Appeal against the finding of facts and the conclusion of law made by the Royal Court, firstly challenging the suitability of the PPI for appointment by the Respondent in relation to the Appellant's Members Account in the Pension Scheme and secondly challenging the decision of the Respondent to invest the DB Proceeds into the Bond allocated among the Three Funds.

[2020]GCA051

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION – APPEAL NO. 535

Before: **Clare Montgomery QC, President**
George Bompas QC
Helen Mountfield QC

Between: **MANITA KHULLER** **Appellant**

-v-

FIRST INTERNATIONAL TRUSTEES LTD **Respondent**

Decision handed down: 14th September 2020

Advocate Peter Ferbrache for the Appellant

Advocate Mark Dunster for the Respondent

[JUDGMENT OF THE COURT]

BOMPAS JA:

Introduction

1. This is an appeal from the decision of the Royal Court (the Bailiff, Sir Richard Collas, with Jurats S M Jones, OBE, D J Robilliard and S M Crisp) given on 2 December 2019 (Khuller v FNB International Trustees Ltd [2019] GRC 063). By its order the Royal Court dismissed with costs the action for damages for breach of duty brought by the Appellant, Manita Khuller, against the Respondent, FNB International Trustees Ltd.

2. On this appeal the Appellant contends that the Royal Court should have given judgment in her favour. In summary, the Appellant's contention is that the Royal Court was wrong both as to its

finding of facts and as to its conclusion of law. The Respondent, in contrast, contends that the Royal Court reached the right conclusions for the right reasons and that in any case the present appeal fails to approach to what is necessary for the Royal Court's findings of fact to be disturbed on an appeal to the Court of Appeal.

3. The Appellant's case centres on what happened once she had caused a transfer of her benefits from two UK defined benefit pension schemes ("the P&G Scheme" and "the Unilever Scheme", together "the DB Schemes") to a scheme of the Respondent's which provided benefits by reference to the return on investments made for the pension beneficiary. The amount paid over from the DB Schemes to the Respondent in respect of the Appellant was over £300,000 ("the DB Proceeds"). This was paid in two tranches, first from the P&G Scheme and later from the Unilever Scheme. The Respondent's scheme is known as "the Plaiderie Pension Scheme" ("the Pension Scheme"), the Respondent being its promoter and trustee.

4. The DB Proceeds were the contributions to the Pension Scheme, of which the Appellant became a member on 5 July 2011. Their amount was applied by the Respondent as the premiums for an insurance policy on the life of the Appellant ("the Bond") effected by the Respondent with Royal Skandia Life Assurance Ltd ("Skandia"): the Bond was a wrapper for investment into three funds ("the Three Funds") described below. The Bond was allocated to the Appellant's "Member's Account" within the Pension Scheme. As indicated above, the returns from the Bond were to be in due course the pension benefits paid to or in respect of the Appellant under the Pension Scheme.

5. Of the Three Funds, one collapsed in early 2013 and became worthless. This was the LM Performance Fund, an Australian unregulated scheme ("the LM Fund"). Over half of the DB Proceeds were allocated to the LM Fund, being applied in the purchase of 36-month fixed investment Sterling LM Global Portfolio Bonds in the LM Fund. The second of the Three Funds, the Mansion Group Student Accommodation GBP Feeder fund ("the Mansion Fund"), became gated in October 2013 and then went into liquidation within a couple of years of the investment having been made on behalf of the Appellant. Only the third, the Prestige Fund Management - Alternative Finance Fund ("the Prestige Fund"), into which one fourth of the DB Proceeds had been applied, continued to perform and show growth.

6. So it was that by early 2014 the Respondent, in an internal document, noted the value of the Bond at the end of 2013 to have been £178,120.46. By 31 December 2017 the value of the Appellant's Member's Account was £163,550.64, according to the Appellant's expert witness, basing himself on a valuation provided by the Respondent as at that date [appeal pdf bundle page 1646].

7. The Appellant complained, first, that the investment into the Three Funds was altogether unsuitable, in particular having regard to her investment instructions and stated appetite for risk, so that the Respondent should not have made that investment for her, and once made should thereafter have reviewed and changed the way the Bond assets were invested; and, second, that what was relied upon by the Respondent as authorising or requiring the Respondent to apply the DB Proceeds in investments into the Three Funds, or otherwise to justify the Respondent in making the investments, came from someone (namely PPI, referred to below) who was, as the Respondent knew or should have known, without appropriate qualification. In this regard the Respondent made a decision, as discussed below and encapsulated in a resolution of the Respondent passed on 30 August 2011, to appoint PPI to carry out for the Respondent investment functions in relation the Appellant's Member's Account in the Pension Scheme.

8. In making her decision to join the Pension Scheme the Appellant had been advised by an investment adviser, a Mr Gary Bradford, working for an entity called "Finance World Ltd" which also traded as "PPI Advisory" ("PPI"). PPI was appointed by the Appellant to be her adviser on terms of a written agreement, and in giving her advice will have owed the Appellant duties. But whether in the event the Appellant was misadvised by PPI or PPI was in breach of any duty owed to her in advising her in relation to her decision is not the subject of the present proceedings. But it will be appreciated that PPI came to have two roles in 2011, one as the Appellant's adviser and the other as the Respondent's appointee in relation to the Appellant's Member's Account.

9. At the material time, in June 2011, PPI already had an established contractual relationship with the Respondent regulated by an agreement of January 2010 [p.985]. By the agreement the Respondent was an introducer of business to the Respondent in return for commission. It appears to have been in the course of this relationship, but advising the Appellant, that PPI arranged for the Appellant's alteration of her pension provision with the change from the DB Schemes to the Pension Scheme. To facilitate this, the Respondent provided to PPI materials (notably the transfer value reports referred to below) to be given to the Appellant. But this existing contractual relationship did not extend to PPI advising or instructing the Respondent as to investments to be made by the Respondent for pension beneficiaries.

10. Perhaps understandably, in particular with the Appellant conducting the trial herself as a litigant in person, the Appellant's criticisms of the Respondent before the Royal Court were not always focussed on the case set out in the Cause and came to include an attack on the advice she was given by PPI when joining the Scheme. But that is not the case which the Royal Court had to deal with. Specifically, while the Appellant's decision to transfer her pension arrangements away from the defined benefits schemes may have turned out badly for her, and may very well have been unwise, the claim against the Appellant is not that it should have prevented the decision, but that it was responsible for what happened to the investment of the funds once the Appellant had joined the Pension Scheme and the DB Proceeds had been paid to the Respondent. From this it is apparent that damages cannot be claimed on the basis of what her position would have been had she never transferred out of the DB Schemes.

11. The Appellant's claim for damages against the Respondent is therefore centred on suggested breaches of duty owed to her by the Respondent <u>as trustee</u> of the Pension Scheme as to the manner of investment of the DB Proceeds and her Member's Account, and also as to the appointment of and reliance on PPI in relation to the Respondent's investment decision. This is plain from paragraph 33 of her Cause (described later in this judgment), a professionally drawn pleading, which describes all the duties said to have been owed to the Appellant by the Respondent and to have been breached by the Respondent as duties owed as trustee of the Pension Scheme. It follows, also, that the claims turn on steps taken, or not taken, by the Respondent from 5 July 2011 when the Appellant became a member of the Pension Scheme.

12. The amount of damages claimed by the Appellant in her Cause was stated as the amount of the DB Proceeds, inflated for growth at a rate which she says had been projected for her when agreeing to have her pension benefits transferred from the DB Scheme to the Pension Scheme. But that measure of damages could not be appropriate, as it is not the case that the Respondent had warranted that the Appellant would have a return of the sort claimed when she became a member of the Pension Scheme.

13. Rather, the measure would be by reference to the return that could reasonably have been achieved had the DB Proceeds been invested in accordance with her stated investment aims. This was a point developed by the Respondent's advocate at the trial, Advocate Mark Dunster, who on this

appeal has represented the Respondent: at the end of his cross-examination of Mr Ian Ashleigh, an expert witness called by the Appellant, Advocate Dunster put to Mr Ashleigh, and Mr Ashleigh agreed, that over the seven years after 2011 the annual return net of fees could reasonably have been in the order of a simple 4% per annum [p.2309].

14. In explaining the position as it is before us, we have not overlooked the amendment to her Cause made by the Appellant on the first day of the trial. She was given leave to add new paragraph 10(a), claiming that she relied on certain transfer value reports made by the Respondent, one of 21 June 2011 and the other of 12 October 211, and that she understood these reports to constitute pension transfer advice before joining the scheme. Ultimately nothing came to turn on these reports, as the trial progressed. They cannot affect either the case on appeal or any damages issues if the appeal were to succeed.

<u>The trial before the Royal Court & its judgment</u>

15. We have mentioned that at the trial the Appellant represented herself as a litigant in person, albeit with the assistance of a Mackenzie friend. Evidence at the trial was given by the Appellant, by a Mr Ian Ashleigh called as an expert witness by the Appellant, by Mr Andrew Bannier called by the Appellant under a witness summons, and Mr Alan Corlett called by the Respondent. As explained in the Royal Court's judgment, Mr Bannier was and is head of pensions with the Respondent, while Mr Corlett was and is Mr Bannier's line manager and a director of the Respondent. Other individuals who featured in the evidence were Mr Geoff Gavey and Mr Matthew Tailford, both employees of the Respondent and working in South East Asia, and Mr Gary Bradford of PPI.

16. The Royal Court did not in the event grapple with any of the damages issues mentioned above, as the Royal Court rejected in its entirety the Appellant's claim that the Respondent had been in any actionable breach of duty to her.

17. Specifically, although the Royal Court was critical of the Respondent's conduct in a number of respects, the Respondent was not found to have been in breach of any relevant duty to the Appellant as contended for by the Appellant in her Cause.

18. The Royal Court's judgement proceeded by describing the parties and protagonists, and the key documents and events, before setting out the critical findings under the headings "*Due diligence on PPI and the Appointment by the Defendant of PPI*" and "*the Defendant's Duties as Trustee*". In the part of the judgment under the latter heading the Royal Court considered in turn each of the Appellant's six pleaded grounds of breach of duty.

19. The Appellant had pleaded in paragraph 33 of her Cause a series of duties said to have been owed by the Respondent as trustee. The first pleaded duty was the general duty under section 22 of the Trust (Guernsey) Law, 2007 ("the Trust Law"). As to this duty the Royal Court explained, at paragraphs [58] and [59] of its judgment:

> *"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] GLR 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."*

20. The Royal Court then drew attention to the exoneration provision relied upon by the Respondent. This is described below.

21. The GAPP code of conduct referred to by the Royal Court [p.1775] is a code issued in 2011 by the Guernsey Association of Pension Providers, of which the Respondent is a member. It describes itself as a "*guide for Members on best practice in the establishment and operation of Qualifying Recognised Overseas Pension Schemes based in Guernsey*", setting out best practice as at March 2011. The reference to Qualifying Recognised Overseas Pension Schemes (or "QROPS") is to pension schemes (including retirement schemes) with an appropriate tax status accorded by HM Revenue & Customs. Under the heading "*Investment*", section 6.1 ("*Need for Investment Advice*") of the document explains:

> "*Subject to the Scheme's documentation, for example where under the Scheme's deed the member is his own investment manager, Trustees should always take professional advice on investment matters from a suitably qualified investment adviser unless they have the necessary investment skills and experience themselves. The choice of assets capable of being held within a QROPS is wide ranging but, as with any pension portfolio, the suitability of the allowable investments should be carefully considered and, as with all trust arrangements, referenced against the Scheme's documentation*".

22. Specific duties alleged in the Cause included a duty to select investments with proper consideration, taking such advice as necessary and having regard to any requirements and wishes expressed by the Scheme members as to the investment of their Member's Account or their expressed risk tolerance; a duty to give information and review investment performance; a duty to appoint investment professionals such a PPI in good faith and in accordance with their responsibilities; and a duty to monitor the performance of PPI as an investment adviser.

23. The breaches of duty alleged by the Appellant were considered seriatim by the Royal Court in its judgment. In each case the Royal Court found that there had been no breach of duty. The relevant breaches of duty alleged on the part of the Respondent were:

    23.1 failing to consider whether it could or should cancel and replace the Bond with another and more appropriate investment vehicle;
    23.2 failing to consider whether it could or should seek to alter the underlying investments selected within the Bond wrapper;
    23.3 failing properly to appoint PPI as its fund manager when it signed the Skandia 2 forms mentioned below, having failed to undertake the proper checks and enquiries for appointing a delegate to take on the functions described in an email of 3 April 2014 [p.1538] (the relevant parts of which are quoted later in this judgment);
    23.4 failing to take account of the suitability of the Bond and/or its underlying investments as investments for the Appellant; and
    23.5 failing to undertake adequate supervision of the performance of PPI or the investments under the Bond or to undertake the annual review referred to in the Application Form.

24. Issue 23 of the parties' Lists of Issues for the trial was "*Whether, as a matter of fact, the Defendant appointed Mr Bradford and/or PPI as its investment adviser, as set out in the Skandia 2 Forms*". As appears from what we say later, the expressions "investment adviser", "investment manager", "fund adviser" and "fund manager" are used in many of the documents before the Court. Broadly speaking the distinction between an adviser and a manager could be assumed to be that the former advises, the latter manages. But the expressions seem capable of being used more or less interchangeably and without precision of meaning, and do not necessarily explain in any particular case the precise functions of the adviser or manager. This is plain, for example, in the Skandia 2 Adviser Appointment document described later, where the expression "fund adviser" is used generically as embracing both someone with "investment adviser authority" and someone with "discretionary investment manager authority", both of which terms are more clearly defined in that document.

25. A difficulty for the Royal Court with the presentation of the case before it at the trial is that central to the Respondent's defence was the proposition that PPI had been appointed by the Respondent to a position which allowed the Respondent to rely on PPI in relation to the investment of the Appellant's Member's Account into the Bond by reference to the Three Funds, so that any errors in the investment choice were to stop at PPI's door. However, there was no clarity as to the case being made by the Respondent as to the way in which that appointment was made or its terms, or what was entailed in it so as to have removed from the Respondent responsibility for investing the DB Proceeds as a reasonably prudent business individual. By way of illustration, the Respondent's pleaded case was that the investment choice was made by PPI (paragraph 17 of the Respondent's Defences), that "*The Defendant's ability to delegate to investment professionals and appoint investment advisers is averred*" (paragraph 27 of the Defences), and that "*At the time of PPI's appointment at (sic) investment advisor, PPI had terms of business with mainstream offshore insurance companies including Skandia*" (paragraph 36.7 of the Defences).

26. Simply stated, the Respondent did not invite the Royal Court to make, and it did not make, any clear finding in relation to the Respondent's appointing of PPI, whether as to the time or manner in which any appointment was achieved or as to the content of any duties or responsibilities taken on by PPI by reason of the appointment. Indeed, in the same paragraph of its judgment, paragraph [75] discussed below, the Royal Court in the one sentence referred to the Respondent's reliance on PPI's advice, and in the other to acting in accordance with PPI's instructions.

27. For reasons which will become clear later in this judgment, the evidence as to the Respondent's appointment of PPI and what was entailed thereby is of central importance. The Respondent's approach to the making of the investment of the DB Proceeds into the Bond, with the allocation among the Three Funds, depended upon the nature and terms of that appointment. We consider that it was for the Respondent to plead and establish its case that by the appointment of PPI it had put itself into a position where the decisions as to, and sole responsibility for, the allocation among the Three Funds were delegated to PPI. In principle, as trustee of the Pension Scheme of which the Respondent was a member, the Respondent owed duties to the Appellant, as described in paragraph 19 above, when the DB Proceeds were being invested by the Respondent. The Respondent, relying on an appointment of a third party to remove or qualify those duties, took on the burden of showing that the appointment was duly made and that it had the necessary effect.

This Appeal

28. On this appeal there are two related challenges made by the Appellant. In brief summary these are as follows:

28.1 The first challenge concerns the suitability of PPI for appointment by the Respondent in relation to the Appellant's Member's Account in the Pension Scheme: the contention is that the Respondent owed a duty to look with reasonable care into the qualification and suitability of PPI for the role to which the Respondent was appointing it, but failed to make proper investigation.

28.2 The second concerns the decision of the Respondent to invest the DB Proceeds into the Bond allocated among the Three Funds: the contention is that the Respondent owed a duty to look with reasonable care into the suitability for the Appellant of investment into the Three Funds, but failed to do so and instead mistakenly did what it was told by PPI.

29. For the Appellant to succeed on this appeal, she needs to satisfy this Court that the Royal Court's findings were not open to it on the evidence before it. The appeal is based quite simply on a contention that the Jurats, who were alone to decide the facts guided by the Bailiff as to the applicable law, had arrived at a conclusion – namely that there was no relevant breach of duty on the part of the Respondent – which could not be supported on the basis of the primary facts. The fact that the conclusion involves an assessment to be drawn from primary facts, does not change the case. We have to be satisfied that there was a material mistake as to the primary facts so that the conclusion cannot be supported, or that the conclusion is outside the range open to the Royal Court.

30. It is to be noted that the Respondent relied, at the trial, on a contention that in its relations with the Appellant it had the benefit of provisions excluding liability other than for wilful misconduct or gross negligence. The Respondent on this appeal submits that the threshold on appeal, for the Appellant to satisfy this Court that the Royal Court's judgment cannot stand, is that there must have been what the Respondent describes as "*unarguable gross negligence*": this test is said to require this Court to be satisfied "*that the acts in question were so obviously grossly negligent that the Jurats can only have acted perversely in finding otherwise*".

31. We prefer to put the point another way. The established principle on an appeal such as the present is that "*We may only interfere if we conclude that the Jurats could not reasonably have come to the decision which they did on the basis of the evidence before them*" (See Simon v Committee for Heath and Social Care, States of Guernsey (unreported, 8 June 2020) Court of Appeal case no.534, at [124] in the judgment of the Court given by Birt JA. This statement of principle was given after careful consideration of earlier decisions of this Court on the point, starting with Guille v Mackay 14 June 1967 and including Islands Development Committee v Laine 15 December 2003 (appeal 53/2003) and Cyma Petroleum (CI) Ltd v States of Guernsey 4 February 2015 (appeal 05/2015). In the light of this a finding, say, that the Respondent was not negligent, or was not grossly negligent, will not be disturbed by this Court even where there is ample evidence sufficient to base a finding of negligence (or gross negligence, if relevant), if the Jurats could reasonably have reached the finding actually made. But if it is apparent that the finding in relation to negligence (or gross negligence) rests on a mistaken appreciation of the facts, that is that the finding depends on a basis of primary fact as to which there is no sufficient evidence, then it is open to this Court to set aside the finding.

32. The Royal Court's judgment in the present case explained, at paragraphs [61] and [62], what negligence could be considered to qualify as gross negligence or as wilful misconduct and thus outside the scope of the exoneration provision relied on by the Respondent. This explanation, which has not been criticised on this appeal, is as follows:

"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 wilful misconduct, 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".

33. In the light of the explanation given by the Royal Court, we would summarise gross negligence as a serious or flagrant degree of negligence, more fundamental than failure to exercise proper skill and/or care constituting negligence, and 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.

34. On this appeal the immediate question is not whether this Court would have decided that the Respondent was negligent in any relevant respect: the Royal Court had found that the Respondent had not been, and in particular had not been negligent in relation to (a) the appointment of PPI and (b) the making of the investments into the Bond (the issues raised on this appeal). But if the Royal Court's decision on either of those issues was not one to which the Jurats could reasonably have come on the basis of the evidence before them, and if this Court were to conclude that the Respondent had been negligent, it would then be for this Court to decide whether or not the negligence was gross or otherwise outside the cover of an exoneration provision available for the Respondent. This is because the Royal Court's observation at the end of its judgment that the Appellant had failed to show that there was any breach of duty on the part of the Respondent that was either grossly negligent or wilful misconduct and causative of loss was not an independent decision that involved an evaluation of the character of any relevant negligence on the part of the Respondent; that is negligence in either of the two relevant respects. Quite simply, the Royal Court had decided that there was no negligence and so naturally there was no gross negligence.

Disposition

35. For the reasons set out below, we conclude that the appeal is to be allowed and the judgment of the Royal Court set aside.

36. In what follows we first describe the principal documents and events. We then consider in turn the two elements of the appeal.

Relevant facts

37. During the first half of 2011 the Appellant was working in Thailand. Later in the year she returned to the UK. At the time she was a divorcee with a son in secondary education. According to the brochure and application form signed by her on 28 June 2011 (the Application Form described below), her wealth was estimated at £500,000. She was a member of two UK defined benefits pension schemes, the DB Schemes. The estimated value of her benefits under one of these, the PG Scheme, was given as £200,000; as to the other, a Unilever scheme, the value of the benefits was stated as not to be known. On any measure her benefits under the DB Schemes represented a major portion of her wealth.

38. By mid June 2011 the Appellant had been in contact with an investment adviser, a Mr Gary Bradford, working in Thailand for an entity called "Finance World Ltd" which also traded as "PPI Advisory" ("PPI"). In particular, this contact was in connection with a proposed transfer of the Plaintiff's pension benefits from the PG Scheme to a defined contribution scheme designed for individuals who were not UK residents and wished to transfer their pension arrangements offshore. This could be into a QROPS.

39. By June 2011, PPI was as mentioned above an introducer of business to the Respondent under signed terms [p.985]. Email exchanges from November 2009 convey that the Respondent was pleased to have a financial adviser who could advise clients to subscribe to a QROPS of the Respondent's [eg. p.930]. By early January 2010 the signed terms of business had been entered into.

40. On about 22 June 2011 the Respondent had prepared and provided to the Appellant through PPI (who sent the document under cover of a letter of the following day [p.258]) a document headed "*QROPS PENSION TRANSFER REPORT*" [p.1047]. (There was an earlier version, dated a day or two before, but nothing turns on this.)

41. This QROPS transfer report had the Appellant's name as the client name, with PPI as the adviser name. The report started by saying that "*The purpose of this analysis is to provide information, regarding the possible transfer of, on (sic) your benefits provided by [the PG Scheme] to an alternative pension arrangement*". The detail of this document is not material for present purposes. One feature of the document which is plain is that, for the alternative pension arrangement to match in several years time the benefits equal in value to what would have been the value of benefits under the DB Schemes protected by the Pension Protection Fund, the annual investment return of the alternative arrangement would need to be in the region of 6.26%. However, as the document pointed out, there were other considerations which could reasonably have led the Appellant to decide on the transfer of her pension arrangements from the DB Schemes into an alternative arrangement. These were noted by the Royal Court in its judgment to explain why the Appellant might have had at least some sensible reason for switching from the DB Schemes to a QROPS such as the Pension Scheme.

42. There then came into being various documents which featured at the trial. These span the period from June 2011 to November 2011 and concerned the Appellant's joining of the Pension Scheme and the transfer of the DB Proceeds in two tranches, first from the P&G Scheme in the summer of 2011 and then from the Unilever Scheme in the autumn of 2011 and their investment into the Bond (and thus into the Three Funds).

43. We describe later and in detail certain documents generated in the second half of June 2011, in addition to the Application Form described in the next paragraph. These documents include the Skandia 1 documents discussed later. These June 2011 documents, including the Skandia 1 documents are, for reasons which will appear, critical to the Respondent's case before the Royal Court and on this appeal.

44. We start by identifying the key documents, so far as concern the Appellant and the Respondent, establishing and regulating the framework for the relationship between them, including as to the DB Proceeds, the Bond and the investment into the Three Funds.

44.1 First, there was the deed ("**the Declaration of Trust**") dated 14 August 2008 constituting the Pension Scheme [p.882]. The Declaration of Trust set down the structure for the Respondent as trustee to hold for the Appellant as a scheme member with a Member's Account, and to invest and deal with, assets to provide the pension benefits to which she would become entitled under rules set out in the schedule to the deed. The Declaration of Trust is the foundation of the Respondent's duties said to have been breached in the present case. As mentioned earlier, the Appellant was admitted as a member of Pension Scheme on 5 July 2011.

44.2 Second, there was the "*Plaiderie Pension Scheme Brochure and Application Form*" ("**the Application Form**"), a document signed by the Appellant and dated 28 June 2011 [p.239]. The form stated, on its first page, that it included "*QROPS brochure", "Application Form",* and *"Investment Profile*". Within the Scheme Application Form both the application form (starting at page 2 of the document) and the investor profile form (at page 9 of the document) contained manuscript text concerning the Appellant, both as to her application to the Pension Scheme and as to her circumstances. The application, as explained below, was for the Appellant to join as a member of the Pension Scheme "*in accordance with the information as set out below*". The information included, beneath the heading "*Investment Advisor/Manager* *Delete as appropriate*" the entry "*Finance World Ltd T/A PPI*" for firm name, and the entry "*Gary Bradford*" for contact name. There was no deletion made in the heading, leaving it obscure whether PPI was an investment adviser, manager or both. Further the Application Form does not say whether the text was informing the Respondent of an existing relationship between the Appellant and PPI, or was asking or instructing the Respondent to make PPI its (the Respondent's) adviser or manager for its investment of the DB Proceeds once received.

44.3 Third, there was an insurance bond ("**the Bond**") effected between the Respondent and Royal Skandia Life Assurance Ltd [p.1373 to 1425]. This Bond was described as "*the Executive Insurance Bond*". It was a life insurance contract, on the Appellant's life, designed to serve as a wrapper for underlying investments to provide the retirement and death benefits for the Appellant in accordance with the rules of the Pension Scheme set out in the schedule to the Declaration of Trust. The underlying investments belonged to Skandia, but the benefits to be received by the beneficiary of the Bond were to be measured by the value of the underlying investments [Part C of the Bond conditions, p.1387]. The Bond conditions provided for the Respondent to be able to appoint a "*Fund Adviser*" to give the Respondent advice, or to act as discretionary manager for the Respondent, while giving investment instructions to Skandia.

44.4 Fourth, there was the relationship between the Respondent and PPI explained above. The signed terms of business, however, contained no provision for PPI to be an adviser to the

Respondent concerning the choice of investments to be made for any of the members of the Pension Scheme, or for that matter to manage for the Respondent the Member's Account of any member.

44.5 Fifth, there was an adviser appointment document ("**the Skandia 2 Adviser Appointment**") made between the Respondent and Skandia, signed on behalf of the Respondent and dated 22 July 2011 [p.323 & 1113]. The introduction explained that "*You can use this form to appoint a fund adviser for the portfolio bond detailed below*". By the document the Respondent agreed with Skandia that Skandia could have dealings with PPI in relation to the investment composition of the Bond: PPI was appointed fund adviser (that is the Respondent's, not the Appellant's adviser) for the Bond to "*act on my/our behalf for the purpose of making investment decisions in respect of my/our bond".* This appointment document allowed for two alternative (but mutually exclusive) roles for PPI to perform for the Respondent in relation to Skandia and the Bond, as being "*the basis on which this authority is given*". These we describe later. Fundamentally the difference was not in the way communications could be made on the Respondent's behalf, but in the internal relationship between the Respondent and PPI. The Skandia 2 Adviser Appointment required the relevant role to be selected; but the document was left incomplete, no selection being indicated on the document.

44.6 Sixth, there was an application/addition form ("**the Skandia 2 Bond Investment Form**") made between the Respondent and Skandia, signed on behalf of the Respondent and dated 22 July 2011 [p.307 & 1117]. The Skandia 2 Bond Investment Form was an application by the Respondent (not by the Appellant) concerning the subscription of the Bond with some £200,000, and the direction by the Respondent (not by the Appellant or PPI) of the investment of the subscribed funds into the Three Funds in particular proportions (£100,000 to the LM Fund, £50,000 to the Mansion Fund and £50,000 to the Prestige Fund). Over the signatures of two individuals on behalf of the Respondent, one of whom appears to be Mr Corlett, there was a declaration that the Respondent had completed the application itself (and hence had requested the choice of Bond investments set out in the document). The Skandia 2 Bond Investment Form contained, at the end, a declaration signed by Mr Bradford for PPI claiming to have given advice to the Respondent (not the Appellant) about the investment in Thailand on 22 June 2011; but this declaration is, for reasons explained below, implausible. The Royal Court made no finding on the point one way or the other. It is likely that Mr Bradford was referring to advice given to the Appellant on 22 June 2011 as referred to in the Skandia 1 Bond Investment Form made in the second half of June 2011 (see below). This declaration features prominently in the Appellant's criticism of the Respondent's conduct relationship with PPI.

The Skandia 2 Bond Investment Form together with the Skandia 2 Adviser Appointment are referred to below as "the Skandia 2 documents". This is because an earlier and similar pair of documents, discussed below and referred to as the Skandia 1 documents (the Skandia 1 Bond Investment Form and the Skandia 1 Adviser Appointment), had been completed by mistake: these were then replaced by the Skandia 2 documents because the earlier documents were inappropriate (as the Respondent recognised in early July 2011) for an investment into the Bond by the Respondent: they were designed for a case where an individual was making a direct investment into a Skandia insurance bond, and not one where the subscriber of the Skandia bond was to be a trustee for someone else.

44.7 Seventh, there was a further application/addition form ("**the Skandia 3 Bond Investment Form**") [p.1135] made between the Respondent and Skandia, this form bearing signatures of two individuals on behalf of the Respondent over a date of 17 November 2011 [p.1135]. Above the signatures of two individuals on behalf of the Respondent, one of whom again appears to be Mr Corlett, there was a declaration that the Respondent had completed the application itself (and hence had requested the choice of Bond investments set out in the document). This time the amount subscribed by the Respondent was £105,000, split £55,000 to the LM Fund, £25,000 to the Mansion Fund and £25,000 to the Prestige Fund. The Skandia 3 Bond Investment Form contained a declaration signed by Mr Bradford in the same terms as the declaration with the Skandia 2 Bond Investment Form, the only difference being that it gave 10 November 2011 as the date when Mr Bradford signed it. It was concerned with the DB Proceeds attributable to the Unilever Scheme.

45. We have noted the date when the Appellant became a member of the Pension Scheme, namely 5 July 2011. Other immediately relevant dates following that are as follows:

45.1 On 5 July 2011 an "*FRT … APPLICATION TO ACCEPT NEW BUSINESS - TRUST*" form was generated [p.1043] This was an internal document of the Respondent's designed to note that various administrative matters were in order for such an application as the Appellant's. It contained information about the introducer of the business (identified as Gary Bradford of PPI).

45.2 On 6 July 2011 the Respondent by Mr Bannier emailed Mr Bradford [p.1110], acknowledging receipt of the hard copies of the documents emailed on 29 June 2011, attaching drafts of the Skandia 2 documents, and explaining as follows: "… *Given that the [Skandia Bond] will be in our name as trustee of [the Appellant's] QROPS, we will in fact need to use a different version of the application form. Accordingly, please find attached a partly completed trustee investor application form. … There are still a number of points which we will need to amend or complete on this form but it can serve as a basis for you to Complete the information in Section L on page 15 and sign. Please also complete the relevant sections of the attached Appointment of Fund Adviser form and sign on page 3…*". Section L was the final page of the Skandia 2 Bond Investment Form: in the Skandia 1 Bond Investment Form the relevant section was Section K.)

45.3 On 7 July 2011 PPI returned "as requested" copies of the Skandia 2 documents by email, with originals to follow [p.1133].

45.4 Between 5 and 7 July 2011 the Respondent's personnel processed the Appellant's joining of the Pension Scheme with completion of a check form headed "*FRT/… APPLICATION TO ACCEPTANCE NEW BUSINESS - TRUST*". The form, in the box concerning the acquisition of the new business, indicated that the introducer was not already known to the Respondent but that "*Matt [Tailford] has met Gary [Bradford] and others at PPI*" [p.1043].

45.5 According to the Respondent's chronology [p.179], on 22 August 2011 the Respondent received £208,412.67 from the P&G Scheme (the first tranche of the DB Proceeds), and on 31 August 2011 £207,132.67 of this was invested by the Respondent in the Bond. This investment followed the Resolution referred to in the next sub-paragraph.

45.6 On 30 August 2011 the Respondent passed a resolution ("**the Resolution**") for PPI to be appointed as "*Investment Manager to the Member's Account in The Plaiderie Pension Scheme and that an agreement be sought to give effect thereto*" [p.1260]. There is no evidence of any such agreement having been entered into, nor even of it having been sought. At the same time, by the Resolution, the Respondent resolved on an investment of £207,132.67 into the Bond "*for [the Appellant's] account in accordance with Clause 4 of The Plaiderie Pension Scheme*". (The relevant part of Clause 4 of the Declaration of Trust is set out later in this judgment.)

45.7 On 2 September 2011 Skandia sent to the Respondent the policy documents for the Bond, acknowledging a premium of £207,132.67 [p.549].

45.8 On about 12 October 2011 the Respondent generated a further QROPS pension transfer report, this time in relation to a proposed transfer of the Appellant's pension from the Unilever Scheme. Subject to that the report was much the same as the previous one. This October 2011 report carries the signature of the Appellant over the date 26 October 2011 [p.1070]. Clearly this document was produced to the Appellant before the second application of the DB Proceeds and the signing of the Skandia 3 Bond Investment Form referred to above. Meanwhile, on 20 October 2011 the Appellant had written a letter to the Respondent, in connection with the proposed transfer from the Unilever Scheme, in which she explained that although now in London she intended to retire outside the UK [p.1134]: this letter was required by the Respondent, according to Mr Corlett's evidence [p.864], because some of the benefits of transferring to a QROPS are nullified for an investor remaining in the UK.

45.9 On 1 December 2011 £112,594 was received by the Respondent from the Unilever Scheme as the second tranche of the DB Proceeds; and on 6 December 2011 £111,564 was passed on to Skandia as an addition to the funds invested in the Bond. There is no resolution recording any decision of the Respondent concerning the making of the investment of the second tranche of the DB Proceeds into the Bond on the terms of the Skandia 3 Bond Investment Application, and no evidence that when the Respondent signed that application and made the investment there had been any further consideration given to the way in which this second tranche of the DB Proceeds was to be invested: so far as the evidence goes, the choice was simply made by Mr Bradford when he filled out the Skandia 3 form (see paragraph 63 of Mr Corlett's first affidavit, [p.864]). Mr Bannier's evidence at [p.2358-9] is that there was no further review for this investment.

45.10 The investments into the LM Fund for Respondent pursuant to the Bond were made on 9 September 2011 and 12 October 2011; into the Mansion Fund on 14 December 2011 and 3 January 2012; and into the Prestige Fund on 19 November 2011 and 3 February 2012.

45.11 By the beginning of 2012, when the transfer from the DB Funds was completed and the Bond fully invested, the investments within the Bond comprised, out of the £305,000 subscribed, £155,000 invested in the LM Fund, £75,000 in the Mansion Fund and £75,000 in the Prestige Fund. The concentration of risk is obvious. Not only was the whole £305,000 invested in just three funds with characteristics we describe later, but just over half was invested in a single fund. Mr Ashleigh's evidence was that a diversified portfolio would usually have had a basket of 10 funds across a range of asset classes.

46. The Resolution appears to be an important document. By passing the Resolution the Respondent made its decisions, recorded in the Resolution, both to make an appointment of PPI to a position

in relation to the Appellant's Member's Account, and also to invest the first tranche of the DB Proceeds into the Bond allocated among the Three Funds. These two related decisions lie at the very heart of the present case, as it is these decisions, together with the decision concerning the investment of the second tranche of the DB Proceeds, which are criticised by the Appellant as the operative breach of duty on the part of the Respondent.

47. A feature of the Resolution is that it contains the following text, immediately before setting out the two related decisions just referred to: "*IT IS NOTED that ... the investment objective expressed by [the Appellant] is to achieve a balance between income and the potential for capital growth in Sterling terms through exposure to moderate risk*". There was no reference to any preference or restriction concerning stock market investment. Nonetheless, the information concerning the Appellant's investment objective must have come from what had been set out in, and provided to the Respondent with, the Scheme Application Form.

48. Another feature of the Resolution relates to the finding made at paragraph [75] of the Royal Court's judgment, a paragraph to which we have already made reference and which we return to later in this judgment. The paragraph is directed at the Appellant's claim that the Respondent was in breach of duty in relation to the investment in the Bond in failing to take account of the suitability of the Bond and its underlying investments as investments for the Appellant. Contained in the paragraph are two different propositions concerning the role of PPI in relation to the Respondent. The first is that "*Having appointed a suitably qualified investment adviser, the [Respondent] was entitled to rely upon the advice given*". (The text of the first sentence uses the word "Plaintiff", that being an obvious error (as Advocate Dunster submitted) in the place of the word "Defendant". The second is that (emphasis added) "*there was nothing in the investments ... to cause [the Respondent] to question the advice given by PPI to the [Appellant] and to refuse to act in accordance with the instructions*". (We return to this finding later.)

49. A difficulty with this paragraph is that the decision to invest as recorded in the Resolution contained no indication of the Respondent having acted other than on the basis of a request from PPI. The Resolution did not record that there was any reliance on advice given by PPI to the Appellant or to the Respondent. And the Resolution did not record any attention having been given by the Appellant to the question whether, in the light of what the Appellant knew about the Appellant's investment objective (balanced income and growth in Sterling terms and moderate risk) as stated in the Resolution, after all the investment was appropriate having regard to concerns which had been raised by Mr Bannier (explained below).

50. Further, the Respondent resolved by the Resolution to appoint PPI as "Investment Manager" in relation to scheme assets allocated to the Appellant's Member's Account and to seek agreement to give effect to the appointment; but the appointment did not specify the functions to be performed by PPI or the powers delegated to PPI. In other words, the Resolution, considered by itself, does not determine that PPI was now to be the decision maker as regards the Appellant's investments, rather than say an investment professional chosen to advise the Respondent. We refer below to the terms of the Declaration of Trust, which make it clear that there was a range of powers which might be conferred on an investment manager. The Resolution did not expressly select any of these to entrust to PPI. We have drawn attention also to the absence of any agreement between the Respondent and PPI to establish PPI's agreement to the appointment and its terms.

51. It is to be noted that the Resolution was passed over a month after the exchanges of emails in July 2011, discussed later, which Mr Bannier had had about the LM Fund. In his oral argument Advocate Dunster submitted that the appointment of PPI by the Respondent had in fact been made long before the passing of the Resolution and at the time of and by reason of the

Respondent's signing of the Skandia 2 documents. Certainly, these two documents together were to be used by the Respondent for applying to Skandia for the Bond, requesting the Bond investment to be allocated to particular investments in specified proportions, and to report to Skandia the fact of PPI's appointment to the position of the Respondent's "fund adviser" for communication with Skandia concerning the Bond investment. But, as we have mentioned, the Skandia 2 Adviser Appointment was incomplete and silent as to the relevant role to which PPI was to be appointed as between PPI and the Respondent, and it was only after the date of the Resolution that the Respondent made the investment into the Bond. We therefore are unable to accept that, if the Resolution was insufficient as a delegation by the Respondent to PPI for the purposes of the investment decision made in relation to the Respondent's investment into the Bond, there is anything more to be gained from the Respondent's making of the Skandia 2 documents.

52. It is convenient at this point to describe further the Declaration of Trust and the Scheme Application Form, as these are critical documents.

53. The Declaration of Trust explained in recitals that it was to be a pension scheme with the Respondent as trustee and with assets comprising contributions made to the scheme and property representing the same.

53.1 There were usual definitions, including "Member" as someone admitted to the scheme and with benefits payable or prospectively payable.

53.2 There was also, in clause 3, provision for "Members' Accounts", these being separate notional accounts maintained for each member and with a value being the aggregate as determined by the trustee of the member's contributions and like matters.

53.3 Clause 4 gave the trustee powers of investment, in particular power to invest as if beneficial owner of the invested property, and if the Respondent so chose to invest without diversification. "*Without prejudice to the generality of* " the general exoneration provision in clause 11 of the Declaration of Trust, clause 4.6 provided a specific exoneration other than for fraud, wilful misconduct or gross negligence. It has not been argued that this provision adds anything not already available from clause 11.

53.4 Clause 5 gave the trustee power to appoint an investment manager (again with a specific exoneration clause expressed to be without prejudice to the generality of clause 11). Sub-clauses 5.2 and 5.3 are set out below. It would appear from these provisions that an appointment of an investment manager under sub-clause 5.2 would not, without more, define the functions of or powers delegated to the appointee: on the appointment these would be determined under sub-clause 5.3.

> *"5.2 The Trustees my at any time and from time to time appointment 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 (the 'Investment Manager').*
>
> *5.3 The Trustees may empower any such Investment Manager either unconditionally or subject to such terms conditions and provisions as the Trustees think fit to exercise all or any of the powers or discretions of the Trustees in regard to the selecting making changing and realising of investments or arising from or in connection with the holding of investments."*

53.5 Clause 11, headed "Trustees' Exonerations and Indemnities", excluded by sub-clause 11.1 liability other than for fraud, wilful default or gross negligence. There were other similar exonerations as well. Sub-clause 11.1 reads:

> *"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".*

53.6 A schedule to the Declaration of Trust contained rules for the scheme, detailing such matters as qualification for admission to membership, circumstances in which benefits might be paid, and so forth.

54. The Application Form was described in the Royal Court's judgment at paragraph [19]. We have already drawn attention to certain features. The following further comments are appropriate:

54.1 The first page of the document described in brief the nature of the scheme. Relevantly it indicated that there was very little restriction on the choice of investments under the scheme and that members had flexibility in choosing their most suitable investment option for their individual requirement. This reference to investment options must be to the options referred to below, as the Application Form required the selection of one of four investment options. The first page also contains a warning that the Respondent was not authorised to provide advice as to the suitability of the scheme for each member.

54.2 Within the application form part of the document the member was offered a choice of "*four main options … to suit all pension sizes and investment requirements*". The third option, the one chosen on the completed form, was the "*Insurance Bond Option*", which was said to "*allow any of the mainstream insurance bonds to be used*".

54.3 The application form part also contained personal details of the Appellant, including that her estimated wealth was valued at £500,000, and that approximately £200,000 was the value of her benefits under the PG Scheme. We have described already the part of the form which referred to "*Investment Advisor/Manager**". This included PPI's name as the firm name with Mr Bradford's name as the contact name. At the end of the application form part was a page headed "*Agreement*" which confirmed, among other matters, that the Appellant had received details of the Pension Scheme. There was an indication that the Appellant could obtain a copy of the Declaration of Trust, if she had not already been given it. And there was an acknowledgment that she had taken independent and appropriate legal and tax advice as to the consequences of the transaction. This page was signed by the Appellant with a date of 28 June 2011.

54.4 The following page within the document was the investment profile form, again signed by the Appellant but also by Mr Bradford. This required, by ticked boxes, Sterling base currency of investments, balanced investment objective, long term (plus 7 years) time horizon, and moderate attitude to risk. It contained also the entry "*non-stock market*" under the heading "*Investment preferences/restrictions …*".

55. We have referred to the fact that the Resolution, while describing correctly several of the Appellant's investment requirements set out in the Application Form, made no reference to the

"*non-stock market*" entry under the heading "*Investment preferences/restrictions*". It is not clear on its face quite what the entry in the Application Form was supposed to mean, not only because the expression "*non-stock market*" is opaque, but also because, given the rubric, the entry is ambiguous and might be expressing either a preference for non-stock market or a restriction prohibiting non-stock market.

56. The Bond itself contains, at condition 8 [p.1019], an indication of what might be encompassed by an investment on a stock market; in other words what a requirement for investment into a stock market investment, or a prohibition against a stock market investment, might be understood to cover. In the Bond condition Skandia explains, among other matters, that "*Your Portfolio Fund may include stocks and shares quoted on a principal stock market which is recognised by us …: (a) Government and debt instruments, (b) corporate debt instruments, (c) equity/preference shares in a company …*".

57. To be consistent with the Appellant's stated aim, the natural way of understanding the words in the Application Form would be a prohibition against non-stock market investments. But if the words were a prohibition against stock market investments, taken with the remainder of the Appellant's stated investment aim and risk appetite, appropriate investments might be unit trusts or open-ended investment companies and the like which were not stock-market quoted. The Three Funds (assuming that the Manion Fund was in fact appropriate to be described non-stock market, along with the two others) were not the only non-stock market investment vehicles available for an investor seeking a balanced portfolio with moderate risk, as Mr Ashleigh made clear in his oral evidence.

58. We note that <u>if</u> the relevant note in the Application Form was a requirement that investments should be "non-stock market", meaning that the Bond investments should not be into stock market quoted vehicles, then the requirement may not have been observed as regards the Mansion Fund: Mr Corlett's evidence to the Royal Court, explaining why it was not an unregulated and therefore high risk investment, was that "*it is listed here in Guernsey on the stock exchange …*" [p. 2257, transcript day 3/53/D].

59. Before us Advocate Dunster sought to explain that the expression "non-stock market" really meant "not stock market <u>traded</u>"; and he told us that the Mansion Fund quotation on the stock exchange was only to do with a reporting of prices, so that after all the Mansion Fund was "non-stock market".

60. In our judgment Advocate Dunster's explanation only goes to highlight the difficulty.

    60.1 There is no evidence that the expression was given any attention at all by the Respondent, in particular when the Resolution was made and the decision was taken to invest the first tranche of the DB Proceeds in the Bond allocated into the Three Funds, or indeed that the Respondent gave the expression any attention at any time in 2011.

    60.2 It follows that there is no evidence of Respondent ever having sought in 2011 to understand what was intended by the cryptic entry in the Application Form, or how therefore the entry should be taken into account when attention was being given to the Appellant's investment profile and the investments being made on her behalf. As we have pointed out, the entry is ambiguous, and Advocate Dunster's submission concerning what might and might not be "non-stock market" demonstrates just how imprecise the expression is.

61. So far as concerns the Appellant, there is indeed evidence pointing to an intention to limit in certain respects the investments which might have been made consistently with her preference for a balanced portfolio with a moderate risk appetite. This we explain; but, as mentioned above, there is no evidence that in 2011 this preference was communicated to the Respondent other than in the entry on the Application Form, or that the Respondent paid it any attention. Thus:

61.1 In her written evidence the Appellant explained that "*I had also stated as preference for long term steady growth investments that were not reliant on stock market volatility*" [p.210]. It is possible that the "non-stock market" words on the Application Form are what she was referring to by this statement; but the Application Form does not reflect the Appellant's explanation, being altogether more succinct.

61.2 There are emails from 2014 from Mr Bradford to the Appellant which were before the Royal Court. In one, of 7 January 2014, Mr Bradford asserted that, "*you expressed a desire not to be invested in equities*" [p.1170]. In another, of 6 May 2014, he asserted that "*the reason you instructed me not to use stock market investments is quite different to mine. The conversation began when you stated that you did not want your pension invested in companies who engage in activities that might be considered unethical. … At that point you said that your pension was not to be invested in equities. The volatility of equities was not discussed*." [p.1164]. If indeed this is what had happened, the entry in the Application Form is difficult to explain: "*non-stock market*" is not the same as "*not equities*". There are securities other than equities commonly traded in the stock market or listed on stock exchanges, as is obvious from the explanation in the Bond conditions quoted above.

61.3 Finally, there is an email of 9 May 2014 from the Appellant to Mr Bradford in which she said "*I disagree with your interpretation of what was the reason for non stock market investments. The main reason was seeking less volatility to pursue my balanced portfolio aims. We were still recovering from the end 2008 crash of stock markets at that point. … The ethical issue was discussed, but that related to any fund investments, not stock market related*". This is not easy to follow.

61.3.1 First, a balanced portfolio, as that would normally be understood and as the Application Form indicated, was one with a balance between income returns and capital growth: the entry in the Application Form explained "*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 higher risk investment in alternative asset classes".*

61.3.2 Secondly, the moderate risk indication in that form would convey a willingness to accept "*an average amount of <u>market risk and volatility</u> or risk of loss of capital in order to achieve potentially higher returns than a low risk profile*" (emphasis added). The Appellant's statement to Mr Bradford seems to be saying that her aim was for a conservative investment approach, and not a moderate one as indicated on the Application Form.

62. Whatever the value of the material in the previous paragraph as evidence as to what transpired in June 2011, it seems to us to offer no assistance to the Respondent on the present appeal. The "non-stock market" entry in the Application Form, if heeded at all, should have caused confusion. But, as mentioned, there is no evidence that it was heeded by the Respondent in 2011.

63. The Skandia 2 Adviser Appointment contained, as mentioned above, two different bases on which PPI could be given by the Respondent authority to be "*fund adviser for*" the Bond, these different bases defining the function and responsibility of PPI in relation to the Respondent's portfolio bond issued by Skandia (and thus in relation to the management of the portfolio notionally comprised in the bond). The basis and nature to the authority was explained as either "*Option 1 – Investment adviser authority*", or "*Option 2 – Discretionary investment manager authority*". But the Skandia 2 Adviser Appointment before the Royal Court, and before us, does not contain any selection of either option; and no evidence was given at the trial as to a choice having been made by the Respondent and communicated to Skandia. In terms the two options were as follows:

63.1 The first was:

> "*Option 1 – Investment adviser authority*
> *I/We have agreed with the fund adviser that they will discuss any proposed alterations to the investment composition of the bond with me/us and that they must have my/our prior written agreement before any changes are made.*
> *I/We authorise the fund adviser to submit written instructions to Royal Skandia on my/our behalf.*"

63.2 The second was:

> "*Option 2 – Discretionary investment manager authority*
> *I/We have delegated all investment decision-making to the fund adviser. This means the fund adviser has complete discretionary authority, without consulting me/us, to make all investment decisions, to buy or sell assets, hold cash or other investments. I/We authorise Royal Skandia to act upon the investment instructions of the fund adviser*."

64. At this juncture it is convenient to note that the Respondent's pleaded case was that PPI was the Appellant's investment adviser chosen by the Appellant, and was appointed by the Appellant to select the investments that came to be made, the selection being that of the Appellant and PPI, not the Respondent. The Respondent's Defences did not state a positive case as to PPI's appointment to any position with the Respondent, beyond admitting that PPI had been "appointed"; stating that PPI owed duties both to the Appellant and the Respondent (paragraph 26.2); and stating that PPI ("*alternatively … the [Appellant] herself*") had the duty of "*advising on the various funds and the diversification thereof, including the investments held via the Bond*" (paragraph 26.3). The Respondent's Pretentions stated (paragraph 36.7) that when PPI was appointed as "*investment advisor*" indications were that PPI was "*a normal professional investment advisory firm*".

65. As the case developed, the Respondent's position came to be that the duty of the Respondent as trustee of the Pension Scheme, and of the Appellant's Member's Account, was to follow the instructions communicated to it by the Appellant and her agent, PPI, and to hold the benefit of the Bond to provide her pension benefits, and was not to exercise any independent judgment of its own: investment decisions were no part of the Respondent's duty because PPI was appointed as "the Scheme investment manager", and the Respondent owed no duties to the Appellant in that regard beyond a general duty "*to exercise supervisory oversight in the case of obvious failings in respect of the investment strategy*" (paragraphs 5 and 35 of the Respondent's trial skeleton [p.96&102]). For this contention the Skandia 1 documents in particular are critical.

66. Consistently with this argument, the Respondent made no positive case in its pleading that the Respondent itself gave any attention to the suitability, nature or quality of the investments chosen

(that is, investment into the Three Funds in the proportions which came to be used). Further, Mr Corlett's first affidavit, in which he set out the principal evidence for the Respondent to support its pleaded case, contained no reference to any investigation having been made as to the suitability of the chosen investments. Mr Corlett's description of the Three Funds in his affidavit was given by reference to "*subsequent research*" [p.866]. His position in his affidavit was that it was the Appellant in conjunction with PPI who chose the investments, and that the Respondent resolved upon and made the investments in response to PPI's request [p.863, para 57 & 63]: because, as he said, there were no "red-flags", the Respondent went ahead. The Respondent "*would have no difficulty in accepting that it may have a duty to intervene to some extent* " where the investment adviser advised that all the funds should be invested into "*a single investment in North Korean residential property, or in a brand of 'cryptocurrency'*" [p.870, para 92].

67. To quote further from Mr Corlett's statement, Mr Corlett explained [p.870, para 93] that, "*I should stress that [the Respondent] would have, in many cases (as in [the Appellant's) very little and often no in-depth knowledge of the underlying investments being made or proposed to be made. That is the job of the investment advisor. What [the Appellant] would do is apply a common sense overview of the transactions in question to ensure that there is nothing obviously amiss.*"

68. Mr Bannier's oral evidence was consistent with this. He did not accept that it was either his or the Respondent's responsibility to deal with the investment of the portfolio, given that an investment manager had been appointed [p.2371]. His evidence, indeed, was that PPI had been appointed manager and that therefore PPI and not the Respondent was to decide what investment should be made [p.2374]; but he did not say when or how this appointment had been achieved or the basis of it. According to him, the choice of investment was made by PPI, together with the Appellant, not by the Respondent [p.2386H-2367A].

69. Mr Corlett's oral evidence was to the same effect: when asked whether the Respondent produced any paperwork to show a comparison between the beneficiary's investment profile and the selected investments he said, "*We certainly ... when we are receiving investments ... the investments from the investment adviser appointed by the client we wouldn't be doing a review and going back to them to discuss it because we are not investment advisers.*" [p.2473] (see also 2474C.)

70. If PPI was appointed by the Respondent to be its investment manager in relation to the Appellant's Member's Account, and the task of selecting the investments and causing them to be effected with Skandia had been delegated to PPI in such a way that the choices made and responsibility for them did not rest with the Respondent, then the Respondent could quite fairly have said that there could not be any duty lying on it as regards the selection, at any rate other than in an extreme case (perhaps, for example, because it had actual knowledge or actual notice that something was materially wrong with the selection – as illustrated by Mr Corlett's suggestion of a single investment into North Korean property or into cryptocurrency).

71. But if, on the other hand, PPI was appointed by the Respondent only to advise the Respondent, then it was ultimately for the Respondent to make the decision as to the investments after considering such advice as PPI might give among other matters, and responsibility for the decision rested with the Respondent, and not PPI. Simply following a request to make an investment would hardly qualify as a decision to invest after considering advice. And there was nothing in the Respondent's pleaded case or Mr Corlett's affidavit to suggest that the decision to invest into the Three Funds was anyone's decision other than that of PPI (in conjunction, it may be, with the Appellant).

72. We return to this topic later in this judgment. However, the Royal Court may well have been led into confusion by the way the case was presented. The crucial questions concerned (a) the Respondent's appointment of someone to be its, not the Appellant's, investment adviser or manager, and (b) the extent to which the Respondent, not the Appellant, had delegated to or was entitled to rely upon that someone once appointed. The Royal Court, having found that the Respondent was not to be held liable for any breach of duty in the appointment of PPI to be the Respondent's adviser or manager, then seems not to have addressed the critical question concerning the character of the appointment of PPI by the Respondent, and the consequences for allocation of responsibility as between PPI, the Appellant and the Respondent. What function was PPI appointed by the Respondent to perform, and for whom? The answer to that question necessarily required consideration of the way in which the appointment had been made and the terms of the appointment; but the Royal Court did not address this consideration in its judgment and made no finding about it.

73. We return, in this context, to paragraph [75] of the Royal Court's judgment. As mentioned above, when considering the Appellant's case that the Respondent failed when investing into the Bond to consider the suitability of the investment into the Three Funds, the Royal Court made the following finding:

> "*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."*

74. It is immediately apparent that the second sentence refers to both "*advice*" and "*instructions*", the first sentence having referred to "*advice*". The Respondent's investment adviser, if appointed to advise the Respondent about investments, would normally be expected to advise, not simply to direct; a manager might be expected to request or even make investment decisions, with such powers and within such limits as might be decided and agreed. A manager might indeed be appointed to carry on the management without any reference to the Respondent, the manager itself making and changing the investments as agent. The central problem with the paragraph is that neither in that passage, nor anywhere else in the judgment, is there a finding to explain what position PPI had been appointed to, and with what powers and duties, in relation to the Respondent's investment of the DB Proceeds. Without this finding, there could not be a sound basis for a finding that the Respondent could not, by reason of things done by PPI as the Respondent's appointee, be in breach of duty to the Appellant as regards the selection of the Three Funds: there could be no basis for reliance on PPI.

75. There is a further problem with paragraph [75] of the Royal Court's judgment. As we explain later, there was no advice (and no finding of advice) ever having been given by PPI to the Respondent concerning the proposed investment of the DB Proceeds. What there was consisted only of the listing out of the Three Funds in the Skandia Bond Investment Forms. While that might have been a request or even a direction or instruction, it was not advice.

76. Considering the way in which the Bond was directed to be invested by Skandia, there was surprisingly little evidence at the trial concerning the Three Funds as they were in 2011. The material dating from 2011 and at the time in the possession of the parties (that is, the Appellant and the Respondent) is exiguous. This would be consistent, so far as the Respondent was

concerned, with its understanding of its duties in relation to the Respondent's Member's Account. Thus:

76.1 For the LM Fund there was (a) a rate sheet [p.281], (b) Summary Flyer dated September 2010 [p.1181], (c) a fact sheet dated 30 June 2011 [p.1527] sent to Mr Bannier on 22 July 2011 by someone from LM Australia and attaching an email dated 22 July 2011 [p.1524] which attached also a pdf with the title "*popping_a_housing_bubble_fantasy_6_7_11*", (d) a fact sheet dated 30 September 2011 [p.1197], and (d) and certain material taken from the internet [p.1512-1526], including an headline from The Economist, read by Mr Bannier and referred to in an email from him dated 27 July 2011 and captioned "LM Fund risks" [p.1510].

76.2 For the Mansion Fund there was a two-page May 2011 monthly update document [eBundle284] which alluded to the fact that the fund had a CISX listing date of December 2009.

76.3 For the Prestige Fund there was a summary fact sheet and May 2011 update [p.282].

77. The first of the LM Fund documents just referred to, and the Mansion Fund and Prestige Fund documents, were given to the Appellant by PPI when PPI was advising her [p.150 paras 12 & 24].

78. Mr Corlett, however, explained in his first Affidavit, at paragraph 71ff, what had been the Three Funds' investment strategies, as he had ascertained them from subsequent research.

79. So it was the Respondent which produced, and Mr Corlett who exhibited, the September 2010 "Summary Flyer" and the LM Fact Sheet dated 30 September 2011, the documents referred to in the Royal Court's judgment, which contained the following description at paragraphs [31] to [33]:

> "*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 Savills. 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'."*

80. It should be noted that the Summary Flyer of September 2010 exhibited by Mr Corlett made it clear that the LM Fund's assets were "*set up as loans*", to "*provide passive income in the hands of the investors*". This continued "*While the assets of the fund are Australian, investment is accepted in a range of currencies, with movements in the Australian dollar eliminated through the use of forward foreign exchange contracts*". The September 2011 Fact Sheet exhibited by Mr Corlett (a document which did not exist when the first tranche of the DB Proceeds was passed over to Skandia and invested in the Bond) explained the LM Fund's assets as comprising cash and "*Loans: - Range of property-related finance facilities. – Participation in property development profit*". According to this information the fund did not itself invest, or not

principally, in the acquisition of property, but in property finance. In other words, risks for an investor in the fund would include loss of returns on the LM Fund's property finance investments, should there be a downturn in the Australian property market or economy, as well as (for a Sterling investor) risks in relation to the currency hedging. Not long before, with the financial crisis of 2008-2009, the global economy had suffered dramatically with the collapse in property and secondary mortgage markets from which (according to a table in the Summary Flyer) there had not yet been a recovery.

81. In his oral evidence Mr Bannier stated that "*the LM fund … was marketing itself basically as safe as a bank, just like putting money in the bank, so that was being sold as a low risk investment*" [p.2332 G]. But in December 2013, after the collapse of the LM Fund, he sent an email to Mr Corlett [p.1506] saying "*When I first looked at the LMMPF I was opposed to any significant investment not least because my initial research revealed credible media comment that the Australian residential property prices were in bubble territory. When I later learned of the high levels of payment which were available from LM to introducers I was also sceptical about the impartiality of the investment advice being given. … I believe that the situation regarding the three directly invested clients illustrates the dangers inherent in prioritising a smooth path for sales over other areas of the business. We should take care that sales concerns do not impair our fiduciary duties.*"

82. Relevant to this email is a number of emails sent by Mr Bannier in July 2011, starting with one of 21 July 2011 to Mr Tailford [p.1522] and captioned "LM Investment Management". In this email it appears that three clients were contemplated as having the whole of their funds applied into the LM Fund; and Mr Bannier explained he was concerned about lack of diversification.

83. On 22 July 2011 Mr Bannier sent an email to a Mr Young of LM Investment Management International Ltd. In his email Mr Bannier explained that the Respondent was "*preparing to make investments in the LM Managed Performance Fund for the pensions of a number of clients*", and he then asked for guidance on a number of points. The first concerned "*options for introducers and/or investment advisers"* to be remunerated by LM for investments into their funds. Another concerned penalties for early redemption. The final one stated "*I understand that The Economist recently reported that the ratio of house prices to rents in Australia is 56 per cent above its long-run average between 1975 and 2010. We appreciate that the fund does not guarantee capital and would appreciate it if you could give us some indication of the extent to which returns and GBP capital might be impaired by a major downward move in property prices.*" The response to this email made it clear that early withdrawal was permitted only exceptionally; and no direct answer was given to the question of the risk of returns being impacted by a downwards move in property prices (as Mr Young acknowledged), save to deny, for reasons Mr Young asserted, that there was any risk at all of such a move, and to say that there was 100% currency hedging to provide security for GBP investors.

84. On 27 July 2011 Mr Bannier sent an email to Mr Tailford with the label "*LM Fund risks*" [p.1510]. This referred to an LM fund (the LM First Mortgage Income Fund) in relation to which investors "*have been unable to access their capital for two years*", and then explaining that this consideration should be borne in mind when deciding how great a proportion of a QROPS member's assets could be put into similar funds as the LM Managed Performance Fund. Mr Bannier's email provided links to two web-pages, one captioned "*Nick Nichols: Coast funds managers in deep freeze*", and the other "*Fund manager to fight Tweed in court*".

85. The first of the two pages [*p.1517*], was not directed specifically to the LM First Mortgage Income Fund, although that fund was mentioned as having suspended redemptions; and the LM Fund was mentioned as continuing to make payments in the ordinary way. But the article did

explain what could go wrong with a property finance fund confronted with a fall in property markets. The article began "*Retired investors thought they were latching on to secured investments that offered generous monthly incomes backed by mortgages over bricks-and-mortar assets. But now, many of them are locked into a living hell thanks to the global financial meltdown".* The article then explained how, with that meltdown: "*Massive debts and falling property values have combined to see many developers … hitting the financial wall. Loans extended to them by mortgage funds now have fallen well past their due date …*".

86. There were other web-pages in the trial bundle, which were accessed from a folder with the label "H/Teams/Pensions/Andrew%20Bannier/Investments/FundsLM%...", (the same folder as containing the two pages with the 27 July 2011 email) and seemingly from the Spring of 2011. One of these, dated 23 May 2011, was headed FT.com, and was captioned "*Australia's property market softens*", and explained "*After a decade-long boom, Australia's property market appears to be coming off the boil, as higher interest rates and the withdrawal of a government stimulus package for first-time buyers fees through into lower or stagnating prices…*" [p.1512]. In other words it was not only a single report in the Economist which identified the risk of a possible drop in the values of Australian residential property (eg. "*Australia's property market softens*" and "*Australian home prices the world's most overvalued: The Economist*").

87. It would be surprising in any circumstances for half the investment to support an individual's retirement pension to be invested in a fund invested in property finance in a single market, when the individual was not otherwise of great wealth, when the 2008-2009 financial crisis was still in recent memory, and when there were known to be commentators warning of overvaluation of properties in that market, and when the risks to which a fall in the market could give rise were readily to be understood.

88. In his oral evidence Mr Corlett agreed that he had had drawn to his attention a report that Australian property might be in "bubble territory", but said that the Respondent had no knowledge of the Australian property market, and so could not provide advice on it but that "*the investment adviser having used the fund for many years was in a far better place to provide that advice*" [p.2476] and also that, despite the report, "*we didn't have concerns*" [p.2477; see also p.2479].

89. The Royal Court's conclusions on this point, at paragraph [76] of the judgment, were as follows:

> *"76. Mr Bannier took a different view [to Mr Corlett, as described in paragraph [75]]. 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."*

90. We return to this paragraph in the Royal Court's judgment later. As to the conclusion, this is a finding of the Jurats which this Court could only interfere with if found to be outside the bounds of what could reasonably be decided on the basis of the evidence before the Royal Court. That

said, ordinarily a trustee, about to invest the funds which are to provide pension benefits for a beneficiary placed as the Appellant was believed to be, and having been warned that the selected investment for half of the funds might well be into a single fund invested in a market in bubble territory, could well be in breach of the duty contained in section 22 of the Trust Law (absent some suitable exoneration provision which the trustee could rely on) in going ahead with the investment without at least some further investigation to satisfy itself that the investment was chosen with appreciation of the risk or was reasonably suitable. If the trustee's task was only to give effect to an instruction (or request), still a red flag should usually be given at least some attention, if only to confirm that the instruction (or request) had been made with knowledge of the red flag. In this respect the situation would be comparable to Mr Corlett's example of the obviously questionable investment into North Korean property.

91. As we discuss below, in our judgment the Royal Court's finding at paragraph [76] is based on a mistaken view of the position of PPI, so far as concerns its relationship to the Respondent, since the Respondent had produced no evidence to support its contention that PPI had been appointed as its discretionary manager. At paragraph [75] the Royal court referred both to "advice" and to "instructions" being given to the Respondent as though advice and instructions are the same; and in paragraph [76] PPI is referred to as "investment manager". Although paragraph [76] speaks of PPI's "advice", the assumption clearly made by the Royal Court in that paragraph is that the position was that described in paragraph 19 of the Respondent's Defences: "*The issue of suitability of investments or their risk level is a question for investment professionals or the [Appellant] or the Plaintiff herself (who was the one who had set out her investment objectives and risk tolerances) and not for a fiduciary in the position of the [Respondent]*". On this assumption, PPI had had delegated to it the decision making concerning the selection of investments for the Appellant's Member's Account, with the result that the situation was that set out in the last paragraph above, not that the decision as to the investment was to be made by the Respondent having taken into account "advice". In this regard advice on the one hand and instruction (or direction, or request) on the other are not the same. Where a trustee's duty is to consider advice and then make an investment decision, in our judgment the trustee could not properly make the decision without having any advice in any conventional use of the expression, as opposed to a bare and an unreasoned suggestion or direction in the face of a red flag warning: choosing to invest simply because the trustee had "no other adverse reports" could not be a proper exercise of a power of investment in such circumstances.

92. Mr Corlett did not exhibit any contemporaneous (or indeed any) material concerning the Mansion Fund, although he stated in his first Affidavit that it was listed on the Channel Islands Stock Exchange, and held a portfolio of freehold or leasehold properties, its objective being to achieve capital growth through the acquisition and management of suitable properties. It was said to invest in private halls of residence which were subdivided into studios or cluster flats with communal kitchens and bathroom facilities [p.867].

93. For the trial the Respondent added into the trial bundles an undated brochure for the Mansion Fund; but the brochure, which explains that the fund was launched in October 2009, and having regard to an entry on the fifth page must date from 2012 at the earliest [p.2167].

94. According to the Prestige Fund summary fact sheet given to the Appellant, the fund invested in "*rural, commercial and industrial loans and leasing agreements in the United Kingdom*", and used an "*absolute alternative investment strategy*". For the trial the Respondent added into the trial bundles an information memorandum [p.2175] which must date from after March 2011 and explains terms on which Prestige Fund offered its shares. This stated that that the contracts into which the fund invested are "*fully securitised against assets [which] may be highly diversified*

and often very specialist but typically agricultural, rural or equestrian in nature such as – farm machinery, specialist farm vehicles, road going vehicles, food production machinery (including vehicles), contracting plant machinery, land and buildings, and live stock."

95. On this appeal the Appellant has submitted that she gave no authorisation of the allocations (Skeleton/Grounds para 15). This submission has not been challenged by the Respondent.

96. We now return to the documents of June 2011 which are central to the Respondent's successful defence of the Appellant's proceedings before the Royal Court.

97. At the end of June 2011 PPI, having had discussions with the Appellant concerning the transfer of her pension benefits from the DB Schemes, sent to the Respondent various documents relevant to the transfer and designed to put the transfer in train for her. The documents sent included the Application Form; but there were others, too. Copies of these were emailed on 29 June 2011 [p.1100] and hard copies couriered. They included, materially, the Skandia 1 documents (that is, earlier versions of the documents at paragraphs 44.5 and 44.6 above (the Skandia 2 Adviser Appointment and the Skandia 2 Bond Investment Form). As explained already, the Skandia 1 Bond Investment Form contemplated that the party to be affecting the Bond with Skandia would be the Appellant as an individual, rather than the Respondent as trustee of a pension scheme.

98. The Skandia 1 Adviser Appointment appointed PPI to be the Appellant's (not the Respondent's) investment manager in relation to the Bond, so far as concerned Skandia. The Skandia 1 Adviser Appointment was signed by the Appellant with a date of 28 June 2011 [p.1114]. The Skandia 1 Bond Investment Form was, as mentioned above, signed by Mr Bradford. But there is no evidence that it was signed by the Appellant: the copy in the trial bundles, and in the materials before us, appears to be missing some pages, but despite our request to the Respondent we have not been shown any version of the document with a page carrying the Appellant's signature. As mentioned, the Appellant has submitted on this appeal that she did not authorise the percentage allocations for her pension; and this submission has not been challenged by the Respondent.

99. Also on 28 June 2011 the Appellant signed a letter [p.1112] addressed to PPI confirming she had read the QROPS report, wished to proceed with the transfer from the DB Schemes to the Pension Scheme, and made reference to the Three Funds as the underlying funds but without specifying allocations. This document does not appear to have been included with the email of 29 June 2011 from Mr Bradford to the Respondent referred to above; and the evidence does not explain when or how a copy came to be held by the Respondent or what the Respondent knew of this in 2011.

100. Finally, on that same date, 28 June 2011 the Appellant signed a client agreement with PPI [p.997]. This identified the Pension Scheme "*with Royal Skandia ERB*" as the product recommended, the reason for this recommendation being "*QROPS transfer*". Again, there is no evidence as to the time that this document was provided to the Respondent.

101. The Skandia 1 Bond Investment Form was signed at the end by Mr Bradford. Above his signature were matters to complete, including boxes to show place and date of the giving of advice to the Appellant about the investment dealt with in the form. It said, as completed, "*I confirm that I gave advice concerning this investment to the applicant(s) in Thailand on 22/06/2011.*" It will be recalled that the date of the QROPS Pension Transfer Report was 22 June 2011, the date of the Appellant's signature on the Application Form and on the Skandia 1 Investment Adviser Appointment was 28 June 2011, and Mr Bradford is shown as having signed the Skandia 1 Bond Investment Form on 29 June 2011 (the date of his email to the Respondent).

102. The Skandia 2 Bond Investment Form contained text in precisely the same form as in the Skandia 1 form, as we have just described, but this time (that is, in the Skandia 2 form) the date beneath Mr Bradford's signature was 29 June 2011 (the same date as on the Skandia 1 version). The text in this iteration of the form, read literally, would confirm that on 22 June 2011 Mr Bradford had advised the Respondent (not, therefore the Appellant) about "this investment". But the explanation given by Mr Corlett for the text in the form that it is, and referred to in paragraph 28 of the Royal Court's judgment, was that when the Skandia 2 form was made, the information from the Skandia 1 form had simply been copied across onto the Skandia 2 form, it being appreciated that the Skandia 1 form would not serve for a subscription of the Bond by the Responden. Mr Bannier, too, offered the suggestion that someone, either Mr Bradford or a secretary, must have "*just copied the data*" from the Skandia 1 version of the document into the Skandia 2 version [p.2351A; also p.2356C-D].

103. This view of what happened appears to be consistent with the dating of Mr Bradford's signature on the Skandia 2 Bond Investment Form. The date on which the Skandia 2 version was signed by Mr Bradford cannot have been 29 June 2011, as it was only at the beginning of July 2011 that it was appreciated that the Skandia 1 documents were inappropriate and replacements were needed, these being sent to PPI on 6 July 2011 and returned the following day: Mr Bradford's signature must have been added on either 6 or 7 July 2011.

104. There is a difference between the evidence of Mr Bannier and Mr Corlett, however, according to the Royal Court at paragraph [73] of its judgment. This concerns a critical aspect of the entry in the Skandia 2 Bond Investment Form (and, for that matter, the Skandia 3 Bond Investment Form) about the advice given to the Respondent. This difference, the Royal Court explained, is that "*Mr Bannier said that advice was given on the date quoted to Mr Tailford*", (that being 22 June 2011 as stated in the Skandia 2 version), while "*Mr Corlett was unaware of that and acknowledged that no advice was given to [the Respondent] on that date*".

105. In fact it is apparent that Mr Bannier did not himself know whether Mr Tailford (or anyone else within the Respondent's organisation) had been given any advice by Mr Bradford on 22 June 2011, and did not say that he did; only that he imagined that the reference to advice being given was to advice to Mr Tailford, and that this could have been given by Mr Bradford when in Thailand either in person or by a telephone call by him from Thailand to somewhere else [p.2349G-H]. Mr Bannier's evidence was speculation, as demonstrated by his answer to the question, '*Why would Mr Bradford be advising the Respondent about the Appellant's pension scheme and funds when she was not even a member of the scheme?*' Mr Bannier said simply "*You would have to ask him*". Further, when being cross-examined by Advocate Dunster on behalf of the Respondent, Mr Bannier said [p.2370G] "*I cannot speak, if you like … for the whole company in that respect. I can only speak for the Guernsey office … I can't say what Mr Tailford did or did not do. He was our man on the ground in Thailand, so I don't know what he did."*

106. The Royal Court made no finding as to the question whether any and if so what advice was given to the Respondent concerning the investment of the Appellant's Member's Account, beyond considering the issue concerning the statement on the Skandia 2 version of the Bond Investment Form. And this issue the Royal Court focussed on in connection with the question whether a misrepresentation in the form, if such there was, should have caused the Respondent to question the suitability of PPI to be appointed by the Respondent to be investment adviser. Thus, at paragraph [73] the Royal Court addressed the question whether the way in the final page of the Skandia 2 version of the Bond Investment Form had been completed should have caused the Respondent to realise that PPI was unsuitable as an adviser. This suggestion the Royal Court dismissed, saying as to that page that "*If it is indeed the case that the date was wrong, the*

[Respondent's] failure to notice that is not gross negligence nor wilful misconduct. Furthermore, it did not cause any loss."

107. Staying with the last page of the Skandia 2 Bond Investment Form, it should be kept in mind that the relevant form was one to be communicated to Skandia to explain the Respondent's investment decision. Given this, one might have expected that the Respondent would check to see that what was being told to Skandia was accurate; but (as we conclude) the Royal Court found that, if this check was not done or was done carelessly, that was not gross negligence.

108. But, more importantly, the real question for the Royal Court was whether PPI had given any and if so what advice to the Respondent. The Royal Court's judgment, as mentioned, contained no finding on this crucial question. On this question we comment as follows:

108.1 First, reverting to the question of the Skandia 2 Bond Investment Form, it is inherently implausible that any advice was given by PPI to the Respondent in Thailand, or somewhere else by telephone from Thailand, on 22 June about the suitability of the investments for the Appellant's pension arrangements and as to reasons for that suitability; that is, concerning the investment of the DB Proceeds into the Bond to be allocated as set out in the Bond Investment Form, as suggested on the form. The explanation for the way in which the forms were completed is most naturally that given by both Mr Bannier and Mr Corlett as described above. The same applies as regards the Skandia 3 Bond Investment Form.

108.2 Second, there is no contemporaneous document from the Respondent recording the substance of any advice given to the Respondent by PPI, whether in Thailand or anywhere else; and the assertion that such advice was given is purely based on the declaration signed by Mr Bradford on the Skandia 2 and Skandia 3 Bond Investment Forms.

108.3 Third, the way matters unfolded between Mr Bannier and Mr Corlett in July 2011 concerning the investment into the LM Fund are inconsistent with there having been advice given by PPI concerning the investment to which either Mr Bannier or Mr Corlett could have had recourse to answer the concerns about the Australian property market being "in bubble territory". Quite simply, Mr Corlett never suggested that he had had any regard to any advice from PPI concerning the investment to be made for the Appellant, in particular into the LM Fund.

Breach of duty as regards the appointment of PPI?

109. The first of the Appellant's challenges to the Royal Court's judgment can be disposed of shortly. The Royal Court's records, in summary at paragraph [73]: "*... 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 [Appellant's QROPS]*". As there was evidence to support this finding, it is not open to us to disturb the finding or the Royal Court's rejection of the Appellant's challenge to the Respondent's appointment of PPI.

110. The Royal Court's judgement explained, at length, the challenge made by the Respondent and the detailed reasons for its rejection. This is at paragraphs [46] to [57], which read as follows:

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.

111. A feature of the case which the Appellant does not consider in her perfected grounds of appeal is that she herself signed the Skandia 1 Adviser Appointment. At the least, when the Respondent was deciding on the appointment of an investment manager in accordance with clause 5.2 of the Declaration of Trust, a starting position would be that PPI should be considered as the choice, absent some reason for not appointing PPI. But the material document was the Application Form; and that did not mandate that the choice had to be PPI, or what authority PPI would have.

112. In Advocate Dunster's written submissions on behalf of the Respondent attention is drawn to contemporaneous evidence explaining due diligence carried out by the Respondent in respect of PPI before the time when the Resolution was passed and PPI was appointed. The Appellant submits, with some force, that what the Respondent had established was little more than sufficient to satisfy money-laundering concerns and the like, and did not qualify as ever having involved a serious interrogation of PPI's investment advisory or investment management experience and skills. This is not sufficient, however, to enable this Court to interfere with the findings made by the Royal Court after a trial with Jurats.

113. Shortly before this appeal was called on, the Appellant made an application to introduce fresh evidence concerning the question whether, in 2011, PPI needed a regulatory licence to give investment advice to the Appellant in Thailand. The majority of the Jurats considered that the Respondent was entitled to rely on the information and advice on this particular licensing issue it had received at the time, as set out in paragraph [56] of the judgment. Given this, it is immaterial to consider further what in fact the licensing position was in Thailand, so far as concerns the advice to the Appellant by PPI, and what therefore might have been discovered if, contrary to what happened, the Respondent had made enquiries of the Thai authorities. We therefore refuse the application to introduce fresh evidence, as the evidence cannot have any impact on the outcome of the appeal.

Breach of duty as regards the choice of investments within the Bond?

114. We have already set out earlier in this judgment paragraphs [75] and [76] of the Royal Court's judgment and have drawn attention to features of those paragraphs. However we need to deal further with paragraphs [77] to [80], the remaining parts of the Royal Court's judgment addressing the material question. As appears from what we say later, in our judgment the Royal Court has reached a conclusion which is based on a mistaken appreciation of the position to which PPI was appointed, and hence of the duties which remained to be performed by the Respondent. In our judgment this conclusion cannot be supported on the evidence at trial.

115. The email of 3 April 2014 [p.1538], referred to in the Appellant's Cause and by reference to which PPI's functions as PPI's appointee in relation to the Appellant's Member's Account were pleaded, had explained "*It is the function of the investment advisor to research the funds in which the assets are invested. ... It is the function of the investment advisor, not the trustee, to advise on all aspects of the investment portfolio including concentration or the avoidance thereof.*

Professional investment advisors are appointed to provide this type of guidance". The appointment alleged is not one of a manager to take for the Respondent the responsibility for making the investment decisions of the Respondent in relation to the Appellant's funds, but of an adviser to provide to the Respondent advice or guidance.

116. The mistaken appreciation, we think, is to be laid at the Respondent's door. The fault is that the Respondent failed to make sure, when it came to deal with the DB Proceeds, that it had paid proper attention to the functions and responsibilities it was delegating to PPI and the legal consequences for it of having done so.

116.1 First, this was not a case in which the Respondent was an execution-only intermediary for a client, regardless of the question whether the client was a professional or non-professional investor or whether the client appeared to be adequately advised by a professional. In accepting the Appellant as a member of the Pension Scheme, as it did on 5 July 2011, the Appellant took on the duties of trustee set out in the Declaration of Trust while at the same time obtaining the benefit of the exemption (in clause 11 of the Declaration of Trust) from liability for negligence falling short of gross negligence. The Application Form did not limit those duties; rather, it added to them by reminding the Respondent of the Appellant's means, investment objective and risk appetite to which the Respondent was to have regard. It did not in terms require any delegation of the Respondent's duties or responsibilities for investments to be made to PPI.

116.2 Secondly, the Skandia 2 Advisor Appointment contained no choice made by the Respondent of the function which PPI was being appointed to perform. It cannot be said that by that document the Respondent appointed PPI to a specific investment management role, making and taking responsibility for investment decisions in relation to the Bond, which PPI accepted.

116.3 Thirdly, the Resolution did not contain any delegation to PPI of any of the powers set out in clause 5.3 of the Declaration of Trust. The appointment, resolved upon at the same time as the investment decision, was consistent with PPI have the function of giving advice to the Respondent in connection with the Bond. Bearing in mind that the primary responsibility for the investment decisions lay with the Respondent, delegation of the Respondent's responsibilities would need to be clearly made, failing which they would remain the Respondent's.

117. In his oral argument Advocate Dunster submitted to us that the relevant delegation was to be found in the Skandia 2 Bond Investment Form. This document, signed by Mr Corlett and another on behalf of the Respondent on 29 July 2011, and hence before the Resolution was passed, has a page which sets out the way in which £200,000 of the first tranche of the DB Proceeds to be subscribed in the Bond should be allocated (that is, among investment in between the LM Fund, the Mansion Fund and the Prestige Fund). Above the box in which this was explained as "*Investment Choice*" there was text headed "*Managing your investments … Would you like someone else to manager your investments?*", with two boxes to tick. One, which was ticked, was "*A fund adviser*". Related to this was another ticked box to indicate, in particular, that having ticked the fund adviser box, there was to be enclosed also with the form a form "*Appointing a fund adviser to your Royal Skandia portfolio bond – for appointment of your fund adviser*".

118. We do not consider that the Skandia 2 Bond Investment Form had the effect submitted by Advocate Dunster. Certainly, it showed the Respondent to be asking Skandia for an allocation of

the DB Proceeds into the Bond. But as it depended upon the terms of the Skandia 2 Adviser Appointment to set out the terms of PPI's appointment (that is, the appointing of the fund adviser), the failure to clothe PPI with "discretionary investment manager authority" (if that had been what the Respondent intended) rather than "investment adviser authority" remains.

119. We have some difficulty with the Royal Court's finding that the Respondent was not in breach of duty in relation to the investment of the DB Proceeds, making the assumption that PPI had had delegated to it responsibility for choosing the investments to be made by the Respondent for the Appellant and that the Respondent's duty when the investment decisions were made was simply the one of exercising supervisory oversight asserted by the Respondent at the trial. But in this respect the Jurats accepted the explanation given by Mr Corlett (as stated at the end of paragraph [76] of the Royal Court's judgment).

120. However, we do not need to ask ourselves whether that finding was capable of being supported. This is because the Royal Court did not find, and indeed could not reasonably have found, that the Respondent had discharged its duty as trustee, if (as we find) the Respondent had not shown itself to have done any more than to appoint PPI to a position of giving it advice in relation to its investments, and in particular had not shown itself to have delegated to PPI responsibility for making the investment decisions. Specifically, there is no evidence to explain when, how or to what extent there had been any delegation in favour of PPI or of PPI agreeing with the Respondent to take on that delegation.

121. Paragraph [77] to [80] of the Royal Court's judgment were in the following terms:

> *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*.

122. The comment made at paragraph [77] of the Royal Court's judgment does not assist the Respondent.

122.1 It is difficult to think that Mr Bannier's evidence concerning normal procedures, as his evidence has been summarised by the Royal Court, was to be taken at face value. If Mr Bannier's evidence were correct, there was no purpose served by the Respondent asking for and then being provided with a pension beneficiary's investment profile, as

contemplated by the Application Form. Having the information only makes sense if the Respondent was expected to be able to pay attention to it. Further, the Respondent's internal forms made provision for this information to be obtained and recorded.

122.2 More importantly, in the present case the Respondent knew of the investments proposed to be made while also knowing the Appellant's investment profile, objective and risk appetite, and knew also that Mr Bannier had drawn attention to concerns as to risk for the proposed investment. What might have been normal in other cases cannot determine what duty the Respondent owed, and what therefore it should or should not have done, in the present case.

123. The second sentence in paragraph [79] of the Royal Court's judgment, the sentence explaining the Respondent's inability to give investment advice and thus its entitlement to rely on the advice given by PPI, starts from a premise which is not relevant to the question at hand, to arrive at a conclusion which anyway does not follow from the premise.

123.1 As to the proposition that the Respondent was unable to give investment advice, the present was not a case in which the Respondent was being called upon to give investment advice. The decision as to the way in which Skandia should be directed to invest the DB Proceeds when subscribed in the Bond was one to be taken by the Respondent (either by itself or with advice or by a delegate). The Respondent was not, in this respect, giving advice but was managing an investment in its capacity as trustee.

123.2 In the second place, the Respondent did not in fact rely on any "advice" given to it; it simply followed the request (or "instruction") made by PPI in the Skandia 1 Bond Investment Form. Precisely what PPI had advised the Appellant the Respondent did not know.

124. As to the first sentence in paragraph [79] and the whole of paragraph [78], the central proposition is that the words "non-stock market" on the Application Form had the effect, heeded by the Respondent, of so limiting the range of permissible investments within the Bond (excluding investments quoted on a stock market, or perhaps excluding only some other category of stock market investments) that investing in just the Three Funds might have given "some diversity".

125. We have noted that if the relevant words on the Application Form had this effect, quite arguably (on one reading of the words "non-stock market) the Mansion Fund investment should not have been made.

126. More importantly, there is no evidence that the Respondent paid any attention to them at the material time. Thus, the last – and crucial sentence – in paragraph [78] of the Royal Court's judgment contains an error. The proposition is that the Respondent was given "*instructions ... - namely not to make any stock market investments*", which the Respondent was obliged to follow. But there was no evidence that the Respondent was aware of and sought to obey any such instruction. Quite simply, the instruction the Respondent was given, an instruction to invest in the Bond allocated into the Three Funds, came from PPI without the Respondent knowing what, if anything, could have justified the instruction.

127. The closest evidence on the point is that of Mr Bannier, who said, of what he saw as the force of the words "non-stock market" in section 7 of the Application Form, "*It is very, very unusual to see a mandate like that, where as I was trying to say this morning, that mandate, rather, that instruction, just puts out of scope most of the investment market, basically*" [p.2376B-C]. And his

evidence was that this mandate having been given by the Appellant to PPI, resulted in *"potentially not a normal diversification"* because of the very abnormal profile and limited choice left for PPI to select: "*You [the Appellant]",* said Mr Bannier, *"had specifically told Mr Bradford that the investments were to be non-stock market investments. So, you are basically saying ... most of the investment market, well put that to one side and we are not going to look at most of the investment market. We are going to focus on some tiny ... not tiny, but some small area of the potential investments. So, whereas PPI would have a large number of ... if you hadn't put the non-stock market condition on your investment profile, then I don't know how many sort of potential funds or stocks ... mostly funds, I would imagine, would have been in their white (sic) list, the things that they would potentially be investing you in, or investing the portfolio in. I don't know how many would be on that list but it would have been an awful lot more ..."* [p.2361E]. Mr Bannier's evidence was not that the Respondent itself had paid any attention to the words "*non-stock market*" on the Application Form, only how those words might have had an effect on PPI's instruction to the Respondent.

128. Furthermore, as explained above, we do not see that the words had the effect described, or were in fact (or could properly have been) relied upon by the Respondent as having that effect, or that even if they did have that effect there were so few permissible investments that investing in just three was reasonable.

129. Finally, the fact that each of the Three Funds had within its portfolios multiple underlying investments cannot realistically qualify as giving diversity sufficient to disperse undue concentration of risk, when in each case the underlying investments were of broadly one single type in one single market (the Australian property finance market in one case, the market for student accommodation in the UK in another, and for the third the UK secured loan and lease finance market).

130. The real point is that the Respondent simply chose to follow the request made by PPI in the Skandia 1 Bond Investment Form, taking it that the fact that the request had been made was sufficient to determine that the investment was suitable for the Appellant's Member's Account and appropriate for the Respondent to include into the Skandia 2 Bond Investment Form and pass on to Skandia, when there was a red flag in relation to the LM Fund which (a) the Respondent disregarded, and (b) was material having regard to the want of diversity and the nature of the selected investments against the Appellant's profile ("*balanced*", which contemplated as to the potential for capital growth there being a combination of alternative asset classes of low, medium and some higher risk, and "*moderate risk*"). The Respondent had ample material and should have questioned whether, after all, the request from PPI was appropriate to follow unless it had devolved all responsibility for selecting the investments by an appointment of PPI as a discretionary manager. In the absence of such an appointment, PPI were acting at most as an adviser and in those circumstances the Respondent's clear duty was at least some effort to look into what was proposed, with its possible risk, and to exercise its own judgment as to suitability of the investment; and this it admittedly never did.

131. In his oral argument, Advocate Dunster sought to rely on the finding made by the Royal Court in response to the Appellant's claim, not pursued on appeal, that the Respondent was in breach of duty in failing to review the Appellant's investments from time to time to see whether they continued to be suitable. The Royal Court had rejected this claim: at paragraphs 65 and 66 of the judgment the Royal Court remarked "*In evidence Mr Bannier said that annual reviews were carried out, although there is no documentation to support that ...*" and "*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*". In our judgment this finding is of no

assistance. This appeal is concerned with the question whether the Appellant's investment should have been made in the first place into the Three Funds via the Bond, not with the question whether annual reviews were duly carried out and, if not, what should be the consequences.

132. However, Advocate Dunster drew attention to passages in Mr Bannier's oral evidence which, as Advocate Dunster submitted, showed that once Mr Corlett had been warned of the reported risk as to the proposed investment raised by Mr Bannier, there had in fact been a review.

133. In our judgment this evidence of Mr Bannier's does not carry the weight Advocate Dunster sought to place on it: it does not show the Respondent to have taken any relevant step to discharge its duty to the Appellant when making the investments into the Bond.

133.1 First, the Jurats appear to have made no finding about the evidence. That said, the Jurats did consider Mr Bannier to be a truthful witness.

133.2 Secondly, and more importantly, Mr Bannier's explanation of the review was "*...the point was in terms of a review it was a question of, okay, these are the investments with the investment adviser with a discretionary authority had sort of put down or agreed with you for your portfolio and the review was effectively do those look like a moderate portfolio? Yes, so move on. It is not an involved process*" [p.2340]. But this description of the exercise did not entail any consideration of the consequences for the Appellant's proposed investment portfolio in the eventuality of a fall in the Australian property market or an investigation into the risk of there being such a fall. The review described by Mr Bannier can have had nothing to do with the recognised red flag.

133.3 Thirdly, Mr Bannier was clear that his concern about the LM Fund was not discussed with PPI [p.2327]. He referred it to Mr Corlett, and he was overruled. "*The view that was expressed to me is that as we are paying investment advisors or investment managers to do the investment management and it is not the role of the trustee to be questioning them on a regular basis ... not on a regular basis but to be saying ... we should let the advisors get on with their job and then when we come to review portfolios, then that is how our process works*".

134. Finally there is paragraph [80] of the Royal Court's judgment, which we have quoted above. The conclusion, that "*With hindsight, the investments were not at all suitable for the Plaintiff's risk profile",* seems without any doubt to be correct. The Royal Court added that "*that was not known at the time*". That is a finding on the evidence before the Royal Court which is to be accepted. The difficulty for the Respondent is that, with the red flag which had been raised, it knew enough to have reason to look further into the suitability of what was being proposed, but chose not to do so and to pay no more attention to the identified risk, so it ought to have informed itself better, and it ought to have known more than it did.

135. It follows, in our judgment, that subject to the impact of the exoneration provision in the Declaration of Trust, the Respondent was negligent and in breach of duty in the selection of the investments made within the wrapper of the Bond: the approach to the selection adopted by the Respondent was not that to be expected of a reasonably prudent man of business, in the absence of any satisfactory evidence as to the character of PPI's appointment.

136. Advocate Dunster submitted that the test of what is gross negligence can be characterised as "jaw-dropping" negligence. The test applied by the Royal Court, as explained above, was less

colourful in language but to similar effect: serious or flagrant negligence, which can embrace serious disregard of or indifference to an obvious risk.

137. In our judgment the present case reaches the necessary threshold. The Respondent had a red flag raised by Mr Bannier in relation to a proposed application of over half of the DB Proceeds into a single fund in a single market (Australian property finance). But because the Respondent saw itself as not being an investment adviser and for that reason not an investment professional able to choose investments, and because the investment had been requested or instructed by PPI, the Respondent went ahead with what can only be described as indifference to its duty and the identified risk. That, we conclude, qualifies as having been grossly negligent. Clause 11 of the Declaration of Trust does not excuse this negligence.

138. It remains to consider a question which was raised by Advocate Dunster, this being a question of causation. His submission was that following up the red flag would not have led to any different result: still half of the DB Proceeds would have been applied into the LM Fund, no doubt because that is what Mr Bradford would have continued to advise.

139. We reject this submission. The point which had been raised by Mr Bannier was that there was concentration of risk in the portfolio with exposure to a recognised risk. However positive Mr Bradford might have been about the LM Fund and its bank-like qualities, he could not have properly advised the Respondent to continue to invest half the DB Proceeds into that fund, once the implications of the concentration of risk had been noted; and the Respondent could not properly have acted on that advice, if given, as the advice could not have been sensibly reasoned and plausible. Even if the risk was small, it could have disastrous results if it eventuated. In our judgment this is not a case in which it was incumbent on the Appellant to prove that the outcome would have been different had the Respondent discharged its duty, when there is no real reason to explain how the outcome could reasonably have remained the same.

140. There remains the question of the relief which should be given in consequence of our conclusion that the Respondent was grossly negligent in its breach of duty to the Appellant. One possibility would be to remit the case to the Royal Court, to determine the quantum. However we understand that neither party would wish us to adopt that course. Rather, the Respondent would be content for us to assess the Appellant's damages in the manner proposed by Mr Ashleigh for loss of the value of the Bond although with an adjustment. We consider the adjustment in principle correct, having been accepted by Mr Ashleigh in cross-examination.

141. Essentially the starting point would be the total amount passed over to Skandia out of the DB Proceeds (£318,696.67). It would be assumed that the amount invested within Skandia grew at the rate of a hypothetical portfolio over the time from the investment of the DB Proceeds down to the date of a portfolio valuation of the Appellant's portfolio at 31 December 2017. There would then be deducted the value of the actual portfolio at that date (£163,550.64), to arrive at an investment loss at that date. Advocate Dunster explained that the growth of the notional portfolio should be taken as net of fees, and would yield a growth rate of about 4% per annum, a figure with which Mr Ashleigh agreed.

142. As we understand it, this adjustment contemplated by the Respondent would result in a loss, and hence a measure of damages, as at 31 December 2017 in the order of £167,550. We have not attempted the arithmetic, which no doubt the parties will be able to agree if we have understood the principle correctly. We assume also that there will be interest to be paid on the amount of damages to cover the time between the end of 2017 and the date of the order.

143. Once the parties have considered this judgment, we will hear argument on the amount of damages and the interest rate referred to in the previous paragraph (assuming these matters cannot be agreed between the parties), as well as on costs and any other consequential matters arising out of this judgment. If we have mistaken the position being taken by the parties on the quantum of damages, and the parties are unable to agree, we will hear argument on that too, including as to whether or not after all the determination of the damages should be remitted to the Royal Court.