

Final Determination – Mr N v Ardonan in respect of the Kreston QROPS

Applicant – **Mr N**

Respondent – Ardonan (at the relevant time known as Kreston Pensions (Isle of Man) Limited)

Kreston Isle of Man Pension Plan

Names of certain persons who were not parties to the complaint redacted

1. Complaint Summary

1.1 The complaint relates to an investment in an Isle of Man cell company (the **Cell Company**) made by Ardonan (which was then known as Kreston Pensions (Isle of Man) Ltd (**Ardonan**) as the then trustee and administrator of the Kreston Isle of Man Pension Plan (the "**Plan**"). The investment was made on the advice of Mr N's investment adviser (**IFA1**) and on the direction of Mr N. It is alleged that Mr N's IFA1 did not have the appropriate permissions to advise either on the transfer of Mr N's UK pensions to the Plan or on the investment in the Cell Company.

1.2 Mr N contends, among other things, that:

1.2.1 Ardonan as Trustee and administrators owed a duty to ensure that only properly authorised and regulated financial advisers could provide advice in relation to the Plan and Ardonan breached this duty by allowing the investment;

1.2.2 Ardonan as Trustee/Administrators did not exercise due skill and care in establishing whether the Cell Company was an acceptable investment for the Plan and breached this duty by failing to carry out adequate due diligence in relation to the investments;

1.2.3 Ardonan as Trustee/Administrators processes were not robust enough, in establishing whether these types of investments were appropriate for individual members.

1.3 Mr N's detailed complaints are set out more fully in section 5 of this determination.

1.4 I do not uphold Mr N's various complaints for the reasons set out in section 10 of this determination.

2. Background to initial investment in the Cell Company by the Plan

2.1 The complaint relates to an investment in the Cell Company made by Ardonan as then trustee and administrator of the Plan which was known at the time as Kreston Pensions (Isle of Man) Limited. The investment was made in accordance with the rules of the Plan on the advice of IFA1 immediately following the transfer of Mr N's benefits in the MacDonalds Pension Scheme (a defined benefit scheme) and a personal pension plan with Guardian Financial Services (totalling £63,789) to the Plan.

2.2 The Plan is registered with the Isle of Man Financial Services Authority (registered number DD 991). The Plan is a domestic authorised scheme for the purposes of the Retirement Benefits Scheme Act 2000. The Plan is trust based. Before the subsequent appointment of Baker Tilly Isle of Man Corporate Trustee, the Plan administrator was Ardonan Limited (known at the time as Kreston Pensions (Isle of Man) Limited). The Plan is a multi-member plan with a common set of rules, but the Fund (as defined in the

Rules) of each member is segregated and the assets are not pooled, so that no other Member of the Plan is affected by the investment of Mr N in the Cell Company.

- 2.3 Mr N alleges that he was cold called by a representative of an unregulated Gibraltar based marketing firm) (**the Introducer**) in late 2014 who introduced Mr N to IFA1 of IFA1 Wealth Management. It is alleged that the controllers of the Introducer are also directors of the Cell Company or that there is some form of business relationship or connection between the two entities. Mr N understands that IFA1 Wealth Management is not itself a regulated or authorised business, but is rather a trading style of another regulated business which was described by IFA1 under a different name and " listed under the Financial Conduct Authority register in the UK.
- 2.4 IFA1 subsequently described his regulated business by a different name and I understand clarified that this was the business operated by a different financial adviser (**IFA2**) in Netherlands which Mr N has identified on the Financial Conduct Authority register in the UK under a different firm reference number. It is alleged that both IFA1 and IFA2 have passport permissions to conduct "Insurance Mediation" only in the UK and not to advise on pension transfer business or give investment advice on pension investments.
- 2.5 It is important to note at this stage in the determination that as Deputy Pensions Ombudsman I do not have jurisdiction to determine any complaint against IFA1, IFA2 or the Cell Company in relation to this matter. The complaint only relates to the actions of Ardonan. I, therefore, have not been able to consider any representations from any of these persons or entities in relation to the events which are described in this complaint.

3 Application Process to join the Plan

- 3.1 IFA1 sent Mr N a letter on 9 December 2014 with his recommendations on behalf of IFA1 Wealth Management Limited in relation to his recommendations to transfer to the Plan and the investment in the Cell Company. The letter states in the footer that IFA1 Wealth Management is an EU based financial adviser registered in the Czech Republic. Mr N was also sent a critical yield calculation on 14 December 2014 prepared by the QROPS bureau showing the critical yield necessary to achieve a comparable pension to that which would have been provided under his UK defined benefit pension.
- 3.2 On the advice of IFA1/IFA2, Mr N sent a letter to Ardonan attaching his application to join the Plan dated 9 December 2014. The letter among other things states that:

"I have read and understood the "Reasons Why Letter" provided by my adviser and confirm that the investment strategy is in line with my risk profile and retirement planning objectives.

I hereby instruct you to invest all of the funds received into my account, net of any reserve you make for fees, into [the Cell Company], which I am advised gives me a diverse spread of investments in a variety of high growth asset classes. As I have been advised by my IFA I would like the risk profile of my investment with them to be "balanced".
- 3.3 The signed application form dated 14 December 2018 (i.e. after the date of the letter to Ardonan) contained a statement of the risk profile the member was comfortable with and a number of declarations in its detailed terms and conditions.
- 3.4 The risk profile section in the application offered the following choices:

Risk Profile		
Which of the risk profiles below are you comfortable with?		
Risk Category	Risk Profile	Risk Profile Definition
<input type="checkbox"/> 1.	Very Low Risk	Investments designed to preserve capital and any growth is likely to be minimal
<input type="checkbox"/> 2.	Low Risk	There is a small degree of risk to your capital which may go down as well as up – any growth is likely to be fairly moderate
<input checked="" type="checkbox"/> 3.	Medium Risk	There is some risk to your capital which may go down as well as up – there is potential for growth over the long term
<input type="checkbox"/> 4.	Med/High Risk	There is a chance of more aggressive growth of your investment over the longer term but with an increased possibility of your investment value declining
<input type="checkbox"/> 5.	High Risk	There is potential for significant growth but that potential should be balanced with the increased chance that your investment value may decline more aggressively
*As a general rule – the higher the risk, the greater the potential return, as well as the increased chance of your investment falling in value. Please consult your professional adviser for a broader definition if required.		

Disclaimer – Kreston are professional trustees and administrators who ensure that your retirement fund is managed within relevant legislation **and in line with your stated investment strategy** [emphasis in red by the Deputy Pensions Ombudsman – the red highlighting is not in the original]. We accept our duties and responsibilities as both trustees and administrators in full. We do not however provide or accept liability for any investment tax or legal advice in relation to your fund. Please consult your professional adviser for a broader definition.

3.5 The form then indicated that the investment should be made in the Cell Company Limited – BALANCED and then contained details of the transfers to be made to the Plan. There were a

number of declarations signed by Mr N attached to the form including the following declarations:

"I request that the Trustee may appoint any nominated investment manager, if applicable, but fully understand and accept that: I am solely responsible for all decisions relating the purchase, retention and sale of investments within my Pension Plan fund and relating to the nomination of investment managers.

I will not hold Kreston responsible in any way of any delays in the purchase or sale of any investments.

I will hold Kreston fully indemnified against any claim in respect of such investment decision or directions.

I acknowledge and accept the terms and conditions for membership of the Pension Plan.

I acknowledge that the responsibility for investment advice and subsequent investment instructions to Kreston must be made by me or my Appointed Professional Adviser.

I acknowledge and accept that the services provided by Kreston do not extend to financial, legal, tax or investment advice. Kreston has not provided advice in relation to membership of the Pension Plan or its suitability to my current or future circumstances and my pension scheme will be established on an Execution basis only"

The detailed terms and conditions attached to the application form which Mr N signed included further statements and disclaimers that the Trustees are unable to provide *could go down as well as up and the full amount of the Pension Plan funds invested may not be returned.*

I therefore Direct the Trustee to make the Non-Standard investments as recommended."

- 3.6 Mr N then signed an overseas transfer form/declaration on 10 January 2015 instructing Guardian Financial Services to make a transfer from his personal pension scheme to the Plan and then signed a deed of adherence on 19 January 2015 confirming that the Trustee had made available a copy of the Trust Deed and Rules governing the Plan and confirming that independent advice on the suitability of the Plan to provide benefits on retirement and other benefits in respect of the Applicant. On 5 March 2015 Ardonan wrote to Mr N thanking him for his application to transfer his pension benefits to the Plan which had been received from his financial adviser. The letter confirmed that the application had been accepted and Ardonan would be contacting his exiting scheme to request funds to be transferred to the Plan and once the funds are received, the investment will be placed as instructed. Ardonan have subsequently provided evidence that the funds transferred were invested in the Cell Company on 17 February 2015 and 18 March 2015 respectively.

4 Subsequent Developments

- 4.1 On 19 March 2015 (i.e. the day after the second investment in the Cell Company was made) Ardonan was made aware at a meeting with the Isle of Man Pensions Regulator, of general concerns relating to the business received by Ardonan from another local pension company. I understand from Ardonan that the regulator stated that it had no evidence of any wrongdoing but simply advised Ardonan to review investments. Ardonan I understand then undertook additional investigatory work at

its own cost into the relevant investment and concluded that the Cell Company was unacceptably high risk for a pension plan and removed it as a permitted investment for the Plan.

- 4.2 Following the completion of this review Ardonan subsequently contacted Mr N on 26 May 2015 to advise him that the funds had been invested in accordance with Mr N's direction. The letter of 26 May 2015 also advised Mr N that:

"Following our most recent review of investments of the Plan, including [the Cell Company], we have concluded that the investment which you have requested we make represents an unacceptably high level of risk.

We have been increasingly concerned at the lack of financial and accounting information available to investors in [the Cell Company], about the nature of its underlying investments, despite our enquiries in this regard and the apparent high risk nature of those investments about which we have been able to obtain information.

In the circumstances we have removed [the Cell Company] from our list of approved investments for the Plan and are no longer able to subscribe for shares in, or accept funds for investments into, [the Cell Company].

The purpose of this letter is to bring our concerns to your attention and to ask for your confirmation that you wish us to take all reasonable steps to seek recovery of your investment from [the Cell Company]. If not, please confirm that you wish to remain invested in [the Cell Company], notwithstanding our concerns about the possible risks associated with the investment.

We strongly recommend that you take independent financial advice from a Financial Adviser regulated by the Financial Conduct Authority who has expertise in offshore pension schemes. A list of such advisers can be found on the FCA's website at <http://www.fsa.gov.uk/register/home.do>. Any such adviser (with appropriate expertise) will be able to provide you with advice on a suitable investment strategy for your pension funds.

Please confirm that you have taken further advice and provide your instructions as soon as possible and in any event no later than 21 days from the date of this letter, by completing and returning the enclosed forms."

- 4.3 Mr N appears to have subsequently contacted both IFA1 and the Introducer about the letter from Ardonan. The Introducer appears, on the documents I have seen, to have given Mr N assurances about the continued appropriateness of the investment.
- 4.4 On 18 August 2015 Ardonan contacted Mr N again about the [Cell Company] investment asking for instructions on whether it should be retained now that it was no longer a permissible investment and sending him a further non-standard investment form to complete.
- 4.5 There then seems to have been further contact between Mr N and Ardonan on 11 May 2016 Ardonan wrote to Mr N as follows:

"[The Cell Company] ("Cell Company")

In accordance with your instructions a request was made for a full redemption of the shares in [the Cell Company] and the subsequent return of monies to your pension fund in Kreston Isle of Man Pension Plan.

The directors of [the Cell Company] have since confirmed that, as per the offering memorandum, they consider the investment to be long term, (which they state as 10 years), and, that redemptions are subject to the discretion of the directors.

In these circumstances they are not minded to exercise the discretion to allow redemption. They have stated that they will not redeem shares before the expiry of the 10 year term on any basis other than payment of pension benefits, death or ill-health.

We recommend that you take independent financial advice from a Financial Adviser regulated by the Financial Conduct Authority prior to providing us with any further instructions."

- 4.6 I understand that Mr N has been unable to redeem his investment and has had difficulty obtaining a valuation of this investment. Mr N is concerned that at best the investment is not suited to his pension plans and he should not have been advised to invest in [Cell Company] having regard to his agreed risk profile. At worst he is concerned that he may possibly have been a victim of some sort of scam. It is not possible on the information available to me to establish whether this is the case but I can understand why Mr N has concerns about whether his investment is suitable for him under the Plan given that it is unregulated and the fact he cannot redeem it for 10 years and the difficulty, I understand, he has had of obtaining information about its value.

5 The Complaint

- 5.1 Mr N has subsequently made a complaint against Ardonan on 5 July 2016. The complaint as originally formulated was broadly that Ardonan owed a general duty of care to Mr N and failed in their duty of care, by:
- 5.1.1 allowing his then "financial adviser" to carry out an activity they were not authorised to do;
 - 5.1.2 failing to establish whether the Plan was appropriate for him;
 - 5.1.3 failing to establish that the investment in [the Cell Company] was appropriate for him; and
 - 5.1.4 failing to protect him from what may potentially turn out to be a pension scam/fraud.
- 5.2 The complaint was rejected by Ardonan in September 2016 on the following grounds:
- 5.2.1 the transfer of his pension benefits to the Plan and the investment in [the Cell Company] was completed at his direction;
 - 5.2.2 it was made clear in all the relevant documentation that Ardonan does not provide any advice with regard to transfers to the Plan or otherwise. The Plan documentation is clear that the responsibility for obtaining investment advice was solely Mr N's. For example the terms and conditions in the application form signed on 14 December 2014 state that Ardonan has no duty to Mr N with regard to investments within the Plan.
 - 5.2.3 In any event it is unclear at this stage whether any loss has been suffered as it will not be known what the value of the investment is in [the Cell Company] until it is redeemed.

- 5.3 Mr N subsequently made a complaint to the Pensions Ombudsman. As part of the complaints process Mr N clarified and expanded certain aspects of his complaint. In particular Mr N contends:
- 5.3.1 The Trustees/Administrators had a duty to make sure that they only allowed properly authorised and regulated financial advisers to arrange transactions with the Plan (both transferring benefits into the scheme and arranging deals in investments deals within the scheme. Mr N believes that the regulated firm involved did not have the appropriate permissions to conduct the business it was engaged in (advising on and arranging deals in investments). Mr N refers to a BBC investigation by the "You and Yours" programme into the advisers involved and the Cell Company in January 2018 which investigated the alleged links between the Introducer that was allegedly cold calling clients and the directors of the Cell Company. Mr N notes that this is the exact process Mr N went through with the same adviser, IFA1. It was also alleged in this case that the financial adviser did not have the appropriate permissions. Mr N is not contending that the Ardonan as trustee/administrator were responsible for the advice but they had a duty of care to protect members from unregulated advice and possible pension scams by not dealing with unauthorised advisers;
- 5.3.2 The Trustee/Administrators did not exercise due skill and care in establishing whether [the Cell Company] was an acceptable investment for the Plan. On the evidence Ardonan did not have any procedures in place to assess whether investments are acceptable for the scheme member and, again, this put member's benefits at risk;
- 5.3.3 The Trustee/Administrators processes were not robust enough in establishing whether the types of investment were appropriate for individual members. The fact that the Plan had a non-standard investment form indicates that the Trustees were aware that some investments may not be appropriate for individual investors. It is noted that the non-standard investment form was not properly completed as the names of the investment and financial adviser were missing. On the second page, of the Investment Policy Statement Ardonan indicate that "*we will use the information provided to help us undertake appropriate oversight of any investment instruction provided to us by your professional adviser. Mr N's investment policy indicated "Medium Risk" defined as "There is some risk to your capital which may go down or up – there is potential for growth over the longer term"*". Mr N does not consider that the description reflects the investment Mr N was investing in. An unregulated offshore cell company would be considered (by most reasonable professional assessments) as a very high risk investment. It is alleged that Ardonan failed to exercise any appropriate oversight by not determining the risks presented by an investment in an unregulated cell company.

6 Ardonan's statutory obligations in relation to investments as Trustee and Administrator of the Plan

- 6.1 In order to consider whether Ardonan acted in breach of any of their duties under the Plan it is first necessary to consider the nature of those duties. In particular whether there were any duties to consider the suitability of [the Cell Company] as an investment under the Retirement Benefit Schemes Act 2000, the Trustee Act 2001 or under trust law generally, or, as argued by Ardonan, the Trustee's only duty was to follow the directions of Mr N in relation to the investment.
- 6.2 The statutory provisions relating to investment by pension schemes on the Isle of Man are set out in the Retirement Benefit Schemes Act 2000. They are similar, but not

identical, to the statutory investment duties imposed on trustees of occupational pension schemes in the UK in the Pensions Act 1995. The Isle of Man is also not subject to the European Pensions Directive (or IORP) as it is not part of the EU. The investment restrictions (including the restriction on the proportion of investments which can be invested in unregulated investments) that apply in the UK and EU accordingly do not apply in the Isle of Man.

- 6.3 A preliminary point to note is that under section 20 of the Retirement Benefits Schemes Act 2000 any provision of any document constituting an authorised scheme shall be void in so far as it would have the effect of exempting the trustee or administrator from liability for any failure to exercise due care and diligence in the discharge of their respective functions in respect of the scheme. The exoneration clause in clause the Trust Deed governing the Plan and any exemptions from liability in the terms and conditions entered into with Ardonan will not, therefore, necessarily be effective in protecting Ardonan if it can be shown that there is a failure to exercise due care and diligence in the discharge of their respective functions in respect of the scheme. It is still necessary, however, to consider what those functions are. Any contractual exclusions also take effect to the provisions of the Misrepresentation and Unfair Contract Terms Act 1980 and any applicable provisions in the Consumer Protection Act 1991 (Part V).
- 6.4 Under the Retirement Benefit Schemes Act 2000 (**RBS Act 2000**) in the Isle of Man (unlike the UK) any person acting as scheme administrator has to be registered with the Financial Services Authority which performs the function of pensions regulator in the Isle of Man. The regulator may also pass regulations specifying practices to be followed by registered scheme administrators in carrying on the affairs of the scheme (section 36(7) of RBS Act 2000).
- 6.5 Under the RBS (Domestic Schemes) (General Administration) Regulations 2000, Regulation 15 the trustees of any scheme (the expression scheme potentially could include both an occupational or personal pension scheme unless it falls within the stated exemptions) are required to secure that there is prepared, maintained and from time to time revised a written statement of the principles governing decisions about investments for the purposes of the scheme including the kind of investments to be held, the balance between the kinds of investment, risk, the expected return on investment and the realisation of investments. Before preparing such a statement the trustees must obtain and consider written advice. There is an exemption, however, from this requirement for personal schemes in which all investments (other than broadly those in policies of insurance, accepted investment schemes where the trustees had no discretion how any of the monies with the insurer or accepted investment scheme) are made in accordance with instructions received from the member in exercise of any powers given by the scheme rules for the member to choose how funds in respect of the member should be invested (Regulation 15(1)(d)). Given the obligation under the Trust Deed and Rules to act on the directions of the member (see below) the Plan does in my view fall within this exemption. Regulation 15, therefore, does not apply to a self-directed scheme like the Plan.
- 6.6 There are, however, other more general investment duties on trustees of certain types of trust which may apply to trustees under the Trustee Act 2001 that are potentially applicable to a personal pension scheme like the Plan. Where certain duties under the Trustee Act 2001 apply (including investment duties) the trustee must exercise due skill and care as in reasonable in the circumstances having regard in particular to any special knowledge or experience he has or holding himself as having or if he acts as a trustee in the course of business or in a profession to any special knowledge or experience it is reasonable to expect of a person acting in the course of that kind of business or

profession. This duty is known as the "duty of care". The duty of care however does not apply if or in so far as it appears from the trust instrument that the duty is not meant to apply (paragraph 7 of Schedule 1 to the Trustee Act 2001).

- 6.7 Under section 3 of the Trustee Act 2001, subject to the provisions of the Act, a trustee may make any kind of investment that he could make if he were absolutely entitled to the assets of the trust. This investment power is in addition to any other investment power under the Plan and is subject to any restriction or exclusion imposed by the trust instrument or any statutory provision.
- 6.8 In exercising any power of investment whether arising under Part 1 of the Trustee Act 2001 or otherwise, a trustee must have regard to the standard investment criteria. A trustee must also from time to time review the investments of the trust and consider whether, having regard to the standard investment criteria, they should be varied. The "standard investment criteria" in relation to a trust are:
 - 6.8.1 the suitability to the trust of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind; and
 - 6.8.2 the need for diversification of investments of the trust, in so far as appropriate to the circumstances of the trust.
- 6.9 Before exercising any power of investment, whether arising under Part 1 of the Trustee Act 2000 or otherwise, the Trustee has to take proper advice about the way having regard to the standard investment criteria, the power should be exercised.

7 Investment Duties under the Trust Deed and Rules

- 7.1 As noted above, however, the Trustees general investment duty under the Trustee Act 2001 is subject to the terms of the Trust Deed and rules governing the Plan. Also the duty of care under the Trustee Act 2001 does not apply if or in so far as it appears from the trust instrument that the duty is not meant to apply (see above).
- 7.2 The investment powers are set out in clause 6.1 of the Trust Deed and referred to also in Rule 15.2 of the Plan Rules. I have set them out in the Appendix to this determination. Broadly under clause 6 of the Trust Deed the Trustees can invest in any manner subject to such guidelines as may be issued from time to time by the Assessor of Taxes. There are certain types of investment which are not permitted by the Assessor and which could prejudice tax approval. Accordingly the Trustee is, in my view, under a duty to ensure that no investment is in breach of the guidelines issued by the Assessor of Taxes or under the general law. Rule 15.2 provides that the permitted investments of the [Plan], the restriction on investments and procedure for such investments are as stated in Clause of the Deed and are otherwise as may be prescribed by overriding law or permitted by the Assessor.
- 7.3 Clause 6.2 of the Trust Deed goes on to provide that the Trustees are required to exercise their investment power under Clause 6.1 in accordance with any direction given by the Member unless to do so would in the opinion of the Trustee be in breach of the provisions of the Scheme. Such direction shall be made with reference to any schedule or list of acceptable investments made available by the scheme administrator from time to time or to any investment fund available from an investment manager appointed in accordance with the Trustee's power to do so under clause 5.4.1.
- 7.4 If the Trustee does not act in accordance with the direction of the member the Trustee will be acting in breach of trust unless the investment is not permitted by guidance issued

by the Assessor of Taxes or the general law or is on a list of non-permitted investments issued by the Trustee from time to time. As noted above the Trustee Act 2001 investment provisions and also any investment duty under the Trust Deed and Rules take effect subject to the provisions of the Trust Deed. The investment function under this type of scheme is in my view limited to ensuring that the Plan does not invest in investments which are not permitted by the Assessor of Taxes and any investments from time to time listed in any list or schedule of non-permitted investments. A duty of care, under the Trustee Act 2001 or otherwise, can only apply in relation to this very limited duty. This conclusion is consistent with the conclusion reached by the UK Pensions Ombudsman in a similar case but not a recent decision of the UK Financial Services Ombudsman. I will discuss both UK cases further in section 10 of this determination.

- 7.5 There is a possible argument that, under clause 6 of the Trust Deed and Rules, the Trustee is under an active duty to consider from time to time whether certain types of investment (e.g. unregulated investments) should be permitted and put in place a list of non-permitted investments. I understand that in certain other Isle of Man schemes there are lists of permitted types of investment including limits on the proportion of unregulated investments at the time the investment direction was given there was no list of permitted investments in place. There is no evidence that the Trustees had a formal list of acceptable investments in place which excluded [the Cell Company] as a permissible investment at the applicable time.
- 7.6 It has been argued quite persuasively by Mr N's representative following the issue of the provisional determination that whether or not the Ardonan as Trustees/ Administrators had a formal list of acceptable investments there must have been a de facto list of acceptable investments (being all the investments the Trustees had ever previously allowed members to invest in). It should be implied that if the Trustees have allowed member to invest in something, than it must be an acceptable investment, otherwise the Trustees would be in breach of trust in allowing it. Up to this point I agree with Mr N's adviser.
- 7.7 Mr N's adviser goes onto argue at some point [the Cell Company] were added to the de facto list of acceptable investments (by virtue of the Trustees allowing the member to invest in it). It is, at this point, it is argued that the Trustees had a duty of care. If a new investment is not already on the list of the de facto list of investments, then the trustees are therefore not making an active investment decision about whether to add the new investment to the list (which is not previously been accepted and therefore not automatically acceptable). Mr N's adviser argues that Ardonan have not provided any evidence to support why the decision was made to add the Cell Company fund to the de facto list of acceptable investments – so did by Mr *asses. As I have been advised by my IFA I would like the risk profile of my investment with them to be "balanced"*.
- 7.8 The Disclaimer below the Risk Profile Box in the Plan application form signed by Mr N indicates that "*Kreston are professional trustees and administrators who ensure that your retirement fund is managed within relevant legislation and in line with your stated investment strategy [Deputy Pensions Ombudsman note – highlighting in red is for emphasis and is not in the original]. We accept our duties and responsibilities as both trustees and administrators in full. We do not however provide or accept liability for any investment, tax or legal advice in relation to your fund.*" Ardonan do therefore again seem to have accepted responsibility when Mr N joined the Plan for ensuring that the investments are made in line with relevant legislation and in line with the stated investment strategy but do not accept liability for any investment advice provided in relation to the fund.

8 Ardonan's duties under the terms and conditions of membership in relation investments

- 8.1 The application for joining the Plan requires the client to complete an "Investment Policy Statement" setting out the Risk Profile of the investor. The form states that *"We will use the information provided to help us undertake appropriate oversight of any investment instruction provided to us by you or your professional adviser."* Ardonan, as trustee and administrator, does therefore appear to have contractually accepted a duty of care to exercise oversight of investment instructions although the form then requires the member to give extensive disclaimers that it is relying on Ardonan in relation to the investment advice. Mr N has, as noted in his submissions, also ticked the medium risk box for his risk profile i.e. *"There is some risk to your capital which may go down as well as up – there is potential for growth over the long term."* On the face of it this does seem to be inconsistent with an investment in an unregulated Isle of Man cell company notwithstanding that Mr N stated in his application to join the Plan that:

"I have read and understood the "Reasons Why Letter" provided by my adviser and confirm that the investment strategy is in line with my risk profile and retirement planning objectives.

I hereby instruct you to invest all of the funds received into my account, net of any reserve you make for fees, into [the Cell Company] Limited, which I am advised gives me a diverse spread of investments in a variety of high growth asset classes. As I have been advised by my IFA I would like the risk profile of my investment with them to be "balanced".

- 8.2 The Disclaimer below the Risk Profile Box in the Plan application form signed by Mr N indicates that *"Kreston are professional trustees and administrators who ensure that your retirement fund is managed within relevant legislation and in line with your stated investment strategy [Deputy Pensions Ombudsman note – highlighting in red is for emphasis and is not in the original]. We accept our duties and responsibilities as both trustees and administrators in full. We do not however provide or accept liability for any investment, tax or legal advice in relation to your fund."* Ardonan do therefore again seem to have accepted responsibility when Mr N joined the Plan for ensuring that the investments are made in line with relevant legislation and in line with the stated investment strategy but do not accept liability for any investment advice provided in relation to the fund.
- 8.3 Having regard to all the above my conclusion is that there is a limited duty on Ardonan (assumed under its terms and conditions of membership) and notwithstanding the extensive disclaimers, to consider whether the proposed investment is in line with the stated investment strategy of the member. The question then arises whether Ardonan is in breach of this duty or there has been maladministration by failing to raise the potential inconsistency between a stated Medium Risk investment strategy/ a "balanced" investment strategy and investing in an unregulated investment. The question then arises whether, before accepting the investment, Ardonan should have sought additional confirmation from Mr N that he wished to invest in an unregulated cell company having regard to the high risk nature of the investment.
- 8.4 I have not been provided any evidence that Ardonan mentioned that the stated investment strategy was potentially inconsistent with an investment in [the Cell Company] when accepting the application. Ardonan did, however, on the evidence I have seen have procedures in place for accepting higher risk unregulated investments as

investors were required to complete and sign non-standard investment forms before such an investment was accepted. The non-standard investment form Mr N signed specifically highlights the associated risks including lack of liquidity, difficulty in obtaining a valuation and accessing the investment Mr N has ticked various boxes in the non-standard investment form acknowledging this. [The Cell Company] was not, as noted in Mr N's adviser's submissions to me, mentioned in the form. However, it is sufficiently clear in my view from the accompanying application form and the other documents that Mr N were instructing Ardonan to invest in [the Cell Company] and the non-standard investment form related to [the Cell Company]. Mr N has also signed the Investors statement at the end of the form that "*I accept and have been advised that non-standard investments may expose the Pension Plan funds to a higher risk than regulated investments and I am aware that the value of the investment could go down as well as up and the full amount of the Pension Plan funds may not be returned.*" This was also countersigned by the Financial Adviser and the box for the name of the Firm and Licence Number was completed [IFA1 (under licence from IFA2)]. Ardonan do, therefore, appear to have taken steps to confirm specifically that Mr N wanted to invest in a high risk unregulated investment having taken advice from his financial adviser as to its suitability.

- 8.5 Having regard to all the above, my conclusion is that ensuring that Mr N signed the non-standard investment form (and this was countersigned by his financial adviser) was sufficient to comply with the limited duty Ardonan had assumed to monitor the investments against the stated investment strategy requested by Mr N.
- 8.6 In relation to Mr N's complaint that Ardonan should have taken steps to check the scope of the financial advisers permission, I do not consider having regard to:
- 8.6.1 the legal obligations on Ardonan as trustee in the Isle of Man;
 - 8.6.2 the lack of any specific regulatory guidance to this effect from the Isle of Man financial services authority in this respect; and
 - 8.6.3 the lack of anything further to put Ardonan on express notice about the scope of the financial adviser's regulatory permissions:

it amounts to maladministration or breach of law for Ardonan steps to fail to check the scope of the financial adviser's permissions. It was reasonable in my view for Ardonan to rely on the investor statement in the Non-Standard Investment and Declaration Form and the countersignature from the financial adviser. Ardonan do appear to have required the financial adviser in the form to provide his licence number. I do not consider the law and existing regulatory guidance in the Isle of Man requires Ardonan to go behind this and check the detailed scope of the financial adviser's detailed permissions.
- 8.7 If Ardonan had failed to obtain this form, in my view is that there would have been a potential claim by Mr N as it would have breached Ardonan's procedures for accepting non-standard unregulated investments.
- 8.8 Also if Ardonan had placed restrictions on non-standard investments (or the percentage of non-standard investments) or at the time the investment was made [the Cell Company] did not appear in any list of permitted investments issued by Ardonan there could potentially have been a breach of its investment duties if it had proceeded to make the investment – it would have acted in breach of trust. The Cell Company was, however, not on the evidence I have seen excluded from the list of permitted

investments (de facto or otherwise) until after the second investment in [the Cell Company] was made. It was only excluded at a later date.

- 8.9 I agree with Ardonan's submissions that as Trustee and administrator it did not have any duty to provide any financial advice to Mr N on the suitability of [the Cell Company] as an investment for Mr N or on the suitability of making a transfer to the Plan. Ardonan was not authorised to provide financial advice by the Financial Services Authority in the Isle of Man and the terms and conditions of their appointment made it clear that they did and were not able to provide such financial advice.

9 UK Decisions on SIPP Providers duties in relation to unregulated investments

- a. Both the UK Ombudsman and the UK Financial Ombudsman Service have issued determinations on a SIPP provider's duty of care when making unregulated investments on behalf of a member. These determinations are not binding on me or the Isle of Man courts but I have nevertheless considered them in reaching my decision in Mr N's complaint to determine whether the analysis may be of assistance.
- b. In the Robert Goodwin (PO 7436) (16 September 2015) complaint the UK Pensions Ombudsman held that Berkeley Burke as trustee and administrator of a SIPP was not under a duty to carry out the level of due diligence suggested by the complainant in relation to an unregulated speculative investment in 2013 Green Oil Plantations which subsequently went into administration.
- c. The UK Pensions Ombudsman noted in relation to the Trustee's duty under the Trustee Act 2000 in the UK (which is identical in all material respects to the Trustee Act 2001 in the Isle of Man) that the statutory duty of care in relation to investments did not apply to Berkeley Burke in relation to investments as the decision on investments was for the member not the Trustee or administrator. Also, in the UK ombudsman case while the trustee could refuse to allow an investment even if permitted by the Revenue there is no requirement on them to do so. The fact that a specific type of investment is available to invest in a SIPP does not confer any suitability on the investment itself.
- d. The UK Pensions Ombudsman also considered in the Goodwin case whether there were any wider due diligence responsibilities applicable to Berkeley Burke by the Financial Conduct Authority in the UK. The UK Ombudsman considered the thematic review of the way they regulated SIPPs and the practices of SIPP operators which imposed increased focus on "Treating Customers Fairly" and gave authorised firms flexibility in deciding what fairness meant to them and how best to meet TCF requirements. The FCA recommended that SIPP providers should:
 - i. monitor and bear some responsibility for the quality and type of business introduced to them;
 - ii. be responsible for the compliance aspects of investments recommended by advisers; and
 - iii. routinely record and review the types and size of investments recommended by advisers; and
 - iv. request copies of suitability reports.
- e. This was aimed at ensuring providers put in place certain controls and systems designed to flag potential instances of poor or unsuitable advice. In this case the UK Pensions Ombudsman concluded that Berkeley Burke had provided sufficient warnings to the

complainant about the unregulated nature of the investment and the need to take financial advice. Furthermore the checks undertaken were compliant with the requirements imposed on them by the UK regulator at the time.

- f. In a subsequent UK Financial Services Ombudsman case also involving Berkeley Burke and an investment in a "green oil" scheme the UK Financial Services Ombudsman reached a different conclusion to the UK Pensions Ombudsman. The UK Financial Services Ombudsman's jurisdiction is not the same as the UK or IoM pension ombudsman's jurisdiction to investigate complaints in that any decision is to be determined by reference to what is fair and reasonable in all the circumstances. In considering what is fair and reasonable in all the circumstances of the case the Ombudsman is required to take into account (1) relevant (a) law and regulations (b) regulator's rules, guidance and standards and codes of practice and (2) (where appropriate) what he considers to have been good industry practice at the time.
- g. In the Berkeley Burke case the UK financial services ombudsman made an award against Berkeley Burke having regard to the higher level principles of business in the UK financial services rule book that a firm must conduct its business with due skill, care and diligence and a firm must pay due regard to the interests of its customers and them fairly and various other specific rules in the the Financial Services Ombudsman to decide what was fair and reasonable. The UK courts concluded that the UK financial services ombudsman had not erred in law in reaching this conclusion. The Court also noted that there were differences in the facts with the ombudsman cases and also differences in the scope of their respective jurisdictions.
- h. I do not find the UK financial ombudsman decision of particular assistance to the current case as my understanding is that there are no directly equivalent higher level principles to Principle 2 (A firm must conduct its business with due skill and diligence) and 6 (a firm must pay due regard to the interests of customers and treat them fairly) under Isle of Man financial services legislation applicable to pension scheme administrators or trustees. There also has not to my knowledge ever been a similar thematic review of SIPP providers duties in the Isle of Man from which any equivalent duty to exercise due skill and care might be derived. We have to look to Isle of Man law, regulatory practice and the documentation governing the Plan to determine what duties Ardonan owed in relation to the acceptance of the transfer and investment.

10 Findings of fact and law

- 10.1 Ardonan owed a limited contractual duty to Mr N to check whether any proposed investment was consistent with his stated Medium Risk/balanced investment strategy. It is difficult to see how an investment in an unregulated Isle of Man cell company can be consistent with that strategy. Ardonan did, however, obtain a signed non-standard investment form from Mr N containing various declarations acknowledging the high level of risk associated with an investing in [the Cell Company]. It was reasonable for Ardonan to rely on the declarations made by Mr N in the signed non-standard investment form and take the statement from Mr N's Financial Adviser implying that it had the necessary authorisations to give advice on the transfer and investments in [the Cell Company] at face value. Ardonan were therefore not in breach of the limited contractual duty they had assumed in relation to investments.
- 10.2 Ardonan as trustee of the Plan was not subject to any investment duties to prepare a statement of investment principles and keep this under review under the RBS 2000 as the Plan is exempt from these requirements as a self directed plan. Ardonan, as

trustee of the Plan, is also not subject to any investment duty to consider suitability of investments or duty of care relating to investments under the Trustee Act 2001 as such a duty or duty of care is inconsistent with the wording of the Trust Deed and rules of the Plan and the Trustee Act 2001 provisions do not apply in those circumstances.

- 10.3 Ardonan's duties in relation to investments under general trust law are very limited under the wording of the Trust Deed. Ardonan is required under the Trust Deed governing the Plan to ensure that any investment is consistent with guidance issued by the Assessor of Taxes in the Isle of Man and comply with any list of permitted investments and, subject to this, to give effect to Mr N's instructions to make the investment in [the Cell Company] once he was accepted as a member. Ardonan were not, however, required to put in place a list of permitted investments under its investment powers under the Trust Deed of the Plan or under an active duty to review that list from time to time. To the extent that there was a de facto list of acceptable investments in place (which I agree there must have been) there was no requirement, as argued by Mr N, for Ardonan to consider specifically whether [the Cell Company] should be a permitted investment in the absence of being put on notice about concerns about its suitability. It was also not in breach of trust to permit investments to be made in non standard/unregulated investments. If Ardonan had failed to follow Mr N's directions to make an investment (which was not excluded as a permitted investment in any list in place from time to time) Ardonan would have been acting in breach of trust.
- 10.4 Ardonan owed no duty in law to establish whether the Plan was appropriate or suitable for Mr N or whether [the Cell Company] was appropriate as an investment for him (other than the very limited duty described in paragraph 10.1 of this determination). Ardonan were not authorised to give financial advice on suitability of investments or on transfers by the Isle of Man financial services authority and the Plan documentation made this very clear.
- 10.5 On the basis of existing Isle of Man legislation and financial services guidance Mr N owed no duty (in the absence of facts to put them on notice of a potential scam) to protect Mr N from a potential scams.
- 10.6 I therefore do not uphold Mr N's complaints against Ardonan.

Ian Greenstreet

Deputy Pensions Ombudsman

11 January 2019

Appendix – Extracts from Certain powers under the Trust Deed and Rules governing the Plan

5 POWERS DUTIES AND DISCRETIONS OF THE TRUSTEE

5.1 The Trustee is granted all powers rights privileges and discretions it may require for the proper implementation of the Scheme, including the performance of all duties imposed by law and may do anything expedient or necessary for the support, maintenance and administration of the Scheme and for the benefit of the Members and those claiming under them (including for the avoidance of doubt, the institution defence compromise and settlement of legal proceedings, whether brought by or against a Member or otherwise)

6 INVESTMENT

6.1 The Trustee may invest all or any part of a Member’s Fund in any manner subject to such guidelines as may be issued from time to time by the Assessor of Income Tax.

6.2 The Trustee shall exercise the power in clause 6.1 in accordance with any directions given by a Member (either directly or through an appointee in accordance with clause 6.7) in relation to that Member’s Fund unless to do so would in the opinion of the Trustee breach the provisions of the Scheme. Such direction by the Member or his appointee shall be made with reference to any schedule or list of acceptable investments made available by the scheme trustee or administrator from time to time, or to any investment fund available from an investment manager appointed in accordance with the Trustee’s power to do so under clause 5.4.1.

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CLAUSE 7 LIABILITY OF TRUSTEE, RECOVERY OF CHARGES, EXPENSES ETC

7.1 Subject to section 20 of the RBSA 2000, the Trustee shall be entitled to all of the indemnities conferred on trustees by law. The Trustee shall not be liable for any acts or omissions not due to its own deliberate bad faith and each Member in respect of whose Members Fund any relevant liability arises shall keep the Trustee indemnified against any loss, liability, obligation, demand, claim, expenses or proceedings whatsoever (together referred to in this Deed as the “Consequences” of the exercise of all the Trustee’s powers and discretions and against the Consequences of any breach of trust or other breach of duty, including in relation to the making of any Unauthorised Payment (as defined in clause 8.3), except to the extent attributable to deliberate bad faith on the part of the Trustee; and the Trustee shall be indemnified to the same extent from the assets of the Scheme attributable to the relevant Member’s Fund(s).

7.2 Without prejudice to the generality of clause 7.1, no Member or any other person shall have any claim right or interest under the Scheme or any claim against the Trustee in connection with the Scheme except under or in accordance with the

provisions of this Deed. The Trustee shall not be liable for any acts or omissions not due to its own wilful neglect or default and, in particular, shall have no responsibility to or in respect of a Member in connection with investments made at the wish, option or direction of that Member or any person authorised to exercise such wish or option or make such direction on the Member's behalf. The Member in respect of whose Fund there has been any loss shall keep the Trustee indemnified against the consequence of the exercise of all of the Trustee's powers and discretions. Any liability of the Trustee shall be limited to the assets of the Scheme attributable to that Member's Fund.

- 7.3 In the professed execution of the trusts powers and discretions, no Trustee shall be liable for any loss to the Scheme arising by reason of any improper investment made in good faith. The Trustee shall not be liable for the negligence or fraud of any agent employed by it although the employment of that agent may not have been strictly necessary or expedient provided the appointment of the agent was made in good faith.
- 7.4 In this clause 7, "Trustee" includes, unless the context otherwise requires, each former trustee of the Scheme and each person who is or was a director, officer or employee or any company which is or was a trustee of the Scheme at any time while he is or was such a director, officer or employee.

Rules

Rule 3 Scheme Administrator

- 3.1 The Scheme Administrator shall be responsible for the management of the Scheme and the discharge of the duties imposed upon the Scheme Administrator by these Rules and by the applicable law (including within limitation the [Income Taxes Act 1989], the RBSA 2000 and the General Administration Regulations.
- 3.2 Any Scheme Administrator must be a person or persons resident in the Isle of Man having responsibility for the management of the Scheme with such approval as may be required by law.

Rule 12.2 - Extract from Transfer in Rule

The Scheme Administrator shall when accepting and applying a transfer payment comply with the requirement of section 10 of the Act and any regulations made thereunder and generally with all the requirements of the Assessor.

RULE 15 Investments and Deposits

15 Investments and deposits

- 15.1 The rights under the Scheme of the Member or any beneficiary are solely to those rights given to them by this Scheme (including these Rules).
- 15.2 The permitted investments of the Scheme, the restriction on investments and procedure for such investments are as stated in Clause 6 of the Deed and are otherwise as may be prescribed by overriding law of permitted by the Assessor.

16. Scheme Rules

- 16.1 The provision of these Rules shall override those of any other documents constituting the Scheme which conflict with or have the effect of changing the meaning of any of the provisions in the Rules or which prejudice the sole purpose as stated in Rule 1.