the case for contesting the scheme sanction charge. As is explained below, it is once more proposed that this be done by way of a representation order, with Mrs Goldsmith representing those members in whose interest it is for the Claimant not to contest the scheme sanction charge assessments.

162. The figures alone make for a compelling basis for the Claimant to engage properly in appealing against the scheme sanction charges. However, there is an additional value in the Claimant being properly engaged with the Tax Tribunal proceedings given, if appropriately represented, it ought to facilitate a more organised approach to the proceedings and, in turn, a better, cost-effective and swifter resolution of the current uncertainty overhanging the Schemes, than if the Claimant 'took a back-seat' and left the members to contest their individual tax charges on their own. An appropriately run set of proceedings will reduce delay and, consequently, reduce the amount of administrative time the Claimant will inevitably otherwise be forced to spend, for example, dealing with multiple member queries whilst uncertainty continues.

163. It is, of course, possible that the members will coordinate themselves in such a way as to assist in speeding up the Tribunal proceedings themselves. Moreover, it is conceivable that a well-argued case against the unauthorised member payment charges could have the knock-on effect of defeating the

scheme sanction charge, which is parasitic upon the individual charges. However, that is by no means certain. I have addressed below a possible option of providing some funding for members in order to obtain legal representation. Without that, it is presently difficult to see how the members might be able to fund full legal representation for the purposes of the Tribunal proceedings, even for one hearing, but certainly if the proceedings are taken through 2 layers of the Tribunal system. This is not meant to be in any way disparaging towards the members but it is difficult to see how the members might obtain this unless it is offered (collectively between many members) for free or much reduced cost. Otherwise, even on a shared basis, the likely costs could be prohibitively expensive bearing in mind the probable financial predicament of some members. It is also difficult to see how legal representation of this nature could be provided on a contingency or conditional fee basis given that the members would merely be contesting potential tax charges rather than standing to gain anything.

164. Furthermore, it is not at all clear that the members would be able to/want to share the same legal representation when different fact patterns might very well trigger different outcomes on the tax, and, indeed, it might prove to be to the advantage of one member to argue the opposite of another. Potentially, as HMRC have made clear, there might be as many as 6 or more different test cases. Notwithstanding this, as set out below, the Claimant has put forward a proposal for providing some limited funding for whatever test cases are pursued and whichever of the affected members chooses to take up that proposal.

165. For completeness, I note that, aside from considering this action to be in the interests of the members of the Schemes, the Claimant has an additional interest in contesting the scheme sanction charge given the absence of any assurances that HMRC would not seek to levy it against the Claimant personally in the event that the Schemes' assets were insufficient to meet it. Given the extent of remaining assets, that does seem very unlikely to be an issue with the Schemes. In any event, this does not suggest any conflict, but rather an alliance, of interest from the Claimant's perspective.

(2) Costs/benefit analysis

166. The potential savings to the Schemes are alluded to above, in that avoiding the scheme sanction charge in entirety could save close to £4m for the Schemes. There might also be scope for recovering from HMRC costs incurred in appealing against the scheme sanction charge. This is more difficult in the

First-tier Tribunal unless a case is allocated to what is known as the "complex category", but that is likely with a case of this nature. In that event, the Tribunal has a general power to order costs (rule 10(1)(c)(i) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) (the "**First-tier Rules**")) and costs normally follow the event although the taxpayer has the ability to opt out of this "complex costs regime" within 28 days of being notified that the case has been allocated as complex (rule 10(1)(c)(ii) First-tier Rules). In the Upper Tribunal, there is full discretion to award costs in the normal way (rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698)). This is the position whether a case starts in the Upper Tribunal or is appealed from the First-tier Tribunal in appealing the scheme sanction charge before the Upper Tribunal, if proceedings were initiated there or progressed there. HMRC would plainly be 'good for the money' in the event that it were ordered to pay costs, although the corollary of this is that the Claimant itself risks a costs order if it appeals against the scheme sanction charge and loses.

167. In terms of the costs the Claimant is likely to incur, this is far from easy to predict and depends in part upon how many hearings take place, how organised the members are (since the appeal against the scheme sanction charge would almost certainly be joined), and whether proceedings leap-frog the First-tier Tribunal and go straight to the Upper Tribunal. Alternatively, if the proceedings start in the First-tier Tribunal, the prospects of HMRC taking them up to the Upper Tribunal are high, given they will be seeking an authority at least as high as the High Court in order to maximise the prospects of having the effect of the *Dalriada v Faulds* case (from a tax perspective) overturned.

168. As a guide, based on the assumptions below, it is estimated that Pinsent Masons' fees would be in the region of £250,000 (plus VAT) with specialist Tax Counsel in the region of £100,000 (plus VAT).

169. The above figures are based on the first hearing being in the First-tier Tribunal with a rolled-up hearing dealing with 2 member test case appeals at the same time and comprising the following work:

169.1 reviewing HMRC's decision and preparing a Notice of Appeal;

169.2 reviewing HMRC's statement of case;

169.3 parties exchanging documents on which they wish to rely;

169.4 drafting and agreeing directions for progression of the appeal;

169.5 agreeing the content of an authorities bundle;

169.6 agreeing the content of an appeal bundle;

169.7 preparing the agreed bundles and serving copies;

169.8 a probable 2 conferences with Counsel (likely to be Rupert Baldry QC);

169.9 reviewing HMRC's skeleton argument and preparing the Claimant's;

169.10 preparing perhaps 2 witness statements, one from the Claimant and possibly one from Craig Tweedley;

169.11 reviewing appeal documents from the members, potentially giving rise to a need to address inaccuracies;

169.12 attending the hearing, which could be a day of submissions in relation to the scheme sanction charge and perhaps 3 attending in relation to the members' appeals (although the structure of the hearing would not necessarily divide neatly like this); and

169.13 considering the Tribunal's decision (including dealing with corrections).

170. The above estimate is based on work at Pinsent Masons being undertaken by a team of partner, senior associate and trainee. It excludes the following (which could therefore make total costs larger):

170.1 any work prior to HMRC issuing a decision on the scheme sanction charge;

170.2 having material input into the selection of members' test cases;

170.3 liaising to a significant extent with the test members;

170.4 correspondence/discussions with HMRC regarding settlement or, more generally, any currently unanticipated significant discussions regarding the appeal; and

170.5 assisting the Claimant with ad hoc queries from the members.

171. If proceedings did go through the First-tier Tribunal initially and then the Upper Tribunal, the costs would be further increased given an additional substantive hearing, albeit not doubled since the Upper Tribunal would not need to repeat consideration of evidential matters. Otherwise, steps required to prepare for the second hearing could be similar to those above, save that it could be necessary first to seek permission to appeal, although bundle preparation should be more straightforward. It is estimated that costs would be in the region of £175,000 (plus VAT) for Pinsent Masons and £75,000 (plus VAT) for Counsel. As such,

total costs for going through 2 hearings might be in the region of £600,000 (plus VAT).

172. As against these costs, the Claimant considers it inevitable that choosing not to appeal the scheme sanction charge or not becoming involved in the Tax Tribunal proceedings at all would still generate costs on an ongoing basis due to further administration. It is impossible to put a figure on this, although it is not difficult to see how the added delay, increased complaints/communications, loss of scope for redeploying Scheme funds in investments with better rates of return than the current bank account rate could give rise to an extra £100,000 in costs that the Claimant will avoid through a speedier, more organised approach when dealing with the taxation position. (This also obviously leaves to one side the potential increased risk of the scheme sanction charge falling due if the members fail to succeed in their own appeals against the unauthorised member payments.)

(3) Proposed payment to support members

173. Related to this application, the Claimant wishes to propose that, aside from seeking Beddoe relief in relation to its own appeal against the scheme sanction charge, there would be merit in setting aside from Scheme funds 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 that 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, whilst the Claimant would have its own representation, there might be some arguments that it would be less likely to consider appropriate putting forward itself, plus there might be benefit to the Schemes if a properly-argued case put by a representative for the members increased the prospects of a successful challenge to the individual unauthorised member payment charges and, in turn, the scheme sanction charge.

174. In making this proposal, the Claimant is mindful that few members will have sufficient resource available to pay for appropriate representation. Moreover, defending tax charges does not lend itself to a conditional or contingency fee arrangement, bearing in mind all that the members concerned will achieve, at best, is ensuring they do not have to pay any tax, rather than standing to gain anything.

175. More specifically, the Claimant has in mind a figure of 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, which would assist in reducing costs. Subject to one such Counsel confirming a willingness to act and an appropriate fee (with an absolute cap of £50,000), the Claimant would propose that the 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 though if a member chose to act without representation or with separate representation. The funding of Counsel could 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.

176. One slight caveat with the proposed approach is that there might be conflicts of interest between different test case members, for example a member who has notionally made an MPVA payment but not received one having an opposing view from a member who has received an MPVA payment but not made one. Notwithstanding this, the situation in which the members find themselves is far from perfect, and, provided the relevant test cases recognise the tension between some of their prospective defences to the tax charges, it ought to be within the capability of Counsel to advance the respective arguments.

(iii) DIRECTIONS FOR ADMINISTERING THE SCHEMES

(1) Introduction

177. The Claimant has a number of administrative issues that it requires guidance on, primarily relating to allocation of costs, assets and losses between the Schemes and between members of the individual Schemes.

178. The Claimant is in principle neutral, and of course is financially disinterested, regarding which approach should be taken with these matters. However, it will indicate which approach or approaches it believes to be administratively simplest or fairest in each case, and it is then proposed that it should argue in favour of that position, with the alternatives to be argued for by the representative beneficiary. In essence, this will be by way of an 'issued based' representation order. It is recognised that this may not provide perfect

representation for all different possible outcomes, and therefore for all possible classes of members. However, to provide perfect representation would (it is respectfully submitted) be impractical and massively expensive in this case. In such a case, an issues based representation order is the only practical solution. On this issue, see below.

179. It should also be noted that, given the complexity of this matter, it is entirely possible that the representative beneficiary's legal advisers will suggest further alternatives. The Claimant would stress that it is not seeking to encourage that positively but it will give due consideration to any suggestion that it considers particularly worthy of assessment.

(2) Issues where directions required

(a) Costs – allocation between Schemes

180. This issue divides into 3 categories:

180.1 Costs to date and general costs going forward, including any tax appeal, for cross-Scheme matters;

180.2 Costs of recovery and management of non-MPVA assets; and

180.3 Costs of recovery of the MPVA's.

181. On the costs to date and general costs going forward, this is a reference to legal or administrative costs that relate to all of the Schemes, such as where an issue is common to all of the Schemes and including, for example, action taken to date in respect of the PRP fees paid to the Ark LLPs prior to the Claimant's appointment. This does not include issues where there is a clear basis for allocating costs to a specific scheme or schemes, such as dealing with the purported amendments to the scheme documentation for the Lancaster and Portman schemes (explained above), where the Claimant and my firm have specifically recorded costs separately to be allocated to those 2 schemes alone. This also excludes costs of recovery of investments (see the second category below). Where costs have been incurred in relation to issues common to all of the Schemes, there are broadly 2 possibilities:

181.1 The costs are allocated between the 6 Schemes equally; or

181.2 The costs are allocated between the 6 Schemes pro rata by reference to their respective levels of assets, although when and how the assessment of those level of funds is undertaken is a further issue.

182. To date costs have been split between the Schemes on a pro rata basis with reference to the total funds transferred into the Schemes by members prior to the Claimant's appointment. The percentage proportion borne by each Scheme is as follows:

Scheme	**Percentage of costs**
Cranborne	16.66%
Tallton	17.34%
Lancaster	20.37%
Portman	23.73%
Woodcroft	9.97%

183. This can of course be altered going forward or even, if ordered by the Court, adjusted for past payments.

184. There are arguments for and against both basic approaches. However, the Claimant would note that the 'richer' Schemes (as in those that received greater member funds at the outset) ought not only to be able to pay more, but they will very probably receive more reward (or at least potentially receive more reward for example through recovery of assets) from the provision of the costs. For example, the 'richer' Schemes will very probably have larger tax bills, on whichever basis the tax is assessed, because they will have lent, and their members will very probably have received, more. As such, they stand to gain/lose more in the tax appeal. Equally, in terms of administrative costs, the 'richer' Schemes tend to have more members and consequently require a proportionately larger amount of administration. The Claimant would also note that, if an equal allocation basis was used, the 'poorer' Schemes would start to find a disproportionate percentage of their assets being used for legal and administrative costs, and eventually might find themselves exhausted by such an approach.

185. As noted above, if a pro rata/asset ratio basis is to be used, there is one further question: when and how does one value the Schemes' assets? To date the allocation has been performed on the basis of the total value of transfers paid into the Schemes. This is a clear, simple, fixed ratio. This has avoided the difficulty of valuing the assets such as the MPVA's. However, as MPVA's (and other assets) are recovered/found to be irrecoverable, and as members take benefits or transfer out, any ratio of costs to assets will inevitably increasingly vary.

186. If the asset ratio approach is taken, the Claimant would strongly urge the Court either to allow it to use the original ratio of assets transferred into the Schemes or to perform, say, annual assessments of the Schemes' assets (using the Claimant's reasonable endeavours and best estimates) and allocate costs for the next year on the basis of that ratio, rather than have to perform any sort of rolling calculation. The Claimant would also respectfully suggest that if a direction is given to adjust past allocations of costs in accordance with some sort of rolling asset ratio (and it is **not** encouraging this) that practical directions are given as to how to perform such a retrospective assessment of assets.

187. On the costs of recovery and management of non-MPVA assets, to date, where practicable, costs relating to specific investments have been allocated to specific schemes. There appears to be no reason to alter this approach, but it was thought best to raise it in the context of the other costs issues for the sake of completeness.

188. On the costs of recovery of the MPVA's, again there are a number of possible approaches:

188.1 The costs are allocated between the 6 Schemes equally;

188.2 The costs are allocated between the 6 Schemes pro rata by reference to their respective levels of assets;

188.3 The costs are allocated between the 6 Schemes pro rata by reference to their respective levels of MPVA's made;

188.4 The costs are allocated on an individual MPVA recovery basis, each Scheme bearing its own MPVA recovery costs.

189. Whilst seeking to remain neutral, and not wishing to pre-judge any arguments, the Claimant suspects that the last 2 options are the primary possibilities. Of the 2, the former (pro rata by reference to MPVA's made) is the administratively simplest and gives a form of 'costs sharing mutual insurance' in case one Scheme is unfortunate enough to have a disproportionate level of 'bad' or expensive MPVA recoveries. There will also be some costs savings if costs need not be attributed on an individual MPVA basis.

(b) Assets – allocation between Schemes

190. The Claimant does not require directions with regard to the allocation of assets between the Schemes. This is because it is possible to attribute assets on the basis of which Schemes paid for them, and, accordingly, any losses suffered

must be borne by the relevant Scheme. For example, in the case of the MPVA's, any failure to recover a particular MPVA must legally be borne by the Scheme that made the MPVA in question.

(c) Assets and costs (general) – allocation between members

191. The Schemes are non-segregated defined contribution pension schemes. This means that each member's benefits are tied to his 'Member's Account', which is a nominal account allocating a nominal share of the Scheme's assets to him. I would emphasise the 'nominal' in this description, as no member is actually entitled to any specific assets. Clause 1.2 of the trust deeds makes this very clear:

"[relevant Original Trustee] agrees to be, and is appointed as, the Trustee of the Scheme with effect on and from the Commencement Date. The Trustee will hold the Fund on the irrevocable trusts 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.****"* [Emphasis added.]

192. This was also made clear in the supporting literature for the Schemes, as noted by Mr Justice Bean in his 2011 judgment at paragraph 13, and emphasised at paragraph 44:

"13. According to Mr Tweedley, the retirement "pot" available to a member who had taken an MPVA would comprise, on the vesting of his pension, the return made on the part of his fund invested by the trustees of his scheme in what might be described as orthodox investments, specifically property; and the right to be repaid the MPVA discharge amount (the sum originally loaned plus 3% simple interest per year, rolled up) owed by a member of a reciprocal scheme. ***But, although the illustrative literature issued by the promoters of the PRP gave examples of directly paired members (member A in scheme Y and member B in scheme Z as set out above), the schemes were non-sectionalised: clause 1.2 of each scheme's trust deed states that "no person has any right to any particular assets of the scheme".*** *This did mean that in the event of the death or of default by member B of scheme Z in the above example it would be the MPVA lenders in scheme Y generally who would bear the loss, rather than it all falling on Member A. An exact pairing or matching rule, apart from concentrating the risk, would also have depended on the two MPVA loans being repayable at the same time, and on neither*

borrowing member having sought to transfer his fund to another pension scheme." [Emphasis added.]

193. The Member's Account is defined in Rule 1 as:

"...an account under the Scheme referable to the member which amount may comprise or include any contributions, payments, or transferred-in amounts, and any investment profit or loss."

194. Member Accounts are important for the administration of the Scheme because they define what benefits the members are entitled to. In particular, the rules provide that:

Rule 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 Arrangements."*

195. The definition of "Member's Account" clearly allows for attribution of investment losses. However, clause 10 of the Trust Deeds also provides as follows:

"Scheme Expenses. Any costs, liabilities and expenses incurred by the Trustees in connection with the Scheme shall be met out of the Fund. ***The Trustees may decide that specific cost arrangements should apply to any transaction that applies to a Member's Account.****"* [Emphasis added.]

196. This, the Claimant would respectfully submit, gives the Claimant a wide discretion to attribute a Scheme's costs between its members on any fair and rational basis.

197. Again, there are a number of different possibilities.

198. First, in relation to the asset gains and losses:

198.1 All asset gains and losses are attributed pro rata between the Member Accounts on the basis of the proportion of funds transferred in;

198.2 What might be described as a 'unit trust' approach: as each member joins the Scheme, its assets are valued, and they in effect purchase a share in the fund at that date; or

198.3 What might be described as 'nominal segregation': effectively a tracing exercise is conducted to attribute an asset between the members with an interest in 'cash' at the date of the investment being made, and then gains and losses are attributed between Member Accounts on that basis. For example:

198.3.1 1 January: Members A and B both join with £100 each;

198.3.2 2 January: a property is purchased for £200. This is attributed to A and B's Member Accounts equally;

198.3.3 3 January: Member C joins with £100;

198.3.4 4 January: an MPVA of £100 is made. This is attributed to Member C's Member Account solely.

199. The Claimant would note that the first option is the simplest administratively and that the third option is by far the most complicated administratively.

200. The second option (the 'unit trust' approach) would have some complexities, including the problem of valuing the assets of the Schemes at any given time. If this option were adopted, the Claimant would suggest valuing the MPVA's on their face value for the purpose of attributing 'units'. This would, it is thought, result in an attribution of assets very similar to the first option.

201. The Claimant would also note that there is no provision (or at least no express provision) in the Trust Deeds and Rules for nominal segregation. Finally, the Claimant would note that nominal segregation would arbitrarily favour some members over others – and that this would not necessarily be on a straightforward basis, such as earlier members did better than later members or vice versa. It would be, effectively, entirely random depending on when a member joined and when the Schemes made each of their investments. For example, a member who joined just before one of the property investments that has been recovered might be much better off than members who joined just afterwards.

202. Secondly, in relation to the Schemes' costs:

202.1 All costs are attributed equally across the Member Accounts;

202.2 All costs, expenses and liabilities are simply borne by the fund, i.e. attributed pro rata between the Member Accounts;

202.3 All costs are attributed pro rata between the Member Accounts on the basis of the proportion of funds transferred in; or

202.4 General costs are attributed on one of the bases set out above, and

202.4.1 If there is 'nominal segregation' as set out above, asset specific costs are attributed on the same basis; and/or

202.4.2 Member specific costs are attributed to the relevant member.

203. The Claimant would note that the first 3 options are far simpler administratively. It would also note that, in general, with non-segregated occupational pension schemes, costs are borne by the fund generally. This would also tie in with a 'unit trust' approach to asset attribution.

204. Regardless of what general approach is taken to costs and expenses attribution, the Claimant would note that it will necessarily retain the discretion under Clause 10 (as to do otherwise would fetter the discretion unlawfully), and is seeking guidance on the general approach to be taken, in the absence of exceptional circumstances.

(d) Transfer Fees – allocation between members

205. As stated above, when a member transferred his or her pension pot into the Schemes there was a 5% 'fee' taken by the Ark LLPs, the Transfer Fee, which was paid out of the Schemes' funds. This was described as a 'transfer fee' but, as stated above, the Claimant has sought to recover the sums from the Ark LLPs as being paid in breach of trust.

206. Regardless of whether the Claimant is successful with the recovery action, it appears that for some of the members the 5% 'fee' was not actually paid. This is apparent, for example, from the Counterclaim pursued by the Ark LLPs in the Part 7 proceedings mentioned above. Recovery of a further £320,603.76 is sought by way of additional Transfer Fees not already paid and spread across all 6 Schemes. It is not clear to how many members that relates although, given an average pension pot of approximately £55,000 per member, it is likely to relate to more than 100 members.

207. The Claimant has also not found it straightforward to identify which members' 5% 'fees' were not paid since the fees were not deducted one by one but rather in batches for several members at a time. The extent of the reconciliation means that about 90% of Transfer Fees have been identified as relating to particular members but not all, and it is 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. (I note that Mrs Goldsmith is one member for whom there has been no identified and reconciled Transfer Fee.)

208. Accordingly, there are 2 options:

208.1 Letting the Transfer Fees be borne by the Schemes' funds as a whole, i.e. not attributing it to any particular Member Accounts; or

208.2 Using a more detailed analysis and, to the extent it is possible, attributing the Transfer Fees to individual members (although a decision would still need to be made as to the approach to take with unreconciled Transfer Fees, which could include division between all members for whom there are no reconciled Transfer Fees).

209. The Claimant would note that the members who did not have Transfer Fees charged were essentially lucky, in that the Transfer Fee was referred to in the literature for the PRP Schemes and they must have expected to have the charge made. However, it appears that some members were also 'charged' a further amount or 'fee' for their transfers – namely those who were 'advised' by/introduced to the Schemes by Premier Pensions. Premier Pensions is one of a number of introducers through whom individuals joined the Schemes. There remains some doubt as to whether the additional payments were for Premier Pensions Transfers Limited (a UK entity) or Premier Pensions SL (a related Spanish entity). However, for those members who were introduced by Premier Pensions, additional payments were made initially to the Ark LLPs with the surplus over the Transfer Fee apparently paid to one of the Premier Pensions entities in addition to a proportion of the Transfer Fee. It does not appear to be straightforward to work out the specific additional payment made in respect of an individual member, given it is not, for example, as simple as identifying a particular percentage. Absent some clarification of this, it might be easier for these extra charges to be borne by the Schemes' funds as a whole or at least by those funds relating to members who were introduced to the Schemes by Premier Pensions.

(e) Allocation of tax liabilities

210. At present, it is not certain what the tax liabilities of the Schemes will be, or on what basis. As such, at present the Claimant is not proposing specific directions for allocation of tax liabilities. However, for the sake of clarity, it notes the following:

211. As to allocation between the Schemes, this will presumably be done by means of how HMRC raise the assessments and/or how the Tribunal determines tax to be due. It is highly doubtful that there will ever be any need for directions on that issue.

212. However, as to allocation between the members of a particular Scheme, there could be at least 4 alternatives:

212.1 Allocation between all members on the basis of their share of the fund (albeit as at what date may be in issue) - this is effectively identical simply to treating the tax as a cost of the Scheme as a whole and netting it off before calculating assets and dividing between the member;

212.2 Allocation between members who received MPVA's, on the basis of the ratio of one individual's MPVA to the total of MPVA's received by members of that Scheme;

212.3 Allocation between members who 'made' MPVA's (if, and to the extent that, that can be determined), on the basis of the ratio of the MPVA 'made' by an individual to the total of MPVA's 'made' by members of that Scheme; or

212.4 To the extent it is possible, determine the specific element of tax that relates to each member (for example, the scheme sanction charge arising by reason of a particular MPVA would relate to the member who made/received the MPVA in question) and allocate it to that member. This would potentially allow for a member to reduce the tax charge allocated to his or her share of the fund by paying his or her member's unauthorised payment charge, because, as is set out above, this results in a (limited) reduction of the scheme sanction charge.

213. Clearly, how to allocate the tax liability could well depend on how the tax is determined, i.e. depending on whether it is calculated on the basis of the MPVA's made or MPVA's received. As such, the Claimant may have to return to Court for further direction on this issue.

(f) Late transfers in

214. As stated above, the Claimant was appointed on 31 May 2011. At the date of its appointment, there were a further 170 transfers into the Schemes that had not been finalised but that were in various stages of completion. In cases where the transfer was made by cheque, the cheques were not banked, but, in any event, a total of 56 further transfers amounting to £1,772,259.11 were made into the Schemes' bank accounts after the Claimant was appointed and which (despite its best efforts) it did not succeed in stopping. 12 of the transfers in fact related to existing members (£338,088.22), and, given some of the fresh individuals transferring in the balance of the monies did so via more than one transfer, there are effectively 38 individuals whose status as members of the Schemes remains unclear. Efforts were made by the Claimant to prevent further transfers from coming into the Schemes through alerting members/individuals who were thought to be on the cusp of becoming members

in announcements and through liaising with the Regulator although it was not apparent at the time quite what momentum had been gathered in terms of individuals transferring their pensions into the Schemes. The Claimant opted at the time not to 'freeze' the Schemes' bank accounts since it was unclear whether any funds were going to be paid in from other parties such as returns on investments, and there was no ability to prevent receipt of some monies but not others.

215. The question is what should be done with these sums? There are again at least 2 options:

215.1 The funds should be held just as any other funds in the Schemes; or

215.2 The funds should be treated as being held on a resulting trust for the transferring schemes and returned (possibly less costs).

216. The Claimant presently considers that it may be necessary to seek a representation order in relation to this point so that it can argue positively in favour of these funds being retained in the Schemes and the relevant individuals being treated as members (to the extent transfers do not relate to individuals who are already unequivocally members by virtue of earlier transfers). It would propose having a representative beneficiary argue in favour of retaining them.

217. In terms of an appropriate representative beneficiary though, unlike the other directions, the Claimant considers it necessary to involve someone who specifically did transfer in late to one of the Schemes. Moreover, the Claimant considers it might be necessary to have additional evidence produced in relation to this point, looking, for example, at what documentation was completed by the individuals concerned. There is also a sufficiently large sum at stake to merit this being dealt with separately. Furthermore, if there is to be a separate representative beneficiary, it strikes the Claimant as potentially more cost-effective not to involve that individual (and legal representatives) in the numerous other matters being addressed in this application. Instead, the Claimant proposes taking steps to issue a separate application shortly and see whether it is possible to have it listed to be heard immediately after this main application before the same Judge.

(g) Transfer requests

218. Once there is a clear approach that the Claimant can take for attribution of assets and costs both between the Schemes and between the members, it

should be possible in principle to determine what a Member's Account is worth. However, the final determination of this figure may well be some time off, particularly in light of how long the tax appeals are likely to take.

219. This leaves the Scheme and the members in something of a state of limbo. However, the Court should be aware that in principle a member (at least prior to one year before his normal retirement date) is entitled to demand a transfer of his benefits to another HMRC registered pension scheme pursuant to the Pension Schemes Act 1993 ("**PSA 1993**") Part IV, Chapter IV 'Transfer Values'. If he does so, then the Claimant will be legally obliged to provide him, within 6 months, with a cash equivalent transfer value "statement of entitlement" that values his rights/benefits. The valuation of his rights/benefits is conducted under PSA 1993 s.97, under which the Occupational Pension Schemes (Transfer Values) Regulations 1996 (SI 1996/1847) are made, which, in turn, prescribe how the value should be calculated. In broad terms, for a money purchase scheme, the trustees have to value the "realisable value" of the assets: see Regulation 7C.

220. In a case such as this, where the "realisable value" of the assets is far from obvious, that leads to the following questions:

220.1 First, how should the Claimant value such assets?

220.2 Secondly, can the Claimant make partial transfers pending a final valuation and transfer?

221. On the first question, the Claimant will of course have to exercise its judgement. However, in the absence of anything else at present, it proposes valuing MPVA's 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.

222. On the second question, leaving aside the question of whether such a partial valuation and transfer approach is possible under the PSA 1993 (which, it is submitted, it is not), there does appear to be a Scheme provision that potentially allows for this: namely clause 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 that Member to transfer assets from the Scheme) he may exercise that right or concession. If it by [sic] concession, then any transfer is subject to any terms the Trustees impose."

223. It is respectfully submitted that this permits (but does not oblige) the Claimant to make partial transfers, subject to whatever terms it wishes (reasonably) to impose.

D. PROPOSED REPRESENTATION/DISCLOSURE/DIRECTIONS FOR HEARING

224. The Claimant is looking to manage costs of this application as effectively as possible, which also explains in part the rationale for joining a number of issues together and seeking to have them determined at one hearing.

225. The Claimant envisages a directions hearing being listed as a precursor to the substantive hearing of this application in order to ensure that the Court approves of its proposed approach regarding representation and selection of representative beneficiary, a process that might well prove controversial given the nature and history of the Schemes.

Representation

226. Taking each element of the application in turn, the Claimant proposes the following by way of representation:

(a) MPVA Beddoe

227. For the Beddoe application in relation to seeking recovery of the MPVA payments, it is considered sufficient to have one representative beneficiary, which, for these purposes, would be Mrs Goldsmith, a member who did receive an MPVA loan. This is as much for perception reasons as anything since members might well view a member who did not receive an MPVA loan as having a greater interest in the Beddoe relief being granted given that member is not vulnerable to facing a claim against herself in the separate capacity of a recipient of an MPVA.

228. In fact, the representative beneficiary is clearly intended to be represented in his/her capacity as a member of one of the Schemes and not as a recipient of an MPVA, an entirely different relationship the member has with a scheme of which he/she is not a member. Purely in the capacity of a member of a scheme that has made MPVA's, it is academic whether the member received an MPVA or not, and it might even be the case that it is in the interests of that member to have the Claimant seek recovery generally. The position is further complicated in that members of some schemes, where a larger proportion of funds might have been expended on MPVA payments, might have a greater interest in seeking recovery than those where the proportion is smaller.

229. In order to keep costs proportionate, the Claimant proposes therefore that the representative beneficiary for these purposes be subject to an 'issues based' representation order and be tasked specifically with representing those members across the Schemes in whose interest it is for recovery of the MPVA payments not to be sought.

230. Unless the Court considers it necessary to have a second representative beneficiary for the purposes of this application, it is proposed that the Claimant, also under the terms of the representation order, represent those members in whose interest it is for it to seek recovery of the MPVA payments. Given that the Claimant will need to participate and instruct lawyers in relation to this part of the application in any event, this approach seems to be more cost-effective than involving a second representative beneficiary and resulting legal costs.

(b) Scheme sanction charge tax appeal Beddoe

231. Similarly, the Claimant proposes that simply one representative beneficiary be used for the purposes of the part of the application seeking Beddoe relief for use of scheme funds in an appeal before the Tax Tribunals against any scheme sanction charge levied against the Schemes.

232. Again, for the sake of keeping matters straightforward and cost-effective, it is proposed that Mrs Goldsmith be used for this. On the face of it, it would appear logical for members to support this application, given the consequences for their pension funds if the scheme sanction charge is not successfully opposed. For completeness, I note that there is a possibility (although this is not certain) that some members might not be susceptible to unauthorised payment charges if they did not receive MPVA loans and could be deemed not to have received one if viewed on a member-matching basis, as HMRC have approached the taxation to date. It could be argued therefore that, in the event that it is determined that the scheme sanction charge should be levied against the pension funds of those members who have also borne the unauthorised member payment charges, some members might genuinely have less interest in the Claimant taking steps to challenge the scheme sanction charge. As such, conceivably, there will be a difference of opinion amongst members.

233. For the sake of avoiding any argument that the use of scheme funds has not been appropriately explored and tested, the Claimant proposes that this part of the application also be conducted pursuant to a representation order, such that Mrs Goldsmith is tasked with arguing against the use of scheme funds (to the

extent they are so advised), and the Claimant argues in favour (which in this case very much accords with its viewpoint in any event).

234. The Claimant would stress that it believes that it is entirely possible that a representative beneficiary's legal advisers would conclude that it is in the interests of the members to have this relief and, subject to the Court's approval of this approach, could limit their role to testing the Claimant's process.

(c) Application for directions

235. The Claimant envisages this part of the application requiring a variety of approaches depending upon the specific directions sought. The Claimant is generally neutral on these issues and is simply keen to ensure that all possible (and appropriate) positions are argued so that it has a 'watertight' set of directions to enable it to administer the Schemes going forward.

236. The Claimant has considered again that it ought to be possible to resolve these questions through hearing argument of 2 parties and thereby avoiding the cost of additional representation.

237. With the above in mind, the Claimant has drawn up a schedule at pages 366 to 367 of the directions sought and the possible arguments and, as a result, the proposed representation of those arguments using itself and the representative beneficiary. It is proposed that this be confirmed by way of representation order since, whilst in some cases the representative beneficiary may truly agree with the stance she is asked to argue, it will not always be the case.

238. Moreover, the Claimant suggests that it would not be cost-effective to introduce more representative beneficiaries to ensure fact-specific representation on all issues. The Claimant intends to make this schedule known to the members in advance of a directions hearing to see whether there are any comments put forward that might influence a change of view.

239. Equally, it invites any comments from the representative beneficiary and her legal representatives in response to this application after it is served, and in advance of a directions hearing, so that any appropriate adjustments can be made before or at such a hearing.

STATEMENT OF TRUTH

I believe that the facts stated in this witness statement are true.

Ben Fairhead .... 6 June 2016 ....

Benjamin Allen Fairhead Dated