Decision on breach of duty and acting with gross negligence or wilful misconduct

[2019]GRC063

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between: **MANITA KHULLER** **Plaintiff**

-v-

FNB INTERNATIONAL TRUSTEES LIMITED **Defendant**

Judgment handed down: 2 December 2019

Before: Sir Richard Collas, Bailiff and
Jurats S M Jones, OBE, D J Robilliard and S M Crisp

The Plaintiff was unrepresented but assisted by her McKenzie friend: Niall Coburn
Advocate for the Defendant: Advocate M G A Dunster

Cases, Texts and Materials referred to in Judgment:

Spread Trustee v Hutcheson [2009-2010] 403 at para 39
Investec Trust (Guernsey) Limited and others v Glenalla Properties Ltd and Others [2015 GLR 300] at paragraph 118
Red Sea Tankers Ltd v Papachristidis (The Hellespont Ardent) [1997] 2 Lloyd's Report 547
Armitage v Nurse [1998] Ch 241
Trust (Guernsey) Law, 2007

Introduction

1. The Plaintiff, who was formerly a member of two defined benefit pension schemes, transferred the funds held for her in each scheme into a Qualified Recognised Overseas Pension Scheme ("QROPS") under the trusteeship of the Defendant. The funds were then invested in three separate investments, one of which has performed catastrophically and another was suspended for five years before returning the bulk of the original investments to investors. The Plaintiff's claim alleges that the Defendant has breached duties it owed her and in doing so acted with gross negligence or wilful misconduct and in this action she is seeking damages.

2. In this judgment we first set out evidence which was either agreed or largely uncontested. The references to (Red page ….), (Yellow page ….) and (Blue page ….) are to files in the trial bundle produced to the Court.

The Plaintiff

3. The Plaintiff who is a British national also holding an Indian passport has had a career in managerial and senior managerial positions in well-known multi nationals. She has worked mostly in the UK and held final salary pensions within the Duracell section of the Proctor &

Gamble Pension Scheme ("P&G Pension") and also the Unilever Scheme ("Unilever Pension"). In 2011 whilst working in Bangkok, she transferred the value of her P&G Pension to the Defendant's Plaiderie Pension Scheme ("the Scheme"). In November 2011 she also transferred the benefit of her Unilever Pension to the Scheme.

4. The Plaintiff is a divorcee with a son. For the sake of his secondary education, she returned to live in the UK in August 2011 and was living in the UK at the time of the transfer of her Unilever Pension. The Plaintiff holds an MBA and whilst she has had senior managerial experience, she claimed in Court to have had little or no investment experience when taking the decision to transfer her pension benefits into the Scheme.

5. The Plaintiff gave evidence and called the only expert witness, Ian Ashleigh MICA of Compliance Matters UK Ltd.

The Defendant

6. The Defendant, formerly known as RNB International (CI) Limited is a Guernsey company regulated by the Guernsey Financial Service Commission ("the GFSC") as a trust company. In 2011 it claimed to have over 40 years' experience as a licenced fiduciary service provider and was part of the FirstRand Group, a listed company on the Johannesburg Stock Exchange, one of South Africa's largest and most highly rated financial services groups and a top 100 bank globally. Andrew Bannier gave evidence called by the Plaintiff. In 2011 and still today, Mr Bannier was and is the head of pensions at the Defendant with previous experience in other regulated financial services businesses in Guernsey. Alan Steven Corlett who gave evidence on behalf of the Defendant is a director of the Defendant and the line manager of Mr Bannier. Having originally qualified as a Chartered Accountant in Guernsey, he has also had a long career in financial services. Two other employees of the Defendant were mentioned but did not give evidence. They are Geoff Gavey, the Managing Director of the Defendant at the relevant time and Matthew Tailford, Business Development Manager, based in Dubai who was the Defendant's representative in South East Asia at the relevant time.

The Investment Manager

7. In 2011, whilst working in Bangkok, the Plaintiff was introduced to Mr Gary Bradford of Finance World Limited trading as PPi Advisory ("PPi"). It was Mr Bradford who introduced her to the idea of transferring her defined benefit pension schemes into a QROPS. The Defendant had a business relationship with PPi as an introducer of business under terms of business signed by PPi at the end of 2009 and completed by the Defendant in 2010. The origin of the relationship was that Mr Gavey had worked with the Managing Director of PPi, Eric Jordan, in the Finexco Group of Companies in a role where inter alia Mr Gavey had delivered trust training to the PPi Managing Director.

8. The Plaintiff signed a "Client Agreement/Terms of Business" with PPi on 28 June 2011 at the same time as signing forms applying to join the Scheme (Blue page 300).

9. The Plaintiff sought to establish in evidence that PPi lacked the necessary regulatory approval to be delivering pension advice in Thailand. The Defendant claimed that no such approvals were required and that PPi possessed what it needed. We revert to this issue later in this judgment.

The Scheme

10. The Scheme was constituted by a trust instrument dated 14 August 2008 approved under Section 157 A (4) of The Income Tax (Guernsey) Law, 1975 (as amended). It was registered as a QROPS under the relevant provisions of the UK Finance Act from 2004 until 2012.

11. In the application form signed by the Plaintiff to join the Scheme, it is described as *"recognised by HMRC as being QROPS approved"*. Mr Bannier said that was the terminology used at the time although there was never any express approval from HMRC. He denied that it was knowingly false at the time it was written.

Transfer value reports

12. Prior to the transfer of each of the Plaintiff's defined benefit schemes, the Defendant prepared documents entitled *"QROPS Pension Transfer Report"*. Each report says that its purpose *"is to provide information, regarding the possible transfer of, on your benefits provided by the [relevant] scheme to an alternative pension arrangement.*

    This analysis does not, on its own, show whether or not transferring your benefits is advisable, as that also depends on many other factors such as your "attitude to risk", your personal circumstances and your objectives. It does however, give an indication of the likelihood of being able to match or exceed the benefits provided by your existing scheme with a transfer to an alternative plan."

13. Mr Bannier explained that the reports were produced by Mr Tailford. He said that the P&G report (Red page 172) dated 21 June 2011 was a draft and a further document was produced the following day. The report in respect of the Unilever Scheme is dated 12 October 2011.

14. The report is generated using software provided by a contracted actuary, in this case using software known as "Select a Pension". Mr Bannier said that each report is produced for a potential transferee by the Defendant then forwarded to the transferee's advisor to present to the transferee. The Defendant required that it be signed by the transferee to show that the investment advisor had shown the document to the potential transferee. He said it does not amount to advice but is a tool to assist the adviser and the transferee in the decision making.

15. The first report, in respect of the P&G Pension, was forwarded to the Plaintiff by Mr Bradford (Red page 210) under a covering letter dated 23 June 2011 in which he explained that a *"pension transfer report, also known as a Transfer Value Analysis Report (TVAR), is a legal requirement in the UK when transferring a company pension to a private pension. A TVAR alone will not give a definitive answer when considering transferring to a QROPS. Rather, it should be considered alongside other factors."* He noted that a TVAR does not take into account the change in tax status when transferring a UK pension to a QROPS. In Mr Bradford's letter, he suggested two further matters that the Plaintiff might wish to consider. The first related to income tax. The UK pension being UK sourced income is subject to income tax deducted at source. By contrast, the pension benefits payable in Guernsey are not taxed in this island although they may be liable to tax in the country of residence of the beneficiary.

16. He also advised *"Your current pension provides for a spouse's pension at 50% of the full value in the event of your death. There is no provision for other dependants to benefit. The QROPS which we recommend allows for the unused pension assets to be passed to beneficiaries named by you."* He concluded: *"There are other benefits to be gained from the transfer of your pension to a QROPS but just the two mentioned above are sufficient for me to strongly recommend this course of action."*

P&G Defined Benefits Scheme

17. The first Pension Transfer Report stated that the capitalised value of the Plaintiff's benefits in the P&G Pension was £198,091.88 guaranteed until 23 August 2011. The report estimated the benefit payable on the Plaintiff's normal retirement date of 6 April 2025 would be an annual pension of £17,880.00. A key figure in the report is the "Critical Yield" which is the

estimated annual investment return that would be required from the proposed QROPS pension plan in order to provide benefits of equal value to the estimated benefits provided by the existing scheme at retirement. In the case of the Plaintiff's P&G Pension, the Critical Yield was 8.78%. The report also gave comparative estimates for the proposed QROPS assuming annual rates of investment return of 5%, 7% and 9%. The Court was told that those figures were an industry standard in 2011. The standard was later reduced so that at a later date, Pension Transfer Reports had comparisons based on 3%, 5% and 7% annual returns. We were also told that the three bands represent what might be expected from low risk, moderate risk and high risk investments respectively.

Unilever Defined Benefit Scheme

18. The second pension transfer report related to the Plaintiff's Unilever Pension, the comparable figures in the report were as follows. The capitalised value of the benefits was £112,594.00 guaranteed until 21 December 2011. At her normal retirement date of 6 April 2025, it estimated that her pension payable would be an annual pension of £9,826.00 with a pension commencement lump sum of £19,478.00 at age 65. The Critical Yield assuming that all benefits were taken as a pension with no pension commencement lump sum being taken was 7.22%.

The Scheme application form

19. Having received Gary Bradford's letter of 23 June 2011 enclosing the P&G Pension Transfer Report, the Plaintiff completed an application form for membership of the Scheme which she signed on 28 June 2011. In it she described the 'Source and Amount of Funds' as "Procter and Gamble (Duracell Section) £200,000" and "Unilever", value "as yet unknown". In the form she agreed the appointment of an investment manager or advisor and the fees that would be payable. The initial Trustee fee was set at £750 and the Annual Fee at £1,000.

20. The form stated (Red page 51): *"An Investment Advisor/Manager accredited by RMB Investment Services must be appointed."* The Form advised that: *"Your Financial Advisor may charge additional fees for provision of both initial and on-going advice or may receive initial and on-going rebates from the investment chosen. You should discuss and confirm such fees and rebates with them directly."* The initial fee was set at Nil but the form continued *"I authorise the trustee to pay an annual advisory fee of 0.50% (usually up to 1.0%) to the Investment Advisor. This fee will be taken annually in advance on 01 January."* The figure 0.50% was inserted in manuscript. The form nominated Finance World Limited trading as PPi with contact name Gary Bradford to be the Investment Advisor/Manager.

The Plaintiff's Investment Profile

21. The final section of the application form was headed "Investment Profile Form". From a range of options, the Plaintiff selected the following. The base currency for investment was sterling. Her investment objective was *"Balanced – primary objective to achieve a balance between income and the potential for capital growth where there might typically be a combination of low, medium and some high risk investments in alternative asset classes."* The time horizon was Long Term, greater than 7 years. Her attitude to risk was *"Moderate – preference for moderate risk with some volatility. Willing to assume an average amount of market risk and volatility or risk of loss of capital in order to achieve potentially higher returns than a low risk portfolio."* In respect of dividends her requirement was for accumulating rather than distributing funds. A significant restriction on investments was inserted in manuscript: *"Non-Stock Market"*. That latter restriction was described by Mr Bannier as being abnormal and highly unusual.

Application for Royal Skandia Executive Bond for Individual Investor

22. The structure proposed for the Plaintiff's QROPS pension involved an investment bond provided by Royal Skandia described as the Royal Skandia Executive Bond, commonly known as a 'Wrapper'. Initially, Mr Bradford filled in an application form for signature by the Plaintiff but he used a form intended for an 'individual investor' ("Skandia l"). The funds to be invested were not those of the Plaintiff personally but were coming from pension funds so he should have used a form for the 'trustee investor'. The mistake was not spotted until after the incorrect form had been received by the Defendant in Guernsey.

23. The 'individual investor' form was completed by Gary Bradford (Red page 195), signed by him and dated 29 June 2011. It included the Plaintiff's choice of investments: *"LM Managed Performance, GBP £100,000; Mansion Student Accommodation, £50,000; Prestige Alternative Finance, £50,000".* We refer to the three funds as "LM", "Mansion" and "Prestige". Mr Bradford completed a part of the form in which he confirmed that he gave advice concerning the investments to the Plaintiff in Thailand on 22 June 2011.

24. At the same time as completing that form, the Plaintiff signed a form, also dated 28 June 2011, *"appointing a fund adviser to your Royal Skandia portfolio bond"*. In it she gave discretionary investment manager authority to PPi (Red page 201).

25. In the circumstances we describe later, Mr Bannier and Mr Corlett both said that even though the form had been filled in incorrectly the Defendant took comfort from it in knowing that the choice of investments had the express approval of the Plaintiff.

Application for Royal Skandia Executive Bond for the trustee investor

26. Following its rejection of the 'individual investor' form, the Defendant forwarded a 'trustee investor' form ("Skandia 2") to Mr Bradford who completed it with identical information to that contained in the individual investor form, including repeating the date of signature as 29 June 2011 (Red page 215). In it, the Defendant appointed PPi as the investment adviser (Red page 222) and the investment choice specified was the same as in the earlier form. It was signed by Mr Bradford and dated 29 June 2011, the date on which the earlier form had been signed by him. He repeated that he had given advice to the applicant in Thailand on 22 June 2011, although in respect of this form, the Defendant was the applicant, as trustee, rather than the Plaintiff. After receipt of the form in Guernsey, it was signed by Mr Corlett for and on behalf of the Defendant on 22 July 2011. In doing so, as the Applicant, he declared: *"I declare to the best of my knowledge and belief the statements made in this application, and any related documents, are true and complete and that I have not concealed any material fact."*

27. The Plaintiff places great reliance on a number of facts including that she was not notified that this form was completed, Mr Bradford's signature was backdated, the advice given in Thailand on the 22nd June was to her, not the Defendant and therefore in signing the form, the Defendant swore a false declaration.

28. On 10 November 2011 a similar form was completed by Mr Bradford in respect of the Unilever Pension. In each case this form was signed for and on behalf of the Defendant as trustee of the Scheme by Mr Corlett who said the information in it was simply copied across from the earlier form.

29. We revert to these issues later in this judgment.

The Investments

30. The Plaintiff criticised the suitability of the investments for a non-sophisticated investor such as herself, the lack of diversity in the portfolio and the regulatory status (or lack of it) of each of the investments. We consider those questions later in the judgment.

LM Managed Portfolio Fund ("LM")

31. A 'Summary Flyer' issued in September 2010 in respect of LM (Blue page 484) shows that LM was established in 2001 as a high performance income fund, investing in a range of property and property related assets in Australia. It was managed by LM Investment Management Limited ("LMIM") which held an Australian financial services licence to offer managed investments (Blue page 493).

32. A "Fact Sheet" as at 30 September 2011 is at Blue page 500. It states the Fund Size to be AUD 273,552,069. The Fund was advised by five independent property valuers including well known firms, CBRE, Knight Frank and Savilles. The Fact Sheet said that it was suitable for QROPS investors. The historical performance quoted annual growth figures for the period 2006 to 2011 ranging from 6.89% in 2011 to 8.21% in 2007 and an average since 2006 of 7.64% in Sterling. The Fact Sheet also noted that the Fund was *"an unregistered managed investment scheme in Australia".*

33. In Mr Corlett's first affidavit (the truth of which he confirmed in his evidence-in-chief) he explained that LM collapsed in about March 2013 (paragraph 101 of the affidavit at Red page 177). On 19 March 2013, LMIM went into voluntary administration citing liquidity problems in the management company and in the funds under management and on 1 August 2013 it went into liquidation (Red page 505). LM was not the only fund managed by LMIM and when LMIM collapsed, there were approximately 12,000 investors in LMIM funds and over AUD400 million invested in LM by 4,500 investors (para 101h of Mr Corlett's first affidavit). The Plaintiff was aggrieved that she was not told about the collapse of LM until she received a telephone call from Mr Bradford on 11 November 2013. It is now apparent that there will be little or no recovery from LM.

Mansion Student Accommodation Fund ("Mansion")

34. A brochure for Mansion is the ninth document at Tab Q of the Yellow file. The fund is a cell of a Protected Cell Company approved by the GFSC and listed on the Channel Island Stock Exchange (as it was then called). It invests in private halls of residence providing accommodation for students. Its aim was to produce an IRR (Internal Rate of Return) of 10-12% p.a. The advisers to the Fund included well known professional firms who would be expected to be regulated, where required, in their own jurisdictions.

35. In mid-2013, Mansion faced liquidity issues due to an unexpected number of redemption requests and so dealing was suspended and the fund went into liquidation. Mr Corlett said that payments have been made by the liquidators resulting in the investors receiving back very nearly all of their capital.

Prestige Alternative Finance Fund Limited ("Prestige")

36. The tenth document at Tab Q of the Yellow file is an Information Memorandum relating to Prestige which is established and regulated in the Cayman Islands. The professional advisers to the fund include well-recognised and reputable firms. The investment objective is to achieve long term capital growth through investments in finance lease and hire purchase contracts which are fully securitised against fixed assets.

37. Prestige is still trading and according to Mr Corlett the Plaintiff's investment has increased by 43%.

38. The Plaintiff called a compliance and risk consultant to give expert evidence in relation to quantum. Ian Andrew Ashleigh has run his own consultancy since 2004. He said that in view of the Plaintiff's restriction which stated *"No Stock Market"* there should have been a conversation with the Plaintiff to explain that stock market investments were usually part of a portfolio for any investor and that careful consideration would have to be given to other asset

classes in order to achieve the Critical Yield it required in her case. He explained that there are broadly four investment classes – equities, property, corporate bonds and gilts. Neither bonds nor gilts would give the return needed to be achieved and the other asset classes would not be sufficiently liquid or sufficiently diversified for a pension fund. He suggested that the Plaintiff could have invested in an open-ended investment company, a basket of equities and that option should have been discussed with her. In short, the funds in which she was invested were not suitable for her risk profile nor would they achieve returns matching the critical yields foregone by transferring out of her defined benefit schemes.

39. When cross-examined by Advocate Dunster, Mr Ashleigh stated that he had first been approached by the Plaintiff in 2014 to assist with a complaint against Skandia and PPi. He was trying to assist her to recover her funds. As such, Advocate Dunster challenged his independence and hence the weight the Court could place upon his evidence. Mr Ashleigh was critical of Mr Bradford's letter of 23 June 2011 pointing out the benefits of the transfer but not the risks and also that the Defendant did not review that advice.

40. In his written report (Red page 129) he had produced a model portfolio to match the Plaintiff's investment profile comprising a basket of 10 funds and achieving a net annual return of approximately 4%.

41. Under re-examination, Mr Ashleigh said that in the investment climate pertaining in 2011 it was very unlikely that the Plaintiff would have achieved a return approaching the Critical Yield based on her specification of moderate risk with no stock market investments. In his opinion, none of the three funds in which the Plaintiff's QROPS was invested matched her profile. They were too high risk, unregulated and/or non-main stream. In his opinion they were designed for experienced professional investors only. Not being regulated in the UK they were high risk suitable for professional investors or investors willing to forego regulations and there should have been annual confirmation as to whether that was the case with the Plaintiff. Mr Ashleigh said that if a complaint was being pursued in the UK, the estimated value would be twice her loss that is to say twice the amount transferred into the Pension Scheme, the QROPS.

Guernsey Association of Pension Providers

42. The Court's attention was drawn to a code of conduct issue by the Guernsey Association of Pension Providers ("GAPP"). The Defendant is a member of GAPP and Mr Bannier has held a position on the GAPP committee for a number of years although he was not a member of the Committee in 2011. The Plaintiff relied in particular on paragraphs 2.2 and 2.4 of the Code (Yellow page 254):

> *"2.2 Need for advice.*
>
> *The Trustee should use reasonable endeavours to ensure that potential members of a QROPS received professional advice before joining and that the Scheme is suitable for their needs. In particular, potential members should normally receive transfer advice from a suitably qualified pensions advisor before transferring from a UK pension arrangement."*
>
> *"2.4 Transfers from defined benefit schemes*
>
> *It is recommended that in all cases transferees from defined benefit schemes receive pension transfer advice from a suitably qualified pensions advisor which should include a transfer value analysis from an actuary or other competent advisor."*

43. The Plaintiff contended that the code was not followed in her case. Mr Bannier disagreed. The Defendant produced the two Pension Transfer Reports using software developed by an independent actuary as a tool for PPi to use as the adviser to the Plaintiff in assisting her to

decide whether to transfer her pension funds out of the two defined benefit schemes. He said it was not a document that the Defendant used. He did not see the Plaintiff's reports until 2016.

Respective Roles of the Bailiff and Jurats

44. The remainder of this judgment concerns questions of law and factual issues determined by the Jurats. The Bailiff is the sole judge of questions of law and procedure and the Jurats are the sole judges of questions of fact and must accept the Bailiff's directions on the law and follow them. The Bailiff directed the Jurats that if he appeared to express any view on the facts, they were not to adopt his views unless they agreed with him because when it comes to the facts it is their judgment alone that counts. The findings set out in the judgment are the unanimous findings of the Jurats, save where we say otherwise.

Burden and standard of proof

45. The burden of proof is on the party who alleges and the Plaintiff has the onus of proving her claim. The standard of proof is the civil standard of the balance of probabilities which means that to establish something requires proof that it is more likely so than not so. Where the balance is equal in that whether something is so or not so is equally likely, the burden of proof will not have been discharged.

Due diligence on PPi and the Appointment by the Defendant of PPi

46. One of the allegations of breach of duty alleged by the Plaintiff (paragraph 34.4 of the Cause) is that *"the Defendant undertook none of the proper checks and enquiries that any trustee should have taken in appointing PPi as a delegate, and moreover as a person to undertake the functions and the role identified by Mr Bannier in his email of the 3 April 2014"*.

47. The email is addressed to the Plaintiff, written after the problems with LM and Mansion had become known. In the email Mr Bannier stated that because it had become apparent PPi's research and/or judgment had been flawed, they were pressing PPi for a refund of commissions. He wrote: *"It is the function of the investment adviser, not the trustee, to advise on all aspects of the investment portfolio including concentration or the avoidance thereof"* (Yellow page 33).

48. The Defendant's power to appoint an investment adviser is to be found at paragraph 5.2 of the trust instrument establishing the Scheme (Blue page 195): "*The Trustees may at any time and from time to time appoint one or more persons whom they reasonably consider to be suitably qualified and competent to manage the investment of part or all of the Fund to act as Investment Manager."*

49. The Jurats determined that the relevant facts include that the principals of PPi and the Defendant were known to each other, as we said above. PPi was established in Mauritius and operated in both Thailand and Malaysia being licensed to conduct its business in the latter country. The Defendant requested and obtained PPi's Certificate of Incorporation as well as standard *'Know Your Client'* documentation on the directors. The Defendant's business development manager, Mr Tailford had visited PPi on more than one occasion. Furthermore, the individual advising the Plaintiff, Gary Bradford, had an appropriate qualification as an Associate of the Chartered Institute of Securities and Investment *'ACSI'* issued on the 21 January 2011 and evidenced later by a certificate produced to the Defendant. Mr Bradford subsequently did not renew his CISI membership but in the view of the Jurats, that was subsequent and would not have been known to the Defendant at the material time.

50. An issue on which the Plaintiff relied heavily both during the evidence and in her closing submissions was the question of whether PPi was operating illegally without the necessary regulatory licence in Thailand. The assertion of the Defendant was that no licences were

needed. There is no first hand or direct evidence before the Court, only hearsay. The Plaintiff produced much of the evidence she relied upon in her fourth affidavit (Blue page 112a). The Plaintiff relied in particular on the Thai Security Exchange Commission's response to a complaint that she made in May 2014 following which the Thai SEC placed PPi on their investor alert list on their website on 21 July 2014. On 16 September 2014, the Thai SEC wrote to her by email stating that:

> *"Any company that would like to give advice in securities under the Securities and Exchange Act B.E. 2535 in Thailand, whether Thai or foreign securities, must have an "Investment Advisory Service Licence".*
>
> *"Investment Advisory Service" as defined in Section 4 of the SEA B.E. 2535 is "giving advice in the normal course of business to the public whether directly or indirectly concerning the value of securities or the suitability of investing in those securities or the purchase or sale of any securities in consideration of fee or other remuneration"."*

51. On 6 July 2015, after investigating the Plaintiff's case, the Thai SEC issued a news release stating that they had filed a criminal complaint with the Royal Thai Police Economic Crime Division against Mr Bradford and Eric Jordan, the principal of PPi.

52. In response to the Plaintiff's fourth affidavit, the Defendant produced, during the course of the hearing, an email from Mr Jordan dated 14 November 2019 stating that no criminal charges have been brought in response to the Plaintiff's complaint, PPi is still trading and still does not consider that there is currently available any licence to cover its business in Thailand. He included an extract of minutes of a meeting held in March 2016 with the Thai SEC Director of Intermediaries Licencing arranged by a law firm with persons present including himself who represented, in total, three independent financial advisers. He said their business model was explained and questions were asked as to what licence should be applicable and no answers were forthcoming. Mr Jordan believes that even today there is no licence needed.

53. Prior to appointing PPi in 2011, the Defendant's procedure required a form to be completed entitled "New Intermediary Setup Checklist Corporate". At Blue page 245 the Court had a copy of the form in which in the list of documentation held by the Defendant, the question *"Certified copy of Licencing Certificate (or check on-line)"* has simply been crossed out, without any explanation. The form is undated and unsigned, which the Jurats felt is unsatisfactory. The Defendant's explanation was that the question was crossed out because there was no licence needed. The Defendant relied at trial upon Mr Tailford's knowledge but there is no contemporary evidence and in particular no documentary evidence to show what he knew and what enquiries he had made to establish whether a licence was needed.

54. The Jurats have carefully considered all the evidence that has been produced by both parties on this issue, taking into account that it is hearsay and that the requirement or otherwise of a licence is ultimately a question of Thai law on which the Court has received no expert evidence. The Jurats concluded that there was no certainty about the requirements for a licence. PPi remains on the investor watch list but has not been charged, and the officers of PPi concerned have not been charged, with any offence. There is apparently a distinction to be drawn between solicited and unsolicited business. The Plaintiff was introduced to PPi so her business was unsolicited. There is also apparently a distinction between dealing in investments and giving advice in relation to such securities as were involved here. PPi were not dealing in investments on behalf of the Plaintiff.

55. Aside from the question of whether PPi was acting illegally when it gave advice to her, the true question for the Jurats is whether the Plaintiff has shown on the balance of probabilities that the Defendant is in breach of the duty it owed under the Scheme trust instrument. Under

paragraph 5.2 (quoted above) the obligation on the Defendant was to appoint someone whom it reasonably considered to be suitably qualified and competent.

56. With regard to the qualifications of PPi, the Plaintiff argued strongly that the Defendant should have made enquiries of the Thai SEC to establish whether PPi required a licence. Two of the Jurats consider that the Defendant was entitled to rely upon the information and advice it received to the effect that the licencing regime in Thailand did not at that time extend to the type of investment advisory service it was offering to the Plaintiff and other similar expatriates. Jurat Crisp is in a minority and considers that the Defendant should have approached the Thai SEC for confirmation. However, the Plaintiff has not persuaded him that the Thai SEC would have said that a licence was needed and so he does not consider that the Defendant's failure to ask the question is causative of any loss to the Plaintiff. If, as seems more likely than not, the advice from the Thai SEC would have been that no licence was needed, there is no evidence to suggest that the Plaintiff would not have gone ahead.

57. In summary, the view of two Jurats is that the Defendant is not in breach of the duty it owed to the Plaintiff when PPi was appointed. All three Jurats agree that the Plaintiff has not established that PPi required a licence to be providing the advice it gave both to her and to the Defendant. Consequently, the Plaintiff has failed to show that the Defendant has breached the duty owed to her under paragraph 5.2 of the trust instrument.

The Defendant's Duties as Trustee

58. The Plaintiff alleged that the Defendant failed to discharge its duty under section 22 of the Trusts (Guernsey) Law, 2007 to *"act en bon pére de famille"* and to *"execute and administer the trust and shall exercise his functions under it (a) in accordance with the provision of his Law and (b) subject to those provisions – (i) in accordance with the terms of the trust, and (ii) only in the interests of the beneficiaries.."*.

59. The Bailiff directed the Jurats that acting *"en bon pére de famille"* implies a standard of care of how a reasonably prudent man of business would act (referring to the Court of Appeal decision in Spread Trustee v Hutcheson [2009-2010] 403 at para 39). In assessing how the Defendant should have acted it is necessary to look at the duties and powers of the trustee as defined in the trust instrument constituting the Scheme and the GAPP code of conduct.

60. To succeed with her claim for damages, the Plaintiff must show not only that the Defendant was in breach of duty but also that it cannot claim the benefit of the exonerations and indemnities in clause 11 of the trust instrument constituting the Scheme, in particular at paragraph 11.1:

> *"11.1 No Trustee shall incur any personal liability whatsoever in relation to any act or opinion whilst acting (or purporting to act) in the administration of the scheme or when exercising (or purporting to exercise) any power or discretion under this Deed and the Rules, except arising from the Trustee's wilful misconduct or gross negligence".*

61. The parties cited a number of authorities to explain the definition of gross negligence and wilful misconduct. The Bailiff directed the Jurats to adopt the definition given in relation to gross negligence in Investec Trust (Guernsey) Limited and others v Glenalla Properties Ltd and Others [2015 GLR 300], at paragraph 118, where the Court of Appeal approved the Lieutenant Bailiff's statement that *"gross negligence means a serious or flagrant degree of negligence, not equating to reckless or intentional fault or the like".* The Court of Appeal held that was consistent with the approach of Mance J. (as he then was) in Red Sea Tankers Ltd v Papachristidis (The Hellespont Ardent) [1997] 2 Lloyd's Report 547:

"If the matter is viewed according to purely English principles of construction, I would reach the same conclusion. 'Gross' negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence. But, as a matter of ordinary language and general impression, the concept of gross negligence is capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk."

62. In relation to wilfulmisconduct, the Bailiff adopted the Plaintiff's definition taken from the judgment of Millett L.J. in Armitage v Nurse [1998] Ch 241 citing Maugham J. in In Re Vickery [1931] 1 Ch. 572 that the trustee must be consciously doing the act, or omitting to do the act and *"he is committing a breach of his duty if he is recklessly careless whether it is a breach of his duty or not"*.

63. The Particulars of Breach of Duty were pleaded by the Plaintiff in paragraph 34 of her Cause, drafted by Walkers who were acting for her at the time. We consider each breach seriatim.

> *"34.1 At no point did the Defendant ever consider the extent to which it could or should have thought about cancelling the Bond and replacing it with another more appropriate investment vehicle;"*

64. Under section 23 of the Trust (Guernsey) Law, 2007, the Defendant had a duty to preserve and enhance, so far as is reasonable, the value of the trust property and under the GAPP code of conduct, there is an obligation to carry out annual reviews.

65. In evidence Mr Bannier said that annual reviews were carried out, although there is no documentation to support that. The Jurats are critical of the Defendant for the lack of any documentation and other contemporaneous material to show that reviews were conducted. The Jurats were also critical of the Defendant for failing to keep the Plaintiff informed, as was their duty, under sections 25 and 26 of the Trust Law.

66. In the absence of evidence to the contrary and accepting that Mr Bannier appeared to give his evidence truthfully, the Jurats accepted that annual reviews were conducted. There may or may not have been some reporting from the Defendant to PPi but the Jurats agree that the Plaintiff is right to be highly critical of the Defendant for not having kept her informed as she should have been. However, the annual reviews would not have shown any reason for cancelling the investments and incurring whatever charges would have been involved in doing so at any time until it was too late. Consequently, if there were any fault on the part of the Defendant, it was not causative of any loss to the Plaintiff.

67. Paragraph 34.2 pleads:

> *"34.2 Alternatively, the Defendant never gave any proper consideration to the extent to which as the Bond owner it could or should have exercised such powers as it had as owner of the Bond or otherwise to alter the investments underlying the Bond in whole or in part;"*

68. The Jurats' findings in relation to this alleged breach are the same as in respect of paragraph 34.1 above.

69. Paragraph 34.3 pleads:

> *"34.3 The Plaintiff expressly reserves the right to plead further to the allegations under 1 and 2 above consequent upon disclosure of the Bond and/or discovery as to (1) the extent to which the Bond gave the Defendant no power of cancellation, or rather no power which properly could be exercised for the Plaintiff's benefit without her incurring substantial financial penalties and /or*

some other detriment; (2) the extent of the other powers available to the Defendant as owner of the Bond; and (3) the extent to which the Defendant's commissions or other financial benefits it earned through the Bond (or its underlying investments) were a material consideration in its decision to maintain the Bond as the (or the sole substantial) sole asset of the Plaintiffs Member's Account and/or LMMPF, Mansion or Prestige as the underlying assets of the Bond;"

70. The first thing to note is that the Plaintiff has not added or amended her pleading following disclosure of the Bond and discovery. The evidence is that investments could not have been sold or cancelled without incurring substantial financial penalties.

71. The Plaintiff has asserted that the Defendant received substantial and undisclosed financial benefits from the investments. The evidence is that there is an annual fee of £1,000 payable to the Trustee and no other annual payments. The suggestion of additional payments or benefits being received was strongly denied by both Mr Bannier and Mr Corlett. The Plaintiff is unable to show otherwise despite an internal memorandum from Mr Bannier expressing concern as to whether the Defendant had placed a commercial interest above those of the beneficiaries of the scheme. Mr Corlett emphatically denied that and explained that the total income received by the Defendant from the business generated from PPi was less than £10,000.

72. Paragraph 34.4 pleads:

> *"The Defendant failed properly to appoint PPI as its fund manager when it signed the Skandia 2 Form as it knew at that time that PPI never had given it any advice in Thailand in June 2011 and that such advice as had then been given was given instead to the Plaintiff. Accordingly the Defendant undertook none of the proper checks and enquiries that any trustee should have taken in appointing PPI as a delegate, and moreover as a person to undertake the functions and role identified by Mr Bannier in his email of 3 April 2014;"*

73. As we have explained above, the Jurats are satisfied that the Defendant undertook the checks and took the steps reasonably required of it to be satisfied that PPi was qualified and competent to act as the investment manager in respect of the Plaintiff's QROPS. The reference to not having given advice in Thailand refers to the completion of the Skandia 2 Form, as it was described, where the evidence is conflicting. Mr Bannier said that advice was given on the date quoted to Mr Tailford. Mr Corlett was unaware of that and acknowledged that no advice was given to the Defendant on that date. If it is indeed the case that the date was wrong, the Defendant's failure to notice that is not gross negligence nor wilful misconduct. Furthermore, it did not cause any loss.

74. Paragraph 34.5 pleads:

> *"When selecting the Bond as an investment the Defendant failed to take proper account of the suitability of the Bond and/or its underlying investments as investments for the Plaintiff. In particular the Defendant failed to question the fact that the selected investments as appeared in the Skandia 2 Form were manifestly at odds with the Plaintiff's stated risk tolerance, and that the overall portfolio was not consistent with the Plaintiff's preferred investment objectives as set out in the investment profile form;"*

75. Having appointed a suitably qualified investment adviser, the Plaintiff was entitled at all times to rely upon the advice given. Mr Corlett said that on a casual glance there was nothing in the investments to alert the Defendant or to cause it to question the advice given by PPi to the Plaintiff and to refuse to act in accordance with the instructions.

76. Mr Bannier took a different view. He had read an article in The Economist about the Australian property market suggesting that it might be in *'bubble territory'* and as a result he had questioned whether it was an appropriate investment market for private pension funds. He did not think that LM matched the Plaintiff's risk profile and said he would have raised the concerns with PPi before the investments were made but he was overruled by Mr Corlett whose view was to accept the advice of the investment manager, PPi. Mr Bannier said in evidence that he accepted his employer's view at the time. However, he repeated those concerns to Mr Corlett in emails sent in December 2013 (Yellow pages 1 to 4). Under cross-examination, Mr Corlett confirmed that Mr Bannier had raised the concerns but the Defendant's view was that they had no adverse reports other than the Economist article which was not sufficient to cause them to go against the advice of PPi. The Jurats consider that to be a satisfactory explanation.

77. Mr Bannier explained that the normal procedures would be that where an investment adviser had been appointed, instructions could be given by the investment adviser directly to the issuer of the Bond, without the knowledge of the trustee. In this instance, unusually, the Defendant had direct knowledge of the Plaintiff's investment wishes because of the Skandia 1 Form she had incorrectly completed.

78. The investments were not as diversified as might normally be found within a pension fund, but that is in part because of the unusual restriction imposed by the Plaintiff in excluding all stock market investments. The Court has no evidence of the advice given by PPi to the Plaintiff and it may be that the implications and consequences of that exclusion were never explained to her. However, whether that is so or not, the Defendant was obliged to follow the instructions given to it – namely not to make any stock market investments.

79. Subject to that restriction, there was some diversity in the portfolio. The Defendant made clear that it was not in a position to advise on investment strategy and hence was entitled to rely upon the advice given by PPi.

80. With hindsight, the investments were not all suitable for the Plaintiff's risk profile but that was not known at the time.

81. Paragraph 34.6 pleads:

> *"The Defendant failed to undertake any adequate supervision of the performance of PPI or the investments under the Bond or properly to undertake the annual investment review referred to in the FNB Form; and"*

82. The Jurats answer to this breach has been addressed above.

83. Paragraph 34.7 pleads:

> *"The Plaintiff expressly reserves the right to plead further to the allegations under 4 and 6 above consequent upon discovery, as to the nature and extent of the relationship between the Defendant and PPI and any financial benefits resulting to either party from such relationship."*

84. There have been no further pleadings.

Conclusion

85. The Court has every sympathy for the Plaintiff for the financial loss that she has suffered. In giving evidence, Mr Corlett also expressed sympathy for the Plaintiff on behalf of the Defendant.

86. It is easy with hindsight to say that the Plaintiff was ill-advised to transfer the pension fund sitting in her two defined pension schemes to the investment in the QROPS established by her in Guernsey but that is not sufficient. In seeking to hold the Defendant liable for her losses, it is necessary to view the Defendant's actions and inactions in the light of the circumstances prevailing and the facts known to the Defendant at the material time.

87. The Plaintiff had appointed PPi to advise her in relation to her pensions. PPi then approached the Defendant on her behalf. The Defendant prepared Pension Transfer Reports in respect of each of the P&G Pension and the Unilever Pension using the software of an independent actuary and forwarded those reports to PPi to discuss with the Plaintiff.

88. The Defendant was in no position, not qualified and not licensed, to give investment advice to her. The Pension Transfer Reports showed the Critical Yield required in respect of each of her two pensions. However, investment return is not the only factor to be taken into account when establishing a QROPS. With no knowledge of the Plaintiff's personal circumstances, the Defendant had no way of knowing what factors might have influenced her. They might have included the tax consequences and might have included the flexibility to nominate a beneficiary in the event of her death.

89. The Defendant conducted due diligence in respect of PPi. There is nothing to indicate that PPi was not suitable nor qualified to act as investment adviser or investment manager to the Scheme. The information received by the Defendant was that there was no licence available to PPi in Thailand so the fact that it was unlicensed was not a bar to the appointment.

90. The Defendant accepted the Plaintiff's investment choices with a restriction that there be no stock market investments. Although it was not competent to advise in respect of investments, the Defendant noted her choice and saw nothing to suggest that they were inconsistent with her risk profile. They were marketed as being suitable for a QROPS. The Defendant was entitled to act upon the instructions from its appointed delegated investment adviser, PPi. The errors in the Skandia 2 Form in terms of the incorrect dates inserted were neither of any consequence nor causative of any loss.

91. Having made the investments, the Jurats accept that although there are no written records to show it, the Defendant conducted annual reviews. No fresh evidence would have come to light to suggest that the choice of investments was inappropriate until it was too late to do anything.

92. Whilst the Plaintiff has failed to establish any grossly negligent breach of duty or wilful misconduct on the part of the Defendant that has caused loss to her, she has shown a number of failings that merit censure. As we have said, Jurat Crisp is critical of the Defendant for failing to enquire with the Thai SEC whether PPi required a licence. All the Jurats criticise poor administration and poor communication. Examples are the failure to date and sign the *"New Intermediary Setup Checklist Corporate"* and the failure to notice the incorrect dates on the Skandia 2 Form. There was also a failure to record the annual reviews carried out and hence an absence of written evidence to show they had been carried out (although the Jurats accepted Mr Bannier and Mr Corlett's evidence they had been). In its capacity as trustee, the Defendnat failed to communicate with its beneficiary, the Plaintiff the annual reviews and any statement of account showing her portfolio.

93. Even though the Defendant was in breach of its duties to keep the Plaintiff informed and its communications with her were inadequate those failings were not causative of loss.

94. The Plaintiff has failed to show that there was any breach of duty on the part of the Defendant that was either grossly negligent or wilful misconduct and causative of the losses that she has suffered.

95. We have not discussed the quantum of the Plaintiff's loss because it was not necessary to do so. However, if it had been necessary, the evidence before the Jurats was not sufficient to suggest clearly how quantum should be calculated.

96. The Court finds for the Defendant and dismisses the Plaintiff's claim.