**[2017] UKUT 0385 (TCC)**

**UT Reference: FS/2017/002**

***STRIKE OUT – pensions regulation – appointment of trustee by Pensions Regulator under s7 Pensions Act 1995 – reference to Upper Tribunal on grounds that the pension schemes were not "trust schemes" so action was ultra vires – application by Regulator to strike out reference – application granted***

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

**RP MEDPLANT LIMITED** **Applicant**

**- and -**

**THE PENSIONS REGULATOR** **Respondent**

**TRIBUNAL: JUDGE SARAH FALK**

**Sitting in public at The Royal Courts of Justice, The Strand, London WC2A 2LL on 12 September 2017**

**Saaman Pourghadiri, Counsel, for the Applicant**

**Joseph Steadman, Counsel, for the Respondent**

DECISION

1. On 12 January 2017 the Pensions Regulator made a determination to appoint Dalriada Trustees Limited ("Dalriada") as trustee of two pension schemes, the Capita Oak Pension Scheme and the Westminster Pension Scheme (the "Schemes"). The sponsor of the Schemes, RP Medplant Limited, referred the determination to the Upper Tribunal on the basis that the Pensions Regulator had no power to appoint a trustee.

2. This is an application made by the Pensions Regulator to strike out that application on the basis that there is no reasonable prospect of the reference succeeding. The respondent to the reference is therefore the applicant in the strike out application, and the applicant in respect of the reference is the respondent to the application. To avoid confusion I will refer to the Pensions Regulator throughout as the "Regulator" and to RP Medplant Limited as the "Sponsor".

**Background**

3. The Sponsor is a company with an address in Cyprus, but about which no further details were available at the hearing. The Capita Oak Pension Scheme was established by a written instrument dated 23 July 2012 and entered into between the Sponsor and a UK company called Imperial Trustee Services Limited ("Imperial"). The Westminster Pension Scheme was established on 6 December 2012 by a written instrument entered into between the Sponsor and another UK company, Thames Trustees Limited ("Thames"). The two instruments are very similar and for the purposes of the hearing it was agreed that reference could be made to the terms of the Capita Oak Pension Scheme as representative of both Schemes.

4. In summary, the terms of the Capita Oak Pension Scheme recite that the Sponsor established the Scheme outside the UK with effect from the date of the instrument, that it is an occupational pension scheme within the meaning of s150 Finance Act 2004, that the Sponsor appointed Imperial as the "Administrator" of the Scheme and that the Scheme had been registered both with HMRC and with the Pensions Regulator. The operative provisions, considered further below, cover a number of aspects including the powers available, the appointment of Scheme advisers, the making of investments, and such matters as the preparation of accounts and winding up. The position of Scheme members ("Members") is addressed in more detail in a set of rules appended to the instrument (the "Rules"). The instrument and the Rules are stated to be the "governing documents" of the Scheme.

5. It appears that both Schemes received funds by means of transfers from other pension arrangements. Documentation in respect of two transfers to the Capita Oak Scheme and one to the Westminster Pension Scheme were included in the bundle, which was stated by Mr Steadman (on behalf of the Regulator) to be representative.

6. In July 2015 orders were made for the winding up of both Imperial and Thames, and in October 2016 the Official Receiver, as liquidator, sought the Regulator's

assistance in having a new trustee appointed to the Schemes. This was on the basis that the Official Receiver did not consider himself to have the knowledge and experience properly to carry out the duties of a trustee of an occupational pension scheme, and because he was concerned that the Schemes had characteristics indicative of schemes operating as pension or investment scams.

7. On 8 December 2016 the Regulator issued a Warning Notice to the Sponsor, Dalriada and the Insolvency Service as Official Receiver, stating that it proposed to appoint Dalriada as an independent trustee of the Schemes to secure that there was a sufficient number of trustees for their proper administration, on the basis that the Insolvency Service was not willing and able to act. The Warning Notice noted that Dalriada had experience of dealing with schemes with similar characteristics and had already been appointed as trustee in relation to other connected schemes. Dalriada was stated to be willing to act on a conditional fee basis, and to offer the best chance of recovery of Members' assets. Representations were invited, including from the Sponsor (who was identified as the principal employer in respect of the Schemes), but none were received. The Regulator issued its Determination Notice and Appointment Order, to the same entities as the Warning Notice, on 12 January 2017. This document appointed Dalriada as a trustee of the Schemes under s7(3)(b) Pensions Act 1995 and exercised other powers, including determining that Dalriada's fees should be paid out of the Schemes' resources on a conditional fee basis but should also be recoverable from the employer.

**The reference and this application**

8. On 8 February 2017 the Sponsor referred the Regulator's determination to the Upper Tribunal under s96(3) Pensions Act 2004. The sole basis on which the reference was made was that the determination was ultra vires, because s7(3) Pensions Act 1995 provides power to appoint a trustee of a "trust scheme" and neither of the Schemes is a trust scheme.

9. The Regulator applied to have the reference struck out on 15 March, and the Sponsor filed a response to that application on 11 April. In summary, and as discussed further below, the Regulator maintained that the reference has no reasonable prospect of success because the Schemes are clearly trust schemes, even though they are not expressly labelled as such. The Sponsor's response to the application disputed this and maintained that the Schemes were not established under trust.

10. A preliminary point worth making at this stage is that, in dealing with a reference of this nature, the Upper Tribunal is not exercising an appellate function. The Tribunal's task is to make a fresh determination of the appropriate action to take based on its own assessment of the evidence, which may include evidence that was not available to the Regulator at the time that the original decision was made. This is the effect of s103 Pensions Act 2004, as explained by Warren J in *Van De Wiele v The Pensions Regulator (Re Bonas)* [2011] Pens LR 109 at [36] onwards. (The position is similar to that in financial services cases relating to disciplinary matters: see the discussion in *Carrimjee v Financial Conduct Authority* [2015] UKUT 0079 (TCC) from [48].)

**The test for striking out**

11. Under rule 8(3)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "Tribunal Rules") the Upper Tribunal may strike out proceedings if it "… considers that there is no reasonable prospect of the … applicant's case … succeeding". This test is very similar to the test in the Civil Procedure Rules for striking out and summary judgment ("no reasonable grounds" and "no real prospect"). It is a high hurdle. As explained in *Three Rivers District Council and others v Governor and the Company of the Bank of England (3)* [2001] UKHL 16, [2001] All ER (D) 269, and in particular by Lord Hope at [87] to [95], the power to dispose of a case summarily is a discretionary power which requires the exercise of judgment in weighing up the prospects of success. The test is essentially whether the prospect of success is fanciful. If serious consideration of the issues is required, such that a mini-trial might be necessary, that indicates that the power should not be exercised. The power is designed to deal with cases that are not fit for trial at all: *Swain v Hillman* [2001]1 All ER 91. The power must also obviously be exercised in accordance with the overriding objective of (in this case) the Tribunal Rules to deal with cases fairly and justly. This must include assessing whether there is any realistic possibility that evidence could be adduced at trial to support the case being put, such that it would not be a waste of time and resources to proceed to a hearing.

12. Mr Pourghadiri for the Sponsor referred me to the guidance provided by Sir Stephen Oliver QC in *Sharma v Financial Services Authority* (Case FS/2010/0008; 7 December 2010) at [37] and [38]. This case related to a reference to the Upper Tribunal of a decision by the Financial Services Authority as to whether an individual was fit and proper to carry out certain activities. The judge stated that the strike out power must be exercised with care. This was not an appeal, and the Tribunal's task was to determine whether the person was fit and proper. By striking out the reference the Tribunal confined itself to the written material available and lost its ability to question the applicant and (where the applicant was unrepresented) to ensure that he put his best case forward. Additional circumspection was needed because of the Tribunal's obligation to consider evidence that may not have been available at the time of the determination.

13. Although I was not referred to it, the Upper Tribunal's power to strike out a reference has also been considered recently in *Badaloo v Financial Conduct Authority* [2017] UKUT (158) TCC. Judge Berner referred at [50] to the power under rule 8(3)(c) being a discretionary one which requires consideration of all the circumstances, including the need for the applicant in the reference to have a tenable case (even though the burden of proof was on the Financial Conduct Authority) and the consequences of the reference not proceeding. He also referred at [51] to proportionality as being an important element in dealing with a case fairly and justly in accordance with the overriding objective (rule 2 of the Tribunal Rules).

**The relevant pensions legislation**

14. Section 7(3) Pensions Act 1995 provides so far as relevant:

> "The Authority may … by order appoint a trustee of a trust scheme where they are satisfied that it is reasonable to do so in order –
>
> …
>
> (b) to secure that the number of trustees is sufficient for the proper administration of the scheme …"

The Regulator is the "Authority" for these purposes.

15. "Trust scheme" is defined in s124(1) of the Act as "an occupational pension scheme established under a trust". It was not disputed that the Schemes are each an occupational pension scheme.

16. Section 252 Pensions Act 2004 is also relevant. This provides, so far as material:

> "(1) Subsections (2) and (3) apply to an occupational pension scheme that has its main administration in the United Kingdom.
>
> (2) If the scheme is not established under irrevocable trusts, the trustees or managers of the scheme must secure that no funding payment is accepted.
>
> …
>
> (5) Section 10 of the Pensions Act 1995 (civil penalties) applies to a trustee or manager of an occupational pension scheme that has its main administration in the United Kingdom if—
>
> (a) subsection (2) … requires the trustees or managers of the scheme to secure that no funding payment is accepted,
>
> (b) a funding payment is accepted, and
>
> (c) the trustee or manager has failed to take all reasonable steps to secure that no funding payment is accepted.
>
> (6) In this section "funding payment", in relation to a scheme, means a payment made to the scheme to fund benefits for, or in respect of, any or all of the members."

**The requirements for an express trust**

17. The Regulator did not seek to argue that there was some form of implied, resulting or constructive trust, so both parties accepted that the requirements for an express trust needed to be met. I was referred to the description in *Snell's Equity* (33rd edition) of the essential elements of a private express trust. As set out at paragraph 22-012, the three essential elements are that the settlor must intend to impose legally enforceable duties of trusteeship on the owner of the property, that the subject matter of the trust must be certain and that the objects or persons intended to benefit from the trust must be certain. Only the first of these, the intention to create a trust, is in dispute. This requirement is described further at paragraph 22-013 as follows (omitting footnotes):

> "No particular form of expression is necessary for the creation of a trust if, on the whole, it can be gathered that a trust was intended. It is unnecessary for the settlor to use the word "trust": the court construes the substance and effect of the words used, against the background of any relevant surrounding circumstances. Indeed, the settlor need not even understand that his words or conduct have created a trust if they have this effect on their proper legal construction. Conversely, it is not enough that the settlor describes the transaction as a trust if on its proper construction the transaction was not intended to operate as a trust.
>
> The settlor's intention must be clear on two main questions: (1) that they intended the trustee to owe legally enforceable duties rather than duties of a merely social or moral nature; (2) that if they intended to create a legal relationship, it was to involve trust duties as distinct from some kind of legal relationship, such as a simple relationship of debtor and creditor."

18. Paragraph 22-014 elaborates further on the question whether a trust may exist in circumstances where there would otherwise be a contract debt. Where A pays money to B for a particular purpose then B may become a debtor, but will not without more become a trustee. The position may be different if it can be shown that it was intended that B should not have free disposal of the money and that it should be applied solely for a specified purpose, and an intention that the money should be held unmixed as a separate fund is strong evidence of this (this is the foundation of the so-called *Quistclose* trust concept).

19. I was also referred to the definition of a trust in *Underhill and Hayton, Law of Trusts and Trustees* as "an equitable obligation, binding a person … to deal with property … owned by him as a separate fund, distinct from his own private property for the benefit of persons … any of whom may enforce the obligation", and the definition in the 1985 Convention on the Law applicable to Trusts and on their Recognition. This refers to the "legal relationships created … by a person … where assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose", and as having the characteristics of constituting a separate fund which is not part of the trustee's own estate, with title to trust assets standing in the name of the trustee or another on his behalf, and with the trustee having power and duty to manage, employ and dispose of the assets in accordance with the terms of the trust.

20. *Snell's* cites *Paul v Constance* [1977] 1 WLR 527 as authority for the proposition that the settlor need not understand that his words or conduct have created a trust. The labels do not matter. In that case an express trust was held to exist where a deceased individual had regularly told his partner that money in a bank account was "as much yours as mine". His words and actions constituted a clear declaration of trust for the benefit of himself and his partner, who was therefore entitled to a half share. *Dhingra v Dhingra* [1999] CA (Civ) 20 July 1999 similarly cites *Snell's* with approval in confirming that no particular form of words is necessary, and that an intention to create a trust can be inferred.

21. It is also clear that the subjective intentions of a settlor are irrelevant. If arrangements are entered into which have the effect of creating a trust it is not necessary that the settlor appreciates that they do so: see *Twinsectra Limited v Yardley* [2002] 2 AC 164. In that case the House of Lords held unanimously that money advanced by a lender, Twinsectra, to a solicitor on the terms of an undertaking that it would be retained and used solely for the acquisition of property was sufficient to create a trust, irrespective of whether the lender had (subjectively) intended to create a trust. Lord Hoffmann made it clear at [17] that the understanding of the individual acting on behalf of the lender was irrelevant, and whether a trust was created and what its terms were must depend on the construction of the undertaking. Similarly, Lord Millett stated at [71] that the subjective intentions of the settlor were irrelevant.

**The parties' submissions**

22. Mr Steadman submitted that the establishing instruments of the Schemes had the effect that trusts were created. Neither Scheme was an entity with legal personality, and the terms described the terms of the trust on which the relevant assets were held. It did not matter that there was no express reference to a trust. This conclusion was reinforced by how the Schemes operated in practice. Those involved in the administration represented Imperial and Thames as trustees, in particular in communication with ceding schemes, and also indicated that they were "willing and able" to accept transfer payments from the ceding schemes. The Schemes had their main administration in the UK and the effect of s252 Pensions Act 2004 was that this was necessarily a representation that the Schemes were established under irrevocable trusts. In this context "able" must mean "lawfully able". Alternatively, even if the establishing instruments did not constitute the Schemes as trust schemes then the acceptance of each transfer payment itself resulted in the relevant assets being held on trust, and that was sufficient to constitute the Schemes as trust schemes.

23. Mr Pourghadiri submitted that the "no reasonable prospect" test was a high threshold, and that particular care was required here in view of the fact that striking out would prevent the Upper Tribunal carrying out its fact-finding function, and because the Regulator had not in fact grappled with the question of whether the Schemes were trust schemes. That question was one of fact. To be "established under a trust" the Regulator needed to establish that the Schemes were set up at their inception as trusts, and for the purposes of this application it needed to show that there was no reasonable prospect that it would fail to succeed on this point at a full hearing. An express trust required an intention to establish a trust, and in the absence of express words to that effect the question was whether an intention could be inferred, an intention the Regulator had conceded might not have existed by saying in its strike out application that the Sponsor "may have envisaged that the Schemes could be operated as other than trust schemes". The Sponsor had deliberately avoided the language of a trust because it did not intend to create one. The Regulator's strike out application had also sought to draw a particular inference from the fact that the Schemes included references to "Member's Accounts", but no such inference could be drawn. The rules of the Schemes did not require Members' Accounts to be segregated, and the language was indicative of a notional accounting mechanism. The Schemes were contractual rather than trust arrangements.

24. Mr Pourghadiri also submitted that the Regulator's reliance on s252 Pensions Act 2004 was flawed. The Schemes state in terms that they were set up outside the UK, and evidence would be required to establish where their main administration was located. In addition, even if s252 was engaged its effect would merely be that the managers had incurred penalties and had breached a provision of the Rules which required compliance with legislative requirements. The conduct of the managers could have no bearing on the Sponsor's intention when it established the Schemes.

25. For completeness I should mention that the Sponsor's response to the strike out application also raised a procedural objection to the Regulator's action, relating to s7(5A) Pensions Act 1995. This was rejected as misconceived in Mr Steadman's skeleton argument and was not pursued further at the hearing.

**Discussion**

26. I have concluded that the only tenable construction of the terms of the instruments establishing the Schemes is that the Schemes were "established under a trust". I have reached this conclusion by reference to the terms of the instruments under which the Schemes were set up. I have therefore not needed to reach a conclusion on Mr Steadman's alternative argument that the Schemes became trust schemes at the point that funds were transferred into them, and have not done so. For the same reason I have also not reached a conclusion about the effect of s252 Pensions Act 2004.

*The Scheme documents*

27. Clause 2.2 of the instrument establishing each Scheme states:

> "The assets of the Scheme will be held on the terms set out herein and in the Rules, in each case as amended from time to time."

Clause 2.5 also states that "The applicable law is the law of England & Wales".

28. Given that English law applies and that the Schemes were not established as separate legal entities, the only possible alternatives are that the Schemes were established as trusts or that they were contractual arrangements. However, if they were contractual arrangements then any assets would be received by the relevant entity (assumed for these purposes to be Imperial or Thames as "Administrator", but see below) beneficially, and it would owe only contractual obligations to pay amounts to Members in certain circumstances. The references in clause 2.2 to the "assets of the Scheme" being "held" on specified terms are wholly inconsistent with this. If there was a contractual arrangement then the "Scheme" would simply have no assets that could be "held" on the terms of the instrument and the Rules. Any assets transferred into the arrangements would belong to the Administrator and could not realistically be described as assets of the Scheme. The only assets that might (loosely) be regarded as Scheme assets would be the contractual rights of Members, but it would be the Members, not the Schemes, that held those assets.

29. Other terms of the instruments reinforce this conclusion. Clause 3 is entitled "Powers" and provides for a number of powers. Clause 3.1 provides generally that all "powers, rights and discretions shall be available and exercisable to enable the provisions of the Scheme to be discharged". Clause 3.5 provides that "Bank accounts may be opened and operated for the purpose of operating the Scheme and assets of the Scheme may be insured", and clause 3.7 states that "Donations, bequests or other payments may be accepted and shall be applied to and form part of the Scheme assets". If this was a contractual scheme then the Administrator would not need to be given powers in this way because it would be dealing with its own assets. In contrast, a trustee would require appropriate powers to deal with trust assets.

30. Clause 5 deals with investment and provides that "Subject to complying with any statutory restrictions as to the investment of Scheme assets there shall be power to invest, apply or transact with all or any part of the assets of the Scheme". Again, if the assets belonged to the Administrator then there would be no assets of the Scheme to invest. The Administrator would be investing its own assets and would owe only contractual obligations. It would not require power to invest its own assets.

31. Clause 6 provides that "Proper accounts shall be kept in relation to the Scheme". Although it is conceivable that this could describe a record of the contractual obligations owed, it much more naturally refers to accounts which record the assets of the Scheme, its income and outgoings. Clause 7.1 also expressly provides that expenses incurred in connection with the Scheme "shall be met out of the assets of the Scheme", again strongly indicating that the Scheme has assets out of which expenses are permitted to be met. Clause11 deals with winding up of the Scheme and provides in clause 11.4 for the "assets of the Scheme" to be realised, that costs and expenses will be deducted from the proceeds and any "remaining assets will then be applied for each Member to secure benefits for the Member…". This is not consistent with a contractual obligation, and clearly indicates that the Scheme was intended to have assets held for the benefit of Members.

32. The Rules make provision for "Member's Accounts", defined as "one or more accounts under the Scheme referable to the Member which accounts may comprise or include any contributions, payments or transferred-in amounts, and any investment profit or loss". Rule 4.1 provides for the Sponsor to determine the terms and conditions on which a Member may make contributions, and that any contributions "shall be applied to that Member's Account". Rule 5 provides that the benefits payable under the Scheme are those benefits "that are provided by application of the Member's Account", and states that the Member's Account "shall be applied in accordance with the Benefit Provision Arrangements", defined as "such one or more arrangements notified to Members as are available to Members for the application of the Member's Account". There is no indication of what those benefits might be. Rule 6 contemplates that "Investment Facilities" (a term which is not effectively defined) may but need not be selected and made available to Members, which they may then select "for the investment of their Member's Account", in which case the Member's Account "will be invested in accordance with the Member's selection", failing which it will be invested in a default investment option.

33. Mr Pourghadiri drew an analogy between a Member's Account and a bank account, which is of course a contractual arrangement, but in my view the terminology used is different and I do not read the provisions in the Rules relating to Members' Accounts as being consistent with contractual rather than trust arrangements. Although in common parlance a bank account might be referred to as "comprising" or "including" funds paid into it (as referred to in the Member's Account definition), that is not the sort of language that would be expected to appear in a formal legal document. Any such document would recognise the reality that funds paid in to a bank account transfer to the bank, and are simply reflected in the amount owed by the bank to the account holder. Funds colloquially regarded as being "in" a bank account might also conceivably be referred to as being "applied" to make payments to or on behalf of the account holder (Rule 5), but again that is not the language of a formal legal document. Furthermore, references to "investment" of a bank account would not make sense, unless perhaps the bank was making an investment on behalf of the account holder. But that would involve funds being transferred out of the account to fund an investment held by or on behalf of the account holder.

34. I have considered whether there is any realistic possibility that, contrary to my view, the establishing instruments could be found to be contractual rather than trust arrangements. I do not think that there is. Apart from the points already discussed, key questions would include who were the parties to the contract, who owed the contractual obligations to Members, and what those obligations actually were.

35. The instruments establishing the Schemes were entered into by the Sponsor and the Administrator. The documents could be read as creating contractual obligations between them (insofar as they made commitments to each other), but that does not address the position of Members. In order to succeed in arguing that the Schemes were contractual arrangements as far as Members were concerned, it would presumably have to be said that they became parties to a contract when they joined the relevant Scheme and assets were transferred. It is by no means clear how this would have occurred: the sample documentation available related to Members who had made transfers from other pension schemes, and the relevant correspondence and documentation governing the transfer was with the transferring scheme rather than with the individual.

36. It is also not clear who would owe the relevant contractual obligations to Members. The obvious candidate would be the Administrator, which is required under clause 2.3 to "discharge the duties and obligations of the Scheme". However, none of the provisions of the instrument are written in a way that might be expected to be consistent with contractual obligations owed by the Administrator. Indeed, clause 2.3 also envisages that the Administrator can be replaced. If this was a contractual arrangement then that provision would need to be interpreted as some form of pre-agreed permission to novate the contract with no chance for the Member to object to the new Administrator, for example on grounds of lack of creditworthiness. That seems unrealistic.

37. As to what any contractual obligations would be, under a contractual arrangement the language that might be expected to be employed would involve the Administrator agreeing to pay amounts to Members in specified circumstances. The amount payable could be described in various ways, including as an amount determined by reference to the return on specified types of investment, less an amount to reflect expenses incurred. However, I can see nothing of this nature. The provision of benefits appears to depend entirely on what may be notified to Members, and there is nothing I can see in the instrument or the Rules that appears to confer any particular entitlement. This may be explicable in a trust arrangement, where it is clear that the assets are held for the benefit of Members and will ultimately be applied for their (collective) benefit, but it is much harder to reconcile with any realistic contractual analysis.

*Member's Accounts – separate trusts?*

38. In its strike out application the Regulator placed specific reliance on the Member's Account concept as demonstrating a trust arrangement. This was criticised by Mr Pourghadiri on the basis that the language was indicative of a notional accounting mechanism, not of segregation. For support he relied on references to members' accounts in *Dalriada v Woodward* [2012] EWHC 21626 (Ch) at [29] and [35], *Houldsworth v Bridge Trustees* [2010] Pens LR 101 at [45] and *Barclays Bank Plc v Holmes* [2000] Pens LR 339 at [59].

39. I do not consider that these cases assist the Sponsor. In each of them there was no doubt that the pension scheme in question was set up under trust. Both *Dalriada* and *Barclays Bank v Holmes* did consider whether there was more than one trust, and most relevantly *Dalriada* considered whether the members' accounts comprised sub-trusts. However, Mr Steadman confirmed at the hearing that the Regulator was not seeking to argue that the Member's Accounts took the form of separate sub-trusts.

*Evidence of intention*

40. Mr Pourghadiri submitted that the Sponsor had deliberately avoided the language of a trust because it did not intend to create one, and that the Regulator had conceded that the Sponsor may not have had that intention. At a full hearing the Sponsor would produce evidence demonstrating that there was no intention to create a trust and showing that the way that the Schemes were operated was not consistent with a trust. In particular, it would be demonstrated that the funds were not retained by the Administrator for any length of time.

41. Mr Pourghadiri also pointed to a document showing the basis on which the Capita Oak Pension Scheme was registered with HMRC. The option chosen for "Legal structure" was "Other – Scheme established by resolution" rather than a trust. Although the registration of both Schemes with the Regulator did refer to Thames and Imperial as the trustees, that was because there was no other option available as part of the registration process. (I should point out that Mr Steadman sought to counter this by pointing out that the Westminster Pension Scheme's registration with the Regulator showed a separate named administrator in addition to Thames as trustee.)

42. It may well be that the Sponsor did not appreciate that the arrangements gave rise to trusts, either because the concept was not understood or because the Sponsor wished to avoid creating a trust for some reason and believed that that could be achieved by avoiding express reference to terms such as trust or trustee. However, it is clear that the Sponsor's private intentions are not relevant and that labels do not matter. Whether a trust is created depends on the substance and effect of the words used. In my view the substance and effect of the establishing instruments was to require assets transferred to the Scheme to be dealt with as a separate fund, distinct from the Administrator's own property, but with the Administrator having power to manage and invest it. This amounts to the necessary intention to create a trust. Evidence that individuals associated with the Sponsor, Imperial or Thames subjectively believed that they were not creating trust schemes would not be relevant. Similarly, evidence about what happened to the funds after they were received by the Administrator would not demonstrate the absence of a trust (although of course it could show that a breach of trust has occurred).

*Transfer documentation*

43. As already explained, I have reached the conclusion that the Schemes were clearly "trust schemes" on the basis of the documentation establishing them, rather than by reference to how the Schemes operated in practice. However, I have considered what I understand to be sample correspondence relating to two transfers from a ceding scheme to the Capita Oak Pension Scheme, and one transfer from a ceding scheme to the Westminster Pension Scheme. Nothing in this correspondence casts any doubt on the conclusion I have reached, and on the contrary it is consistent with it. In each case documentation sent to the ceding scheme refers to it being sent "on behalf of the Trustees" of the Scheme. The bank account details provided are in the name of the relevant Administrator. In the case of one of the transfers to the Capita Oak Pension Scheme someone on its behalf signed a set of warranties required from the ceding scheme which included a warranty that the cash transferred "will be applied to provide benefits for and in respect of the member". Although Mr Pourghadiri suggested that the individuals involved simply made mistakes in the documentation, in my view the documentation is entirely consistent with the instruments establishing the Schemes and, at the least, contains nothing that casts any doubt on the conclusion I have reached.

44. The correspondence on behalf of each Scheme also represented that the relevant Scheme was "both willing and able to accept the full transfer of this clients (sic) pension benefits". As already mentioned Mr Steadman submitted that the effect of s252 Pensions Act 2004 was that this was necessarily a representation that the Schemes were established under irrevocable trusts. Whether this is correct depends on whether the Schemes had their main administration in the UK, as required by s252(1). The Regulator's position is that the overwhelming evidence is that they did. In addition to the correspondence available, which appeared to emanate from UK addresses, and to Imperial and Thames being UK companies, Mr Steadman pointed to other entities apparently involved in the administration of the Schemes, described as "Investment Service Provider", "Investment Adviser" and "Third-party

Administrator", and teams including a "Transfer in Admin Team", as all having UK addresses. He also referred to the fact that the relevant bank accounts were in the UK.

45. I agree with Mr Pourghadiri that the question whether the Schemes had their main administration in the UK is one of fact, and cannot be determined simply by reference to (for example) the place of incorporation of the Administrator. Mr Pourghadiri indicated that at a full hearing evidence would be provided to demonstrate that the Schemes did not have their main administration in the UK. Mr Steadman submitted that, in the absence of any indication of what that evidence might be and in the absence of any allegation prior to or at the hearing as to where the main administration actually was, I should disregard this as unrealistic.

46. Whilst I do have significant doubts about the likelihood that evidence would be produced that would successfully demonstrate that the Schemes had their main administration outside the UK, I have concluded that it is not necessary to reach a conclusion on the point for the purposes of this application. I have therefore also not reached a conclusion about the effect of a breach of s252.

*The threshold for striking out*

47. As already mentioned, Mr Pourghadiri referred me to comments made by Sir Stephen Oliver QC in *Sharma v Financial Services Authority* (Case FS/2010/0008) at [37] and [38], which indicate that particular care is required in striking out a reference rather than an appeal because the Tribunal would lose its ability to consider evidence, including evidence that may not have been available at the time of the determination.

48. Whilst this is undoubtedly correct, I am not persuaded that the circumstances of this case mean that there is any material distinction between the approach I should take and the approach that any fact-finding tribunal or court should adopt in determining whether a case has a reasonable (or real) prospect of success, applying the approach explained in *Three Rivers* and having regard to the comments not only in *Sharma* but also in *Badaloo*. In *Sharma* the question was whether Mr Sharma was "fit and proper". A determination of that sort could readily involve a consideration of evidence that was not available when the determination was made, including evidence relating to subsequent events. In contrast, in this case the question is whether the Schemes were established as trusts, and I have reached the conclusion that they were based on the documentation entered into at inception. Given that the test of whether a trust is created is an objective one I do not consider that there is any reasonable prospect of evidence being produced which could demonstrate that the Schemes were not in fact trust arrangements.

49. I have considered whether there are any other factors that I should take into account that might indicate that I should exercise my discretion in favour of the Sponsor and refuse to grant the application. I have not been able to identify any. The Sponsor's sole ground for making the reference was that the Schemes are not trust schemes. No indication has been given on behalf of the Sponsor as to what the consequences would be of the Sponsor's reference succeeding. In contrast, it is clear that the proposed appointment of Dalriada is intended to offer the best chance of

recovery of Members' assets. In all the circumstances I consider that the fair, just and proportionate decision is to strike out the reference.

**Disposition**

50. For the reasons set out above I therefore grant the application and strike out the reference under rule 8(3)(c) of the Tribunal Rules, on the basis that there is no reasonable prospect of the Sponsor's case succeeding.

**JUDGE SARAH FALK**

**RELEASE DATE: 5 October 2017**