



Sargent v The Public Trustee of the Bailiwick of Guernsey
Royal Court
11th May 2018

JUDGMENT
22/2018

Seeking relief pursuant to sections 69, 70 and 71 of the Trusts (Guernsey) Law, 2007

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

BETWEEN:

(1) JOHN SARGENT
(2) MARIJA SARGENT
(3) LARA SARGENT
(4) LAURENCE SARGENT

Plaintiffs

-and-

THE PUBLIC TRUSTEE OF THE BAILIWICK OF GUERNSEY

Defendant

Dates of hearing: 5th and 6th February 2018

Judgment handed down: 11th May 2018

Before: Richard James McMahon, Esq., Deputy Bailiff

Advocate for the Plaintiffs:
Advocate for the Defendant:

Advocate C H Edwards
Advocate A R Cole

Cases & legislation referred to:

The Trusts (Guernsey) Law, 2007
The Royal Court (Reform) (Guernsey) Law, 2008
The Public Trustee (Bailiwick of Guernsey) Law, 2002
The Income Tax (Guernsey) Law, 1975

Introduction

1. In this action, the four Plaintiffs, who are all members of one family, seek relief pursuant to sections 69, 70 and 71 of the Trusts (Guernsey) Law, 2007 in respect of what they have described as “*the Plaintiffs' Vestra Pension Assets*” against the Defendant, the Public Trustee, who is now the trustee of the Interim Executive (Guernsey) Limited Occupational Pension Scheme (“the

Scheme”). Whilst I have considerable sympathy for the position in which the Plaintiffs find themselves, for the reasons that follow, I have concluded that the relief they seek cannot be granted.

Procedural history

2. The Plaintiffs' Cause was tabled on 21 October 2016. At that time, the Defendants were the trustees of the Scheme, Sherborne Corporate Services Limited and Kenilworth Consultants Inc. Those Defendants tabled their Defence on 16 December 2016. The Plaintiffs lodged a Réplique on 12 January 2017.
3. By an Order of this Court made on 29 March 2017, the two trustees of the Scheme were immediately removed and the Public Trustee was immediately appointed as trustee of the Scheme. There were four other Schemes in respect of which the same orders were made. The appointment of the Public Trustee was made subject to the conditions set out in para. 2 of that Order:
 - “a) *That her appointment shall be limited for a period of six months whereafter should an alternative Trustee not have been appointed she shall have leave to return the matter to Court;*
 - b) *That the Public Trustee's appointment shall be limited to the making of a full investigation into the Schemes and the taking of all such steps as she considers necessary.”*

The application against the original Defendants (“the Former Trustees”) was brought by twelve individuals, none of whom is a Plaintiff in this action.

4. By a Consent Order made on 26 May 2017, the Public Trustee was substituted as the Defendant to this action in place of the Former Trustees. The Order of 29 March 2017 was also modified so as to add a further condition to the Public trustee’s appointment (as sub-para. (c)), giving her liberty to participate in these proceedings already commenced by the Plaintiffs, including defending or compromising them and taking such steps as she considers appropriate.
5. The Public Trustee applied to stay these proceedings twice. On both occasions, those applications were resisted by Advocate Edwards on behalf of the Plaintiffs. Both applications were dismissed by me on the basis that I could see no reason to deny the Plaintiffs their wish to proceed with their claims. The first application, dated 14 June 2017 was dismissed on 7 July 2017 and the second application dated 19 October 2017 was dismissed on 3 November 2017.
6. In the meantime, having fixed a case management conference for 4 August 2017, which was adjourned by consent to 8 September 2017, directions in respect of the steps leading to a trial early in 2018 were then given, again by way of a Consent Order. In accordance with section 13 of the Royal Court (Reform) (Guernsey) Law, 2008, the parties elected that the trial should be heard by the Court being constituted without Jurats, which is why I heard the case sitting alone. The dismissal of the second stay application resulted in a slight delay to disclosure and inspection, but the order for the parties to file and exchange witness statement by 5 January 2018 was unaffected.
7. By an application dated 11 September 2017, the Public Trustee sought an extension of her appointment as trustee of the five Schemes. By this time, the Plaintiffs had been joined to the proceedings in which the Public Trustee's appointment had been made, being styled as Intervener Applicants. At the hearing of that application on 22 September 2017, none of the other parties

appeared, but representations were made on behalf of the Intervener Applicants by Advocate French. I made orders extending the appointment of the Public Trustee until further order of the Court, continuing the same conditions to which her appointment remains subject.

8. The Plaintiffs duly served their witness statements in accordance with the direction given. No evidence was forthcoming from the Defendant. There was a round of amendments to the pleadings in January 2018. First, the Cause was amended to reflect the substitution of the Public Trustee as the Defendant and to update certain aspects of the case. The Amended Cause is dated 17 January 2018. As a consequence, the Defendant was permitted to amend the Defence in response and did so by way of an Amended Defence dated 26 January 2018. (The Defendant had been permitted, if she so wished, to file and serve any Amended Defence by 29 September 2017 under the agreed directions made at the case management conference on 8 September 2017. In the event, she had not availed herself of that opportunity to plead her case differently from the way it had been pleaded by the Former Trustees.) The Plaintiffs did not object to the more extensive pleading that is contained in the Amended Defence than would have been the case had it confined itself to responding to the amendments made to the Cause, recognising that to have objected would have involved losing the trial dates in early February 2018. Instead, the Plaintiffs responded by way of an Amended Réplique dated 30 January 2018. The trial has proceeded on the basis of those three amended pleadings.
9. Because of the decision of the Defendant not to call any witnesses and Advocate Cole's indication that he did not wish to cross-examine any of the Plaintiffs, I was content for the evidence on behalf of the Plaintiffs to be in written form. Because the witness statements of the Second to Fourth Plaintiffs did no more than indicate their agreement with what was set out in the witness statement of the First Plaintiff, this was achieved by the First Plaintiff swearing an Affidavit on 31 January 2018, by which he exhibited his witness statement and confirmed its truth and briefly supplemented his evidence. Accordingly, the evidence in the case comprises that Affidavit, including the documents exhibited thereto, together with a number of other documents that were agreed by the parties to be included in the trial bundle. The most important of those documents is the Second Trust Instrument and Rules of the Scheme dated 11 February 2008, because the First Plaintiff had managed to exhibit and comment upon an instrument relating to one of the other four Schemes.
10. During the course of the trial, the Defendant made two attempts to adduce further documents, both of which were dismissed. The first application, dated 2 February 2018, related to an e-mail dated 13 December 2017 dealing with the state of play in some proceedings in Liechtenstein that had been commenced by the Defendant and to a document dated 24 November 2016 purportedly between the Former Trustees and Sherborne Corporate Services Limited, assigning to the latter the investment portfolio held for the Former Trustees by Vestra Wealth LLP. There was no evidence in support of this application and, although I had seen the document dated 24 November 2016 as an exhibit to previous interlocutory applications, I reject the Defendant's application primarily on the basis that these were not matters that were engaged on the pleaded cases. The second application, dated 5 February 2018, was confined to the document dated 24 November 2016. On this occasion, the application was supported by an Affidavit sworn by Luis Gonzalez on 5 February 2018. Mr Gonzalez explained that he had been appointed pursuant to section 3 of the Public Trustee (Bailiwick of Guernsey) Law, 2002 to exercise the functions of the Public Trustee in relation to the five Schemes and further clarified that this document had formed part of the disclosure exercise. I remained of the view, though, that the submissions of Advocate Edwards on behalf of the Plaintiffs were to be preferred because it had not been pleaded on behalf of the Defendant that the Plaintiffs could not succeed in the relief they sought because the assets which they had defined as "*The Plaintiffs' Vestra Pension Assets*" had been assigned to a third

party. Because the Defendant had only recently amended the Defence she had inherited from the Former Trustees and had chosen not to raise this issue, I took the view that I should put this purported assignment out of my mind when determining the Plaintiffs' claim on the parties' pleaded cases.

11. The trial proceeded, therefore, on the basis of the Advocates' written and oral submissions on the First Plaintiff's evidence and the documents. On the basis that the Plaintiff's evidence has gone unchallenged, save to the extent that there is any inconsistency with the documentation, I have accepted that evidence. In many respects, as shown by the number of admissions in the Amended Defence, the factual position is largely uncontroversial. The Defendant has resisted the Plaintiffs' action largely on the basis that the construction to be given to the Second Trust Instrument and Rules does not enable the Court to grant the relief sought.

The pleadings

12. Paragraph 19 of the Amended Cause seeks orders that:

- a. *the Defendant be ordered to instruct Vestra to transfer the Plaintiffs' Vestra Pension Assets directly to the Recipient Scheme within [7] days of the date of such Order; and if the Defendant does not do so;*
- b. *Vestra be ordered to transfer the Plaintiffs' Vestra Pension Assets directly to the Recipient Scheme within [7] days of the date of this Order;*
- c. *the Defendant be ordered to transfer all the Plaintiffs' other assets held in the Scheme including an assignment of any claims the Defendant or Former Trustees may have in respect of the Alleged Liechtenstein Loss to the Recipient Scheme within [7] days of the date of this Order”.*

The Recipient Scheme is referred to in para. 13 as “*the Voyager Retirement Plan*”. In para. 9, Vestra is the abbreviation for Vestra Wealth Management LLP. The Alleged Liechtenstein Loss is mentioned in para. 15.2.2 in the context of a letter dated 27 January 2016 sent from the Former Trustees to the Plaintiffs informing them that the vast majority of their pension fund, other than the funds held by Vestra, had been lost due to an unauthorised sale of financial instruments by Raiffeisen Privatbank Liechtenstein AG at one ten thousandth of their market value. Paragraph 15.3.1, which is denied by the Defendant, refers to the Plaintiffs' Vestra Pension Assets as follows:

“The only substantial funds the Plaintiffs have left in the Scheme are currently held in the UK by Vestra. These funds amount to approximately £1,263,000”.

13. The Defendant admits that the four Plaintiffs, John and Marija Sargent and their adult children, Lara and Laurence, were members of Animation 2000 Limited's self-administered pension scheme until the assets in that scheme were transferred into the Scheme in 2010. The Scheme itself had been established in 2006 and the Former Trustees were so appointed by means of an Instrument of Removal and Appointment dated 27 September 2010. The Defendant also admits that Animation 2000 Limited ceased to be an Adhering Employer under the Rules of the Scheme from 31 October 2015. There is an admission that Vestra Wealth Management LLP (“Vestra”), an independent London-based wealth manager, was appointed by the Former Trustees as an investment manager for the Scheme, although para. 30 of the Amended Defence also states that the Defendant is investigating that appointment. However, the Defendant denies that Vestra subsequently opened accounts 033681-C, 033681-X, 033681-Y and 033681-Z for the Plaintiffs and that part of the Plaintiffs' interests in the Scheme are held on those accounts. The Defendant

makes no admission to the Plaintiffs' assertion that they have been provided with very little information relating to the Scheme and that the Plaintiffs' interests are understood to aggregate to £1,263,000 held by Vestra and £311,000 formerly held with Raiffeisen Privatbank Liechtenstein AG. The Defendant joins issue with the Plaintiffs' contention that they have an interest in identifiable assets. Paragraph 35 of the Amended Defence asserts that:

“Individual members do not have any claim to or interest in any particular asset. All the assets of the Scheme are held by the Trustees (or their nominees) upon irrevocable trust and are invested together. No specific Scheme assets are attributable to any Individual Member Account.”

14. The Defendant admits that requests were made by the Plaintiffs on 5 January 2016 to transfer their interests in the Scheme to a new pension scheme, the Voyager Retirement Plan, administered by Trireme Pension Services (Malta) Limited. The Defendant denies that the Public Trustee has not set out for the benefit of the Plaintiffs why the office is refusing to make the transfers requested. Indeed, at para. 42 of the Amended Defence, the Defendant clarifies, for the avoidance of doubt, that the Public Trustee *“intends to exercise that discretion [to make the transfers pursuant to rule 10.1 of the Rules] in favour of making a transfer as requested by the Plaintiffs, once the Plaintiffs' Individual Members' Accounts are determined”*.
15. Paragraph 15 of the Amended Cause, which in any event is largely admitted, contains a long litany of reasons why the Plaintiffs sought the transfers of their interests because they had lost complete faith and confidence in the Former Trustees. These details were not pursued by Advocate Edwards because these reasons had been superseded by events. The Former Trustees had been removed as trustees by Court order and so this history of concerns became far less relevant to the relief being sought. The Defendant accepts that the Plaintiffs had good reason to lose trust and confidence in the Former Trustees. The Defendant has, however, expressly denied para. 15.2.11 and 15.7.8, the former alleging that there have been inadequate explanations about how what the Plaintiffs call the Alleged Liechtenstein Loss occurred and the latter relating to the Plaintiffs' allegation that the Defendant has unreasonably incurred costs by maintaining the refusal of the Former Trustees to make the transfers requested, which has resulted in the Plaintiffs also incurring substantial further costs. Paragraphs 16 and 17 of the Amended Cause develop what is pleaded in para 15 and the Defendant admits that the correspondence referred to says what it says.
16. The Plaintiffs' Amended Réplique adds very little, although para. 6.1 acknowledges that *“It is usual for trust documentation to state that there is no direct right of members to any particular assets.”* Further, *“The provisions of an occupational pension scheme would, however, normally give members a right to benefits and/or transfer values based on the contributions and/or transfer amounts paid in by or in respect of them. Members would also expect to receive the investment return attributable to those sums”* (para. 6.2).

The facts

17. Animation 2000 Limited was founded in 1973 by the First and Second Plaintiffs, who owned the company. The Third and Fourth Plaintiffs became directors of the company and the controlling shareholders of it in 2010, although the precise date in that year has not been provided. The company established a self-administered pension scheme in 1984. By 1996, all four Plaintiffs were members of that scheme.
18. The Scheme was established on 6 June 2006. The Scheme has been approved under section 150 of the Income Tax (Guernsey) Law, 1975, as amended. It was set up as a qualifying recognised

overseas pension scheme (“QROPS”). The Principal Employer is Interim Executives (Guernsey) Limited. A complete replacement of the governing provisions was undertaken by the Second Trust Instrument and Rules dated 11 February 2008. I will cover the provisions in detail in due course. Minor amendments to that instrument were made on 19 May 2008 and 22 March 2010 but they are of no consequence to the Plaintiffs' claim. At all these times, the trustee of the Scheme was Century Trustees Limited, with an address in Alderney. St Anne's Trustees Limited replaced the original trustee on 27 May 2010 and was then itself replaced by Guinness Mahon Trust Company and the two Former Trustees on 27 September 2010. Guinness Mahon Trust Company resigned on 1 December 2010, leaving the two Former Trustees, both companies registered in the Seychelles, and which were not regulated, as the trustees until their removal by Court order on 29 March 2017. The Administrator was originally Century Trustees Limited. I gather it is now Sherborne Corporate Services Limited, although any powers to act in that capacity have been suspended by this Court's order. Although there is no provision for such a person, IXG Services Limited, a company registered in Cyprus, acted as the Scheme Manager when the Former Trustees were the trustees of the Scheme. Its powers, such as they were, are also suspended by order of the Court.

19. The assets from Animation 2000 Limited's pension scheme were transferred to the Scheme in 2010, most probably in June of that year. The First Plaintiff explains (para. 15 of his witness statement) that this occurred “*in anticipation of this providing greater flexibility as to the investment of P's pension funds than were permitted for schemes administered in the UK at that time.*” I infer that what was actually transferred was a cash sum, although the value of the transfer has not been put into evidence. Vestra was appointed in or around February 2011. Accounts with Vestra were opened. The Plaintiffs believe that the Former Trustees used funds received from the pension scheme of Animation 2000 Limited in respect of the holdings with Vestra (para. 6 of the First Plaintiff's Affidavit), but have not produced any supporting documentation.
20. By agreement between the Advocates, I was told the ages of the four Plaintiffs. I had noted that the statements of account sent to each of them under cover of letters dated 16 August 2016 appeared to use a Member's Account reference that probably incorporated their initials, dates of birth and their genders. Having been told their ages, I am inclined to believe that the inference I would have drawn as to their dates of birth is now supported. The First Plaintiff is now 73 and the Second Plaintiff 71. I was further similarly told, although this had not been stated in the evidence or in the Amended Cause, that both received pensions from the Scheme on a quarterly basis from March 2014 to March 2015. Thereafter, they have not received any pension payments, which explains how the First Plaintiff ended his witness statement with the comment that granting the relief sought “*will allow my wife and I to finally receive our pensions (which have not been paid in years)*” (para. 49).
21. The First Plaintiff wrote letters to both of the Former Trustees dated 13 April 2015 on behalf of himself and his wife. He expressed concern that Imperial Xeon Group (Malta) Limited, the Scheme's “administrators” had required Vestra to raise an aggregate amount of £35,000 payable to the Former Trustees in respect of a tax bill and to improve the cash balance for general charges. He was dissatisfied with the way the matter had been dealt with in “*apparent complete disregard for our legitimate interest and involvement as beneficial owners of the Plan*” . He sought various bits of information about the Plan and indicated that Vestra would not be paying away any funds to the Trustees until that information had been received. The First Plaintiff e-mailed the letters *inter alia* to Roger Mewis, an individual who has corresponded on behalf of IXG Services Limited the following day. The General Counsel at Vestra, Edward Heaton, informed the Former Trustees by e-mail shortly thereafter that, until the dispute between the First Plaintiff and the Trustees was resolved, Vestra would not make the transfer of funds requested.

22. By the autumn of that year, the First Plaintiff was instructing Mourant Ozannes to write on his behalf to Mr Mewis. Advocate Matthew Guthrie sent an e-mail on 31 October 2015 repeating the requests for copies of documents, making a number of other points and including, at para. 2.5:

“However, as our client, his family and Animation 2000 Limited wish to terminate their relationship with the trustees and IXG, they have no objection to Animation 2000 Limited ceasing to be an adhering employer as they would welcome the provisions of Rule 23D being applied and their pension funds being transferred to another scheme approved by the Income Tax Office in Guernsey.”

Under cover of a letter dated 5 January 2016 sent by Advocate Guthrie to Sherborne Corporate Services Limited, letters signed by each of the Plaintiffs were enclosed in which each requested the Former Trustees to accept the letter as a formal request to transfer all funds held by the trustees of the Scheme on his or her behalf to the Voyager Retirement Plan. In an e-mail from Mr Mewis on 14 January 2016, he reminded Advocate Guthrie that clause 23E had been engaged by reason of Animation 2000 Limited having given notice by way of his earlier e-mail of 31 October 2015.

23. Albeit that the letter is dated 27 January 2016, the First Plaintiff says it was only received by him on 3 March 2016, and by this letter addressed to each Member, the Former Trustees provided some information about the situation that had arisen with Raiffeisen Bank. In particular, the value of the funds invested had been drastically reduced.
24. It is apparent that someone within IXG, most probably Mr Mewis, made a complaint to the UK Financial Ombudsman about Vestra. The First Plaintiff has exhibited an exchange of e-mail correspondence between an adjudicator at the Ombudsman's office and Mr Heaton, commencing on 9 March 2016. Some of Mr Heaton's comments throw some light on how he regarded the Scheme and its operation. On 9 March 2016, he wrote:

“Scheme beneficiaries are permitted under the rules of the Scheme to elect to have a proportion of those funds held by the Scheme on their behalf as members/beneficial owners managed by an investment manager of their choice, and at the request of one group of Scheme beneficiaries, the Sargent family, Vestra/Mr Carmichael-Jack were appointed by the Scheme to manage these funds. As part of the arrangements connected with Vestra's appointment in this regard, the Sargents' duly appointed financial adviser, Jim Bell of Serenus Consulting, was authorised by the Trustees to have authority over the Scheme accounts managed on behalf of the Sargents to the extent of being included in all correspondence and discussions regarding the management of these accounts (see attached form of authority). As contemplated by this, Vestra has, at all times, kept Mr Bell fully apprised, and actively liaised with him, in respect of all pertinent matters concerning the management of these accounts, and we understand that Mr Bell has kept the Sargents apprised of all such information in this regard as he deems appropriate (subject to any separately applicable obligations of his own, regulatory, contractual or otherwise).

Vestra received a request from the Trustees on 23 March 2015 to pay funds of £35,000 for the beneficiary's tax payment (c£4,500) and additional funds for IXG to hold in cash. An action group in the UK has been formed by members/beneficiaries of the Scheme and their advisers concerned as to the whereabouts/security of their funds within the Scheme. Vestra became aware of the action group and associated beneficiary concerns shortly before the 23 March 2015 request. The transfer request was not outside normal practice,

but, concerned by the discovery of the action group and their concerns, Vestra asked for further information.

The relevant account at Vestra has been valued at all times slightly in excess of £1M and the Trustees independently theoretically hold approximately £97,000 in cash within the Scheme to the order of the Sargents. Ongoing expenses [sic] in relation to the Scheme were typically settled directly by this cash already in hand, and therefore, Vestra was surprised by and suspicious of the instruction referred to above. The underlying beneficiaries also historically received an annual income of c£98,000, which the Trustees then additionally instructed the Vestra to stop. Vestra was again surprised by and suspicious of this instruction. This led Vestra to the IXG action group and to contact Jim Bell in this regard (who was similarly concerned and questioned the whereabouts and status of the funds held by the Trustees).”

In his further response on 30 March 2016, Mr Heaton wrote:

“Our understanding is that the Scheme is constituted in the same manner as any other trust-based occupational pension scheme (i.e. it is a single trust governed by a single trust instrument and the members of the scheme are the beneficiaries). Depending on the nature and constitutional documents etc of the scheme in question, the trustees may set up separate dedicated sub-accounts for each scheme member, but this is a separate matter. The fact is that Vestra in this context has a single client (the Scheme, as represented by its Trustees) and each one of the members' plans that Vestra manages is a sub-account coming under this umbrella relationship (opened on the basis of a single account agreement signed by the Trustees, under a single “person” reference for internal operational purposes). It has never been our understanding that each of these accounts is held to the order of a separate trust individually constituted for the sole purposes of holding the beneficial interest of the member in question, and this would be entirely outside our experience of managing the assets of any other trust-based occupational pension scheme.”

25. Under cover of letters to each of the Plaintiffs dated 16 August 2016, signed on behalf of IXG Services Limited as Scheme Manager, Statements of Account were sent to them showing the changes from 1 June 2015 to 31 May 2016. By way of example, the document in respect of the First Plaintiff shows a small reduction in the value of the pension fund, largely resulting from the administration, etc expenses exceeding the increase in value of what is at Vestra. There is a similar pattern given in the documents for each of the other Plaintiffs.
26. Vestra is now known as LGT Vestra LLP. It has confirmed in an e-mail dated 2 September 2016 that it will comply with any order of this Court.
27. On 27 September 2017, in the context of the proceedings that resulted in the appointment of the Public Trustee as the trustee of the Scheme, and the four other Schemes, having heard from Advocate Cole and Mr Mewis, speaking on behalf of the Former Trustees and others, including the Principal Employer and the Scheme Manager, the Court ordered that, once the trust assets have been transferred to the Public Trustee and pending resolution of the claims of the Former Trustees in respect of liabilities they say they have incurred, the Public Trustee shall retain trust assets totalling not less than £4.2 million as being the reasonable security to which the Former Trustees are entitled pursuant to section 43(1)(b) of the 2007 Law.

Provisions of Trust Instrument and Rules

28. In order to put those events into some context, it is necessary to set out in considerable detail various provisions governing the Scheme. The starting point in the Second Trust Instrument and Rules is Clause 1.1, which provides:

*“The Trustee shall hold the assets of the Scheme (**“the Fund”**) on trust in accordance with the following Clauses and the Rules scheduled hereto. The Principal Employer and the Trustee together agree that the Scheme and the Fund shall at all times be operated:*

- (a) in a manner consistent with the Approval of the Scheme under section 150, Income Tax (Guernsey) Law 1975, as amended;*
- (b) as a money purchase arrangement, and not a cash balance arrangement, and in a manner consistent with the status of a qualifying recognised overseas pension scheme ...”.*

29. Section 150 of the Income Tax (Guernsey) Law, 1975, as amended, deals with approval of pension schemes by the Director (previously known as the Administrator) of Income Tax. Subsection (2) provides that:

“The Director may approve a pension scheme if, but not unless, it is shown to the satisfaction of the Director that the following conditions are satisfied –

- (a) the scheme is bona fide established as a trust,*
- (b) the scheme is established in connection with the carrying on of business, or the exercise of functions,*
- (c) the scheme has for its sole or main purpose the provision of retirement or other benefits –*
 - (i) for person employed in connection with such business or functions, on their retiring at an age, not exceeding seventy-five years, specified in the rules of the scheme or on their becoming incapacitated at some earlier age,*
 - (ii) for the widows, children or dependents of persons who are or have been so employed, on the death of those persons,*
- (d) the person carrying on the business or exercising the functions (hereinafter referred to as **“the employer”**) is a contributor to the scheme, ...*
- (g) each person to whom the scheme relates is entitled by virtue of the provisions of the scheme to benefits defined therein and has been made aware of the terms of the scheme, ...*
- (o) each person to whom the scheme relates is entitled under the scheme, if he ceases to be a member of the scheme at a time when he has more than five years of qualifying service but has not reached normal retirement age, to choose between –*
 - (i) a refund of his contributions (if any), or*
 - (ii) deferred benefits, or*

- (iii) *the making of a transfer payment into another approved scheme, or*
- (iv) *the making of a transfer payment into a retirement annuity scheme or a retirement annuity trust scheme ...”.*

The term “*transfer payment*” is defined in subsection (2A)(c) as “*a payment equal to the value at the time when the transfer payment is made, as determined by a Fellow of the Institute of Actuaries, a Fellow of the Faculty of Actuaries or a person holding other actuarial qualifications approved by the Director, of (i) the deferred benefits which the person concerned is entitled to choose under the scheme concerned, or (ii) in cases where the person concerned is not entitled, under the scheme concerned, to choose deferred benefits, the deferred benefits which he could have chosen had he been so entitled*”.

30. Clause 6 of the trust instrument makes further provision in respect of the Fund:

“The contributions paid to the Trustee in accordance with or for the purposes of the Scheme and all investments for the time being representing the same and all income thereon and all moneys derived therefrom shall constitute a fund (“the Fund”) vested in the Trustee upon irrevocable trust to hold apply and dispose of the same in accordance with the provisions of the Scheme.”

31. Wide investment powers are conferred on the Trustee by Clause 8.A.1 and 8.A.5, the former of which provides:

“All investments and moneys for the time being constituting the Fund shall be held under the legal control of and by or in the names of the Trustee provided that such investments and moneys may be placed by the Trustee in the name of or under the control of such body corporate or individuals as nominee for them as they shall from time to time select.”

32. Clause 3.C.1 deals with expenses:

“All expenses in connection with the establishment of the Scheme have been borne by the Employers. The establishment of the Scheme occurred at the point where the Scheme receives full approval from the States of Guernsey Income Tax. The Trustee shall pay all costs, charges and expenses incurred in connection with the administration and management of the Scheme out of the Fund, unless the Principal Employer determines that these should be paid by the Employers, in which event they shall be paid by the Employers in such proportions as the Principal Employer shall determine PROVIDED THAT no costs, charges and expenses incurred in connection with the establishment administration and management of the Scheme shall be paid by the Employers in respect of a Member who is an Enhanced Protected Member.”

33. Clause 4.5 provides that “*The composition of the Trustee must be such that, at all times, the majority of the trustees must be resident in the Bailiwick of Guernsey or as determined by the Administrator of Income Tax in Guernsey.*” (No explanation has been offered as to how the decision in 2010 to appoint three trustees, two of which are companies in the Seychelles, complies with this Clause but, as Advocate Edwards correctly pointed out, there is no issue between the parties in this action that there has been any non-compliance with the this provision in the trust instrument. Now that the trustee is the Public Trustee, it is clear that this Clause is now being satisfied.) Clause 2 deals with administration and management and provides:

- “1. *The administration and management of the Scheme shall be vested in the Trustee in accordance with the powers expressed in this Trust Instrument and the Rules. Any cash sums or other assets shall be vested in the Trustee.*
2. *The Trustee, with the consent of the Principal Employer, may appoint another person or other persons to act as the Administrator by giving three months written notice to the Administrator.”*

34. In relation to admitting others into participation in the Scheme, Clause 22.A provides:

“The Principal Employer shall have power to admit to participation in the Scheme any subsidiary company or other company or body which is sufficiently associated with the Principal Employer to make its participation acceptable to the Administrator of Income Tax in Guernsey PROVIDED THAT:

1. *such subsidiary company or other company or body, shall execute a trust instrument by which it covenants with the Trustee and the Principal Employer to comply with and to observe the provisions of the Second Trust Instrument and Rules to the extent that such provisions are applicable to Employers other than the Principal Employer; and*
2. *Approval is not thereby prejudiced.”*

35. The final clause of the trust instrument is potentially one of the most relevant to the Plaintiffs' action. Clause 23 deals with reconstruction and winding up. Clause 23.E (withdrawal of an Employer) provides:

“1. *If and whenever:*

- (a) *an Employer ceases to be an associated or subsidiary company of the Principal Employer (otherwise than for the purpose of reconstruction or amalgamation); or*
- (b) *an Employer gives notice to terminate its liability; or*
- (c) *the continued participation in the Scheme of an Employer would prejudice the Approval of the Scheme by the States of Guernsey Income Tax*

the Trustee will set apart out of the Fund investments and cash of such amount as the Administrator (with such actuarial advice as the Administrator deems appropriate) advises to be that part of the Fund applicable to those Members and Postponed Pensioners then in the Service of that Employer or if the Trustee so decide to those Members and Postponed Pensioners then in the Service of that Employer together with Pensioners and Deferred Pensioners formerly in the Service of that Employer or its predecessors in business and beneficiaries whose title to benefits derives from such Members, Postponed Pensioners, Pensioners and Deferred Pensioners.

2. *The investments and cash so set apart shall at the option of the Trustee subject to the provisions of this Instrument and the Rules and subject also to payment of costs charges and expenses properly payable thereout:*

- (a) *be transferred to the Trustee and upon the trusts of any retirement benefits scheme approved or capable of approval by the States of Guernsey Income Tax under the Act as an exempt approved scheme; or*
- (b) *be applied in like manner as stated in Clause 23.D above.*

The Trustee shall have a period of two years in which to carry through such arrangements as may be determined under this Clause 23.E.

The above provisions are subject to compliance with any requirements which may be necessary to comply with the status of the Scheme as an Approved Scheme and as a Qualifying Recognised Overseas Pension Scheme.”

Clause 23.D (covering winding-up) provides:

- “1. *If the Scheme is terminated under the provisions of Clause 21.A or Clause 21.C above, the assets comprising the Fund shall be applied so far as they permit so that the Individual Member Account of each Member, Deferred Pensioner, Postponed Pensioner and Pensioner will be used to purchase non-commutable (except insofar as provided under the Scheme) non-assignable annuities under the terms of Clause 9 above regard being had to the provisions of the Scheme set out in the Second Trust Instrument and the Rules.*
- 2. *The Trustee may in substitution of the provisions of annuities as directed in the preceding paragraph apply (provided always that such application shall not offend against the law as regards perpetuities) any part of the Fund attributable to any one or more of the persons concerned by transferring the same to the Trustee of a registered scheme or a personal pension scheme as defined in the United Kingdom Finance Act 2004 and acceptable for this purpose by the States of Guernsey Income Tax or an occupational or personal pension scheme approved in Guernsey by the States of Guernsey Income Tax. Such transfer shall be subject to the terms of Rule 10 relating to transfers PROVIDED THAT any part of the said Individual Member's Account which exceeds the amount required to purchase for the individual concerned the maximum permissible benefits for States of Guernsey Income Tax purposes shall not be applied as aforesaid but subject to prior agreement of the States of Guernsey Income Tax and to the deduction of any tax due to States of Guernsey Income Tax shall instead be paid to the Employers in such proportions as the Administrator (with such actuarial advice as the Administrator deems appropriate) advises as equitable.*
- 3. *The above provisions are subject to compliance with any requirements which may be necessary to comply with the status of the Scheme as an Approved Scheme and as a Qualifying Recognised Overseas Pension Scheme.”*

36. Clause 3.A(e) states that “*where the context admits, the interpretation of the Second Trust Instrument or Rules shall be governed by the definitions in Rule 1*”. The following definitions are those that make sense of the Clauses already quoted and the Rules to follow:

“**Act**” means the Income Tax (Guernsey) Law 1975 (as amended).

“**Administrator**” means Century Trustees Limited or such other person appointed by the Trustee to meet the requirements of the States of Guernsey Income Tax under the terms of the Income Tax (Guernsey) Law 1975 (as amended).

“Approval” means the approval of the Scheme by the Administrator of Income Tax in Guernsey under section 150, Income Tax (Guernsey) Law 1975 (as amended).

“Beneficiary”

- (a) a Scheme Member, or
- (b) a Pensioner; or
- (c) a person who has been a Member.

“Employee” means a person in the service of the Employer and includes a director.

“Employer” means the Principal Employer and any other company which participates in the Scheme in accordance with the provisions of the Second Trust Instrument.

“Individual Member's Account” means from time to time the total of contributions paid into the Scheme by the Employer and the Member (if any), any additional voluntary contributions paid by the Member, transfer values paid to the Scheme in respect of the Member (from whatever source deemed acceptable by the Trustee) and investment yields and accretions earned and credited to all contributions and sums received in respect of the Member

PROVIDED THAT,

- (a) any transfers from UK registered schemes which are received shall be held in the Fund and shall be separately identifiable; and
- (b) no transfer payments shall be accepted into the Fund by the Trustee in respect of an Enhanced Protection Member which would prejudice the status of that Member as such a Member.

“Member” means each eligible person who agreed the terms and conditions with the Employer under which he is to become a Member of the Scheme and has been accepted by the Trustee or a person who is treated as a Member by reason of a transfer payment received by the Trustee under Rule 10.3.

“Member's Announcement” means in respect of each Member the explanatory letter given to such Member and any supplementary letters and/or statements of intended benefits given to such Member.

“Member's Booklet” means in respect of each Member the booklet given to such Member and any supplementary or booklet of intended benefits given to such Member.

“Normal Retirement Date” is the date determined by the Principal Employer but shall not be in any individual case outside of the age range of 60 to 75, unless otherwise allowed by law, except with the prior approval of the Administrator of Income Tax in Guernsey.

“Pensionable Service” means the period an Employee was a Member of the Scheme.

“Pensioner” (except in the expressions “Deferred Pensioner” and “Postponed Pensioner”) means a person in receipt of a pension from the Plan by reason of his past employment with an Employer or its predecessor in business.

“Qualifying Service” means the aggregate of any period during which the person concerned has been a Member of:

- (a) the Scheme; or
- (b) any other scheme in respect of which a transfer payment has been received by the Scheme.

“Relevant Date” means the date of retirement leaving Pensionable Service or death as the case may be.

“Service” means service as an Employee or director of any of the Employers, including service deemed to be service with an Employer under the Rules. A transfer of a person from one to another of the Employers shall not be construed as termination of Service.

“Transfer Credit” means benefits and rights accorded to a Member by reference to a transfer payment received from another scheme or arrangement.”

37. By Rule 2.1(c), “A Member's benefits and entitlements shall be as described in his Member's Booklet and/or his Member's Announcement, and the Annex to these Rules.” Rule 3.1 covers Employer contributions as follows:

“The Employer shall, from time to time, determine the sum or sums to be paid to the Trustee for the purposes of the Scheme. The Employer shall pay such annual or other contributions to the Trustee, in such proportions and at such time as the Principal Employer and the Trustee taking into account any requirements of the Administrator shall decide, PROVIDED THAT an Employer may at any time reduce, suspend or terminate such contributions on giving notice thereof to the Trustee PROVIDED FURTHER THAT an Employer shall make no contributions or payment of monies into the Scheme or award additional benefits in respect of an Enhanced Protected Member.”

38. Rule 4 deals with benefits on retirement. By Rule 4.1:

“On the Normal Retirement Date a Member shall be entitled to receive such pension benefits and, if applicable, cash sums, as are permitted by the States of Guernsey by applying the Individual Member's Account. The following conditions shall apply:

- (a) A Member's benefits and entitlements shall be as described in his Member's Booklet and/or his Member's Announcement.
- (b) The limits which apply to a Member's benefits and entitlements shall be as described in his Member's Booklet and/or his Member's Announcement, and the Annex to these Rules
- (c) No payment shall be made which would prejudice the status of the Scheme as a Qualifying Recognised Overseas Pension Scheme.”

Rule 4.4(a) provides:

“Upon receipt of a written request from a Member or Deferred Pensioner before payment of a pension commences or in the case of a Postponed Pensioner at any time on or after his Normal Retirement Date the Trustee at its discretion, and subject to the requirements of the States of Guernsey Income Tax, may permit the Member, Deferred Pensioner or

Postponed Pensioner to commute all or part of their individual Member's Account for a lump sum payable to such Member, Deferred Pensioner or Postponed Pensioner

PROVIDED THAT:

- *the amount of the lump sum shall not exceed the proportion of the Fund attributable to the pension commuted nor shall it be greater than that permitted under the Annex to these Rules or breach any requirement which must be met to maintain the status of the Scheme as a Qualifying Recognised Overseas Pension Scheme. This amount shall be determined by the Trustee acting on the advice of the Administrator;*
- *for the purpose of this sub-Rule, if a Postponed Pensioner dies without having made a written request for a lump sum the Trustee may direct that this sub-Rule shall be operated as though such a request had been made;*
- *after any commutation under this sub-Rule no further claim shall arise in respect of the pension or part so commuted except in respect of any contingent widow's widower's or Dependant's pension."*

39. Rule 7 provides that *"The Trustee shall, from time to time, either generally or in any particular case, decide the method and frequency of all pension and annuity payments PROVIDED THAT any such payments may not be made more than one year in advance."* Rule 9 further provides that *"All pensions and annuities in the course of payment under the provisions of the Scheme will be reviewed annually by the Principal Employer and the Trustee and increases may be awarded at the discretion of the Principal Employer first to the maximum permitted by the States of Guernsey Income Tax and secondly to allow for inflation."*

40. Rule 10.1 covers transfers out in general in the following terms:

"Where a person who has ceased to be a Member, Deferred Pensioner or Postponed Pensioner becomes a member of a retirement benefits scheme of a subsequent employer or a personal pension plan either:

- (a) *approved in Guernsey under the Act; or*
- (b) *tax approved (or registered, as defined in the Finance Act 2004, in the United Kingdom); or*
- (c) *acceptable for the purposes of this sub-Rule to the States of Guernsey Income Tax,*

*and the trustee, or manager or provider (as the case may be) of that scheme (the "**Receiving Scheme**") has power to accept a transfer payment, the Trustee may at the request of such person make a transfer payment to the trustee of the receiving scheme subject to the following conditions:*

- (1) *the amount of the payment shall be determined by the Administrator (with the Administrator seeking such actuarial advice as it deems necessary);*
- (2) *the Trustee shall ascertain from the trustee of the Receiving Scheme the section of the Act under which the Receiving Scheme is approved (if so approved) by the States of Guernsey Income Tax, or the relevant tax status of the receiving scheme in its country or jurisdiction of origin;*

- (3) *the Trustee shall give a certificate to the Trustee of the Receiving Scheme stating the amount included in the transfer payment that is referable to the Employee's contributions;*
- (4) *where the transfer is to a Receiving Scheme registered within the United Kingdom, as defined in the Finance Act 2004, there must be compliance with the requirements for registered scheme transfers in that jurisdiction.*
- (5) *any expenses which may be payable by the Trustee in consequence of the transfer may be deducted in arriving at the amount of the transfer.*

The above provisions are subject to compliance with any requirements which may be necessary to maintain the status of the Scheme as an Approved scheme and a Qualifying Recognised Overseas Pension Scheme.”

Discussion

41. The Plaintiffs advance a relatively simple case. Having discovered that they have had the misfortune to invest what they regard as their pension savings into the Scheme, they now wish to transfer what is left of those pension savings into the alternative scheme they have identified, the Voyager Retirement Plan, in order to ensure that those savings are safe, properly invested and so that the First and Second Plaintiffs can receive some pension income. They point to the fact that it had been acknowledged on behalf of the Former Trustees, and has been confirmed by the Defendant, that Animation 2000 Limited gave notice of its intention to cease to be an adhering Employer on 31 October 2015 and each of the Plaintiffs made a formal transfer request to the Former Trustees on 5 January 2016. The trustee of the Scheme had two years in which to carry out what needed to be done as a consequence of Animation 2000 Limited giving notice pursuant to Clause 23.E, and that period has now expired. In those circumstances, Advocate Edwards submits that there is no reason why the transfers requested should not be made now and there is no basis on which they should be further delayed.
42. Through Advocate Cole, the Defendant expresses a great deal of sympathy for the plight of these Plaintiffs, but argues that the relief sought by them is not capable of being granted. The primary reason is that the Plaintiffs seek the transfer of specific assets forming part of the overall trust fund of the Scheme when nothing in the terms of the Scheme entitles any of the Plaintiffs to those specific assets. Instead, the Plaintiffs are entitled to benefits or rights calculated by reference to asset values. In the circumstances in which the Defendant has been appointed as trustee of the Scheme (and the four related schemes), the Public Trustee is unable to determine what the transfer values applicable to the Plaintiffs are, in particular because of the investigations continuing and the need to find a method for allocating the costs, charges and expenses for which account needs to be made. However, the Defendant has confirmed that the Public Trustee is content to make the requested transfers out of the Scheme as soon as it is clear what sums fall to be transferred.
43. There are certain elements in Advocate Cole’s written Skeleton Argument that relate to matters about which no evidence has been adduced by the Defendant (including where the applications made during the hearing were dismissed). I have, therefore, ignored those aspects of his submissions and concentrated on those submissions that deal with the construction of the Second Trust Instrument and Rules.
44. In respect of the evidence adduced on behalf of the Plaintiffs in the form of the Affidavit of the First Plaintiff, I am conscious that there has been no challenge to that evidence, but I am a little

surprised that it is not as complete as it could have been. For example, the First Plaintiff did not expressly state that he and the Second Plaintiff are Pensioners. It follows that both of them must have reached their Normal Retirement Dates and that, at that point, they ceased to be Employees and ceased to be in Pensionable Service, although still Beneficiaries. The Member's Announcement and/or the Member's Booklet in relation to each of the four Plaintiffs are not in evidence. They may have clarified the positions of the Plaintiffs, especially in respect of the First and Second Plaintiffs, because Rule 4.1 provides that "*A Member's benefits and entitlements shall be as described in his Member's Booklet and/or his Member's Announcement.*" Further, also by virtue of Rule 4.1, "*On the Normal Retirement Date a Member shall be entitled to receive such pension benefits and, if applicable, cash sums, as are permitted by the States of Guernsey by applying the Individual Member's Account.*" In the end, nothing particularly turns on these evidential shortcomings because the outcome depends on how the Scheme documentation falls to be construed, but this different status for the First and Second Plaintiffs does matter in the context of Clause 23.E, which is a key provision as to whether or not what the Plaintiffs seek can be granted.

45. When construing the Second Trust Instrument and Rules, I take the view that it is necessary to have regard to section 150 of the 1975 Law, as amended. Subsection (2)(a) provides that the Scheme must be bona fide established as a trust. This is also apparent from the terms of the Instrument, eg, Clause 6. There was a variation made to the Scheme by an Instrument dated 22 March 2010 enabling the trustee of the Scheme to pool assets and so create a "Pooled Sub-Fund", and there could be more than one such Sub-Fund, and Members could be invited to join any Pooled Sub-Fund. However, that is not what the Plaintiffs suggest has happened, with the consequence that they are Beneficiaries of the "general" Scheme on the terms of the Second Trust Instrument and Rules. It is a further reason why I do not have to consider further the so-called "common trust contention" advanced by the Former Trustees. The section also covers what happens to persons such as the Third and Fourth Plaintiffs, who cease to be Members of the Scheme before reaching Normal Retirement Age, where the options include making a "*transfer payment*", which is defined as "*a payment equal to the value at the time when the transfer payment is made*" (emphasis added). This is consistent with regarding all the assets (and liabilities) of the Scheme being subject to a single Fund from which values can then be calculated, eg, Individual Members' Accounts.
46. It is common ground between the parties that there has been a notice given for the purposes of Clause 23.E, with the consequence that "*the Trustee will set apart out of the Fund investments and cash of such amount as the Administrator (with such actuarial advice as the Administrator deems appropriate) advises to be that part of the Fund applicable to those Members and Postponed Pensioners then in the Service of that Employer*". There is an alternative under which the trustee may decide also to include "*Pensioners and Deferred Pensioners formerly in the Service of that Employer or its predecessors in business*". It is this alternative that is relevant to the First and Second Plaintiffs. I am not aware of the Plaintiffs advancing any evidence to show that the Former Trustees actually took a decision that the First and Second Plaintiffs, as Pensioners (being the status that I consider they both must now have), would be included in these arrangements, although the overall tenor of the exchanges that Advocate Guthrie had with Mr Mewis does not draw any distinction between the position of any of the Plaintiffs, so it is possible that giving them all the same treatment could be inferred. It is also common ground that the trustee had two years in which to do everything that was required under Clause 23.E. This means that the setting apart could have been left until the very end of this period; it did not need to be undertaken any earlier. That may have been a generous period in normal circumstances, but in the situation that has arisen, it is also common ground that the deadline passed without what needed to be done being done. The Plaintiffs' have not, though, expressly modified their pleaded

case to highlight any consequences that flow from the trustee of the Scheme not having complied with the transfer requests within the time permitted.

47. It seems to me that one of the reasons that there has not been compliance with that deadline is that the first person who must do something is the Administrator. This is because Clause 23.E requires the Administrator to advise the trustee what needs to be set apart. I understand that the Administrator before the Former Trustees were removed as trustee was Sherborne Corporate Services Limited. (This doubling up of functions had operated initially when Century Trustees Limited was both a trustee and the Administrator.) Advocate Cole points out that the powers of the Administrator have been suspended by order of this Court. However, I note from the terms of para. 5 of the original Order of 29 March 2017, and its continuance by para. 6 of the order made on 22 September 2017, that the suspension of the powers of persons as *inter alia* Administrators does not apply to the Second or Third Respondent, and Sherborne Corporate Services Limited was listed as the Second Respondent. Whatever the true position in relation to the Administrator, the Defendant, as the new trustee, points out that that appointment was a limited one to make a full investigation into the Schemes and the taking of all such steps as the Public Trustee deemed necessary. Given the loss of trust and confidence that had precipitated the removal application, I do not find it surprising that there have been no steps taken to replace the Administrator to enable there to be compliance with Clause 23.E. In any event, the consequences of not having made changes to enable compliance with Clause 23.E are issues for another day rather than falling to be resolved in this action.
48. The point on which the Defendant concentrates, however, is not so much the setting apart of the investments and cash that the Administrator has advised as being the part of the Fund applicable to the Plaintiffs as Members (and Pensioners), but that the “*costs charges and expenses properly payable thereout*” referred to in Clause 23.E.2 cannot be calculated to produce a value to be applied “*in like manner as stated in Clause 23.D*”, which is the route that the Plaintiffs have requested be followed. Their request is not that annuities should be purchased, but rather that there be a transfer to a personal pension scheme. Such transfers are subject to Rule 10. This Rule refers to the recipient having “*power to accept a transfer payment*”. The term “*transfer payment*” is not defined, and so may be governed by the definition in section 150 of the 1975 Law, and one of the conditions that must be met is that “*the amount of the payment shall be determined by the Administrator (with the Administrator seeking such actuarial advice as it deems necessary)*”. Once again, the role conferred on the Administrator has not been performed.
49. The Plaintiffs have been unable to persuade me that there is any mechanism in the Second Trust Instrument and Rules, or from any other source, by which compliance with such a step conferred on the Administrator by these express provisions can be ignored. In other words, any delay against which Advocate Edwards argues arises because of the inability of performing the steps required to be taken under the terms of the Second Trust Instrument and Rules. What I think this means is that the Plaintiffs have sought relief based on the final outcome they desire when what they potentially need to do is to seek the unblocking of the impasse that has been reached through not having a functioning Administrator. If nothing else, I take the view that the Defendant now needs to focus on how to give effect to the transfer requests that have been made as quickly as feasible, possibly by exercising the powers available to the trustee of the Scheme to replace the Administrator, either with the consent of the Principal Employer or through taking steps through the Court to dispense with that requirement for consent.
50. Reverting to the key question of how to calculate the deductions that fall to be made for costs, charges and expenses, Clause 3.C.1 provides a default position of them being paid out of the Fund, although it is permissible for the Principal Employer to determine that these be satisfied by “*the Employers, in which event that shall be paid by the Employers in such proportions as the*

Principal Employer shall determine". The powers of the Principal Employer, Interim Executives (Guernsey) Limited, have been suspended by Court order. Until those powers have been restored, which is only likely to occur if the current Principal Employer is removed and replaced, it is quite clear that this option in Clause 3.C.1 cannot be complied with. There is a subsidiary issue, anyway, as to whether this could now be directed at Animation 2000 Limited as an Employer, where notice under the Scheme to cease to be an Employer has been given.

51. In any event, when the position of the Plaintiffs is put into a wider context, Advocate Cole has persuaded me that I can properly infer that there must be at least one other Member of the Scheme who would be affected by the relief sought by the Plaintiffs. This issue arose because of the absence of any evidence from the Defendant. Advocate Edwards submitted that this meant that I could not be satisfied that the Fund of the Scheme comprised more than the assets identified by the Plaintiffs as "*The Plaintiffs' Vestra Pension Assets*" and whatever remains of the other assets referred to in the Plaintiffs' statements of account. However, there were twelve applicants who sought the removal of the Former Trustees in respect of the Scheme and four other schemes and it must follow from the relief having been granted that the Court was satisfied that at least one of those applicants was a member of each one of the five schemes. It then follows that at least one of those twelve must have been (and must still be) a Member of the Scheme in respect of which the four Plaintiffs seeks relief from the Court. As a result, the arguments advanced by Advocate Cole relating to the difficulties experienced by the Defendant in ascertaining how to apply taking the costs, charges and expenses incurred into account are not academic and cannot be left unresolved before the transfers requested can be made. There are, therefore, uncertainties at present as to what assets comprise the Fund of the Scheme in which the Plaintiffs are interested and the liabilities to which it must now also be subject as a result of events since at least late 2016. There is a further complication arising from the Order of 27 September 2017 that reasonable security pursuant to section 43(1)(b) of the 2007 Law must be provided through the Public Trustee retaining trust assets across the five schemes involved of £4.2 million, which may also affect what the transfer values for these Plaintiffs can be, but that issue adds little to the principal difficulty associated with calculating the costs, charges and expenses element before the transfers requested can be made.
52. The problems that have resulted from the inability of the trustee of the Scheme to comply with what should have happened within the two-year period permitted by Clause 23.E potentially gives rise to a question as to whether there is any argument that the time associated within this deadline has stopped running. I do not need to resolve that issue in these proceedings, and expressly leave it open for future determination should it become relevant, but I appreciate that there may be an argument that it would be inequitable to criticise the Defendant for not taking steps in the months following her appointment when she was commencing the investigation for which the Public Trustee was specifically appointed. Whether the passage of time lessens the ability of the Public Trustee to rely on the impediments that have arisen and affect these Plaintiffs in the manner that they do is another facet of that issue that could only be determined following full argument.
53. For all these reasons, whilst I share the sympathy expressed by the Defendant about the situation in which the Plaintiffs find themselves, I have concluded that the very specific relief sought by the Plaintiffs, relating as it does to particular assets that are in the Fund, even if they appear to have been treated as the basis for calculating each Plaintiff's Individual Member's Account, cannot be granted. To do so would be to over-ride the express terms of the Second Trust Instrument and Rules. The Plaintiffs have failed to deal with the question of how the Fund in general shall bear the costs, charges and expenses that have been incurred in respect of the Scheme. Much will depend on how many other Members there are, what assets the Fund comprises and how to allocate the costs, charges and expenses that have resulted from being one

of five schemes affected by the orders of the Court and the steps that have been taken since the Defendant was appointed. All of these matters can potentially be resolved in time but, until they have been addressed, I do not think it is the correct course to follow to permit the “*The Plaintiffs’ Vestra Pension Assets*” in their entirety to be transferred in any of the ways sought by the Plaintiffs.

Conclusion

54. The outcome is that the Plaintiffs’ action is dismissed. I am not minded to exercise the discretion available under the 2007 Law or, to the extent necessary, the inherent jurisdiction of the Court to make an order directing that the Plaintiffs’ Vestra Pension Assets now be vested in Trireme Pension Services (Malta) Limited.
55. The parties are invited to agree the appropriate costs order that should follow. In the absence of agreement, the action can be re-listed at a suitable Interlocutory Court, or a separate appointment can be requested by liaising with the Greffe, at which time any costs application can be dealt with.