Final Determination – Mr S v Boal & Co (Pensions) Limited as trustee and manager ("Boal & Co") of The Boal & Co Select Personal Pension Scheme (the "Scheme")

1. Complaint Summary

1.1 The Complaint relates to investments made by Boal & Co (as trustee and manager of the Scheme on Mr S's behalf in structured loan notes under a Personal Investment Management Service Flexible Policy (an insurance policy) (the "**Policy"**) with RL360 (an Isle of Man Insurer) on the instruction of Mr S's appointed financial adviser (for the purposes of the Scheme) a Mr [L] of [a Financial Advisory Firm] (the **Investment Adviser**). The Investment Adviser was also appointed on behalf of Boal & Co as investment adviser for the purposes of the Policy.

1.2 These investments in the structured notes subsequently lost a significant part of their value (about 80% of their value). I understand that they now no longer have any value after the charges that have been levied in relation to the member account were deducted.

1.3 Mr S essentially alleges that:

1.3.1 Boal & Co as trustee and manager of the Scheme owed him a duty of care in relation to the appointment of the Investment Adviser (in particular to check his regulatory status) and also to monitor his activities and to alert Mr S of the high risk status of these investments;

1.3.2 Boal & Co were in breach of this duty of care in that:

1.3.2.1 the Investment Adviser was only regulated for anti-money laundering purposes in his home jurisdiction and not in relation to the giving of investment advice;

1.3.2.2 Boal & Co failed to monitor his activities and warn Mr S earlier of the high risk nature of the investments and/or their loss in value which would have permitted him to take steps to mitigate the loss on these investments;

1.3.3 More generally the investments made in and under the Policy were not consistent with the Trustee's duties in relation to investments under the trust deed or the general law.

1.4 I do not uphold Mr S's complaint for the reasons set out in the determination. In particular:

1.4.1 To the extent that a duty of care was owed in relation to the verification of the Investment Adviser's regulatory status, Boal & Co have satisfied this duty as they took steps to confirm that the Investment Adviser was regulated by a self-regulatory organisation in Switzerland. Boal & Co are not responsible for advising Mr S on the limited nature of protection this provided under Swiss law. In particular the self- regulatory organisation only regulated the activities of the investment Adviser for the purposes of anti-money laundering in Switzerland and did not provide access to an ombudsman service or regulate the Investment Adviser's investment activities. Alternatively this part of the complaint also cannot succeed as it is out of time;

1.4.2 In relation to the complaint about the monitoring of activities of the Investment Adviser in the last 3 or more years (any complaint relating to events before then is out of time) Boal & Co did not:

1.4.2.1 owe a duty to advise Mr S on the high risk nature of the investments (it was reasonable to assume that Mr S's advisers would be providing this advice; Boal had no knowledge of Mr S's attitude to risk or investment strategy and under the contractual terms entered into by Boal & Co and Mr S, it was accepted that Boal & Co were not giving investment advice and Mr S should take is own advice);

1.4.2.2 It was reasonable for Boal & Co to assume that Mr S would be notified of the investment losses by the Investment Manager he had instructed Boal & Co to appoint on his behalf and the Investment Adviser was also provided with copies of the 6 monthly investment reports.

1.4.3 In relation to the complaint about whether the investments made were consistent with the Boal & Co's investment or fiduciary duties under the trust deed and the general law I do not consider that there has been a breach of these duties for the reasons set out in more detail in the determination.

1.4.4 I, therefore, do not uphold Mr S's complaint.

[*Note - The names of the Investment Adviser is redacted as they are not party to the complaint*]

2. Background to Application to Join the Scheme

2.1 Boal & Co is the current and original trustee of the Scheme which is a personal pension scheme regulated by the Isle of Man Financial Services Authority. Boal & Co also acts as registered schemes administrator to the Scheme and is authorised to perform this role by The Isle of Man Financial Services Authority. The Scheme is also approved by the Isle of Man tax authorities as an approved personal pension scheme. The Scheme is subject to Isle of Man law. The Scheme is, I understand, authorised as a domestic scheme under the Retirement Benefit Schemes Act 2000 and the Retirement Benefits Scheme (Domestic Schemes) (General Administration) Regulations 2004 and is open to non Isle of Man residents such as Mr S who was resident in Switzerland at the time he joined.

2.2 The Scheme is governed by a declaration of trust dated 20 May 2008 and an accompanying set of rules. The investment provisions can be found in Clause 6 of the Declaration of Trust. Broadly the investment provisions allow the trustees to invest in any investment as if they were absolutely and beneficially entitled subject to certain limited restrictions in loans and Isle of Man applicable law. It is possible however for Boal & Co (as Trustee) to impose restrictions on the investments that can be made under the Scheme. In particular under clause 6.3 of the Trust Deed "*the choice of range of investments offered to Members from the above permitted list shall be at the sole discretion of the trustees, subject to the overriding requirement that such investments shall comply with the Applicable Law*." I have set out the relevant investment provisions more fully in the Appendix to this Determination.

2.3 Under Rule 3.1 of the Trust Deed and Rules admission of a Scheme member is at the absolute discretion of the Scheme Administrator and shall follow completion

of the application form as prescribed by the Scheme Administrator from time to time. In my view the terms set out in the application form (as prescribed by the Scheme Administrator) are also part of the terms of the trust governing members' rights and obligations under the Scheme. These in turn, among other things, place an obligation on the member to comply with the Rules and the terms and conditions applicable to the activities of the administrator. As noted below, the Application Form also instructs the Trustees and Administrator to appoint a financial adviser for the purposes of the Scheme and the member indemnifies the Trustees and Administrator in relation to investment decisions made by the appointed financial adviser.

2.4 Mr S applied to join the Scheme on 23 September 2013. The following documents would have been provided to Boal & Co at or around this time:

2.4.1 An Application form for the Scheme signed by Mr S on 23 September 2013 at page 6 and on 24 September 2013 a page 5, as witnessed by Mr [L] (the **Pension Application**).;

2.4.2 An application form for the Policy with RL360 Limited ("**RL360**") on behalf of the Trustee and [Mr L] on 24 September 2013 on behalf of his appointed [Investment Adviser]) (the "**Application**"));

2.4.3 An Investor Adviser Appointment dated 27 September 2013 appointing Mr [L] of [Investment Adviser] to act in the capacity as investment adviser of the Policy (**Appointment**); and

2.4.4 A Select Brochure with some general information about the Scheme (the "**Brochure**").

2.5 At the time Mr S applied to join the Scheme he was resident in Switzerland, the [Investment Adviser] was also located in Switzerland. It was stated on page 2 of the Application Form that the [Investment Adviser[was authorised by a regulatory organisation called VQF. The Application Form was also countersigned by the Investment Adviser.

2.6 The application form contains a number of provisions which are potentially relevant to the complaint:

2.6.1 Under paragraph 2 of Section 11 of the Application Form (Terms and Conditions) it was confirmed that:

"*Boal & Co does not carry out investment business or provide investment advice. Any investment transactions to which it is party will not involve the giving of investment advice. The Client acknowledges the need to take such investment advice as may be required from parties other than Boal & Co*."

2.6.2 Under paragraph 3 of section 11 of the Application Form (Client Requests and Disclosure) it was provided, among other things, that:

"*a.* *Boal & Co shall be entitled to act upon the requests of the Client or the Client's Financial Adviser, whether given by word of mouth letter, telephone, facsimile, email or other means;*

b. *Boal & Co shall not be obliged to perform any of the Services or act on any instructions which might in their opinion*

contravene the laws of any jurisdiction in which it is carrying out its Services or be contrary to its policies."

2.6.3 Under paragraph 4 of Section 11 of the Application Form (Indemnity) it was provided among other things that:

"*a. Other than as provided for in Section 5 below, the Client (jointly and severally if more than one) indemnifies and agrees to hold harmless and will keep indemnified and hold Boal & Co harmless and will keep indemnified and hold harmless Boal & Co from all actions, suits, claims, demands, proceedings, liabilities costs and expenses whatsoever which may be taken or made against Boal & Co or the Scheme in respect of the Services*."

2.6.4 Under paragraph 5 of Section 11 of the Application Form (Liability) it is provided that:

"a. Boal & Co shall be liable for the acts, decisions and advice that are made in the performance of the Services. Accordingly, Boal & Co shall hold harmless the Client with respect to any direct losses arising under or in connection with this agreement, including, without limitation, for breach of contract, negligence or other tort, or breach of statutory duty in the performance of the Services.

b. The Client agrees that save for liability for death or personal injury, Boal & Co's entire liability for the losses described in (a) above shall not exceed £10,000. Boal & Co shall not be liable for any other loss whatsoever."

2.6.5 Under paragraph 13 of Section 11 of the Pension Application (Member Declaration) it is provided, among other things, that:

"*a. I apply for membership of the Scheme.*

b. I agree to be bound by the Rules of the Scheme.

……….

f. I request the Trustee and Scheme Administrator to appoint the Financial Adviser detailed in the Application Form, and will not hold the Trustee or Scheme Administrator responsible for any delays in the purchase or sale of any investments. I fully indemnify the Trustee and Scheme Administrator against any claim in respect of any investment decision or directions.

….

h.. I consent to the Trustee and Scheme Administrator providing correspondence and information in relation to my Arrangements under the Scheme to my appointed Financial Advisor."

2.6.6 Under paragraph 2 of the Pension Application Mr [L] of the [Investment Adviser] is appointed as Mr S's financial adviser for the purposes of the Scheme. Under the terms and conditions described above, it was also

confirmed that Boal & Co were authorised to act upon his instructions in relation to investments and the member indemnified the Trustee in respect of any claim in respect of any investment decision or directions. In my view it was therefore very clear that the Trustee did not accept responsibility for the investment decisions of Mr [L].

2.6.7 On the instruction of Mr [L] of the [Investment Adviser], on Mr S's behalf and with the knowledge of Mr S, the Trustee then took out the Policy with R360 which among other things appointed Mr [L] of the [Investment Adviser] as discretionary fund manager for the purposes of the Policy. Under the Policy it was agreed that RL360 could disclose all information relating to the Policy to the Investment Adviser.

2.6.8 The authorised signatories of the Trustee, as policyholder, signed a statement t to the effect that:

"*I understand that Royal London 360 is not responsible for any loss or liability incurred to my policy as a result of advice given, or negligence by, my appointed Investment Adviser. I also understand that Royal London 360 is not responsible for the performance of the investments linked to my policy.*"

2.6.9 The Trustee (as policyholder) also ticked the box confirming:

"*I confirm that my Investment Adviser will be acting on a discretionary basis. Dealing instructions may only be forwarded to Royal London 360 without my prior consultation. My Investment Adviser has confirmed to me that they have the necessary regulatory authorisations in order to perform this role*."

2.6.10 The Investment Adviser countersigned the investment adviser appointment at clause 6 and in accepting the appointment agreed the following terms and conditions:

"*6. The Investment Adviser must maintain such authorisation as is necessary to act as an Investment Adviser under the legislation and regulation. Where the Investment Adviser is carrying on investment business in the United Kingdom, under the terms of the Financial Services and Markets Act 2000, they must have the necessary authorisation for the activity of "Managing Investments*".

2.7 Mr S would have had knowledge of the Policy documents signed by the Trustee in relation to his investments at the time which were entered into with his agreement.

2.8 Mr S should also I understand have received the Brochure about the Scheme which is in less legalistic language. The Brochure (at page 10) states among other things that:

"*Investment management can either be self-directed by the member or delegated to an investment manager. Investment can be made into any of the following asset classes:*

- *Private portfolio bonds, managed bonds and other life assurance policies;*
- *Collective investment funds*

As Select is an "open architecture" scheme, insurance bonds and investment funds can generally be selected from any product provider.

Please note that investment in residential property is not permitted in any circumstances because of HMRC regulations applicable to UK tax relieved funds including QROPS. Loans to members or connected persons are also not permitted.

For the avoidance of doubt Boal & Co (the Trustee and Scheme Administrator) do NOT provide investment advice. Responsibility for investment decisions and investment decisions rests with the member, or the member's appointed investment adviser. The value of investments and income from them can go down as well as up, and may be affected by fluctuations in exchange rates."

2.9 The statement at page 10 of the Brochure as to Boal & Co's role in relation to investments provides a very clear statement as to what investments are permitted, Boal & Co's role in relation to investments and the fact that the Scheme is a self-directed scheme. This is also dealt with again at page 6 of the Brochure in the section on Investment Choice.

3. Investments Made under the Policy

3.1 The documents I have seen indicate that an initial premium under the Policy was made on 13 March 2014 of £95,796.

3.2 An online summary of transactions in the GBP account maintained under the Policy that was produced by RL360 on 5 September 2017 indicates that various sales and purchases of investments (structured notes) were made on the instruction of the Investment Adviser during 13 March 2014 and 5 September 2017.

3.3 A Policy valuation produced by RL360 on 5 September 2017 reveals that the Policy Value on that date was £12,982 and the total premiums paid were £95,796 with withdrawals of £3,285 with a negative balance in the cash account. The policy valuation stated that the policy value allowing for withdrawals was down 83.11% at that stage as a percentage of premiums paid.

3.4 From the copy of the dealing instructions I have seen it would appear that all the dealing instructions came directly from the Investment Adviser to RL360. This which would have been permissible under the Policy given that Mr [L] was the appointed investment adviser for the Policy acting as a discretionary manager on behalf of the policyholder (the Trustee).

3.5 I would observe at this stage that the most significant losses were made on the sale of notes occurring more than 3 years ago. Generally I have limited ability to investigate matters which are the subject of a complaint more than 3 years ago so any claim in relation to the earlier losses is potentially out of time. I will come back to the limitation issue later in the determination.

4. Events on and after August 2017 leading up to the Complaint

4.1 Boal & Co contacted Mr S in late August 2017 to arrange a call and to notify him that unfortunately the value of his investments had fallen significantly as a result of the decisions of his Investment Adviser and that they needed to inform him of his options.

4.2 Following up from the original email Mr S then received a call from a Mr Doyle of Boal & Co on 5 September 2017 notifying him that his Scheme had made losses of over 80%.

4.3 In a follow up email on 5 September 2017 Mr Doyle provided a copy of a recent valuation for the Policy and also a transaction history. Mr Doyle stated in this email, among other things, Mr S that:

> "*At the outset, we would have expected [Mr L] to have provided you with a full advice report detailing the recommended pension product, underlying investment product wrapper and proposed investment strategy for the portfolio (amongst other things) in addition to conducting a risk profile questionnaire with you in order to learn of your attitude to risk in respect of investments. As discussed, it appears that [Mr L] , as your appointed investment adviser, elected to use a high risk investment strategy involving the trading of numerous structured notes. Structured notes are often considered as complex, high risk investment assets and would tend only to be suitable for professional investors. Based on your conversation, you informed me that you do not recall any risk profile ever being agreed with [Mr L] at the start of the process. If a risk profile had been put in place, it is quite likely that the investment strategy employed would be in line with your attitude to risk".*
>
> *In addition, as mentioned over the phone as your appointed financial adviser and investment adviser on the plan, we would be expecting [Mr L] to be conducting regular investment reviews with you to ensure the fund is performing as originally anticipated and is on target to meet pre-set benchmarks etc., however, you have informed me that contact has been minimal and no such review has ever taken place*"

4.4 Mr Doyle explained again that Boal & Co could not provide financial advice but gave him a list of financial advisers in Switzerland he could contact and explained his options (e.g. appoint a new financial adviser, perform a self- directed mandate or surrender the policy. In terms of raising a complaint against Mr [L] and the [Investment Adviser] he would need to find out whether they are regulated in Switzerland and by which regulatory body so that a complaint could be lodged.

4.5 Mr S was later advised by another financial adviser that the structured notes that [Mr L] had invested in were indeed extremely high risk (as there were no caps and the notes tracked emerging markets). Mr S's other advisers have, I understand, described the dealings as atrocious and certainly not in the interest of their clients. Boal & Co have argued that I should not consider third party comments (and are looking at the matter with hindsight). However, I would note that the investments made by the Investment Adviser on Mr S do seem to have lost a very significant amount of money and it is not an understatement to say they have turned out a very unsuccessful investment. Shortly after being contacted by Boal & Co Mr S then sought to contact VQF (as the Investment Adviser's regulator) to make a complaint about the high risk investment strategy made on his behalf. Mr S sought to lodge a complaint in October 2017.

4.6 On 9 November 2017 VQF responded and explained that VQF is in its function as a self-regulatory organisation (SRO) pursuant to the Anti-Money Laundering Act on combating of money laundering and the prevention of the financing of

terrorism in the financial sector, responsible for supervising their members about their compliance concerning their duties in accordance with AMLA. VQF only supervises the [Investment Adviser] in relation to that function. Also that the Investment Adviser is no longer registered for this function with VQF. VQF also noted that;

> " *We thank you for informing us about your problems with Mr [L], however, it must be said that according to our obligation of secrecy, we are not allowed to inform you about any measures that can or will be applied by VQF based on your complaint."*

4.7 Mr S has however received confirmation from VQF that:

> *"We always supervised [the Investment Adviser] as a SRO-member and therefore only about its compliance in accordance with the AMLA."*

4.8 It would therefore appear that [the Investment Adviser] was an SRO member supervised by VQF albeit only for anti-money laundering compliance. I do not profess to have any expertise about the financial regulatory system in Switzerland but it wold appear from the Swiss Regulator's webpages www.finma.ch that FINMA requires companies or individuals wishing to engage in financial market activity to obtain authorisation from FINMA which checks they meet the relevant regulatory requirements. The type of authorisation granted under Swiss financial market legislation involves requirements whose degree of stringency depends on the specific activity concerned. It does seem possible for financial intermediaries to either hold a licence directly or become members of a self -regulatory organisation (SRO) recognised by FINMA (which would include VQF). The role of SROs, such as, VQF does indeed seem to be limited under Swiss financial regulations to compliance with anti-money laundering due diligence. I understand, however, that the Swiss Parliament has recently passed a new Financial Services Act and Financial Institutions Act in 2018 which among other things will strengthen consumer protection including, requiring investment advisers in Switzerland to sign up to a register of advisers, maintain adequate insurance coverage and access to and affiliation to an ombudsman service. These provisions will however not, I understand, come into force until 1 January 2020.

5. The Complaint Against Boal & Co

5.1 Mr S then made a complaint against Boal & Co in relation to an alleged failure by Boal & Co to check that the Investment Adviser was an appropriately authorised adviser and also failure to exercise proper supervision of the Investment Adviser's investment activities and to notify him earlier about the losses. The complaint was first dealt with under Boal & Co's internal disputes resolution procedure.

5.2 Boal & Co did not uphold the complaint various grounds including that:

5.2.1 Mr S had appointed [the Investment Adviser] as his financial adviser and investment adviser in advance as the [Investment Adviser] had introduced Mr S as a client to Boal & Co. Mr S fully indemnified the Trustee and Administrator against any claim in respect of any investment decision or directions

5.2.2 Mr S had consented to Boal & Co providing information directly to the [Investment Adviser];

5.2.3 Boal & Co had made it clear in the application that they did not carry on investment business or provide investment advice which may be required from parties other than Boal & Co;

5.2.4 Mr S had agreed that Boal & Co are entitled to act on the requests of Mr S and his financial adviser. Further Mr S indemnifies Boal & Co against all actions, suits, claims, demands, proceedings, liabilities and expenses;

5.2.5 in the appointment form for RL360 as an investment adviser, it is expressly authorised in section 1 (investment adviser appointment) that all investment decision making had been delegated to the investment adviser. Furthermore this section states that the investment adviser has complete discretionary authority, without consulting the trustee to make all investment decisions relating to the policy;

5.2.6 it was therefore incontrovertible that Mr S was aware of his financial adviser's appointment and that all investment decisions had been validly delegated to the [Investment Adviser]. Boal & Co noted that this is common practice in pensions and offshore policies.

5.3 Boal & Co further submitted in response to the complaint that:

5.3.1 it was clear from the Application and documentation relating to the Scheme that Boal & Co was not responsible for any investments in the Scheme. The responsibility was with the appointed financial adviser.

5.3.2 Mr S had declared he had received independent financial advice from a regulated adviser and the investment had been made under the trust deed and rules.

5.3.3 Boal & Co had requested the relevant authority and authorisation number of the financial adviser in the Pensions Application and was under no obligation to undertake further investigation or due diligence;

5.3.4 Boal & Co had power under the terms of the Scheme to appoint the [Investment Adviser] to act as investment adviser in the Pensions Application on a discretionary basis and did so in accordance with Mr S's instructions. The Appointment allows dealing instructions to be issued to RL360 without consultation with the Trustees;

5.3.5 Boal & Co have not knowingly or deliberately acted in breach of trust or failed to exercise due care and diligence in making the Appointment and therefore have the benefit of the exclusion of liability at clause 12.1 of the Trust Deed.

5.3.6 Boal & Co furthermore pursuant to clause 12.4 of the Trust Deed, as trustee, is not liable for any act or omission of an intermediary.

5.4 Boal & Co concluded in its IDRP response that:

> "*Accordingly, it is clear to us that the investment losses which your pension fund has suffered have been as a sole result of the investment strategy by your appointed investment adviser as approved by you in advance. Boal & Co as trustee and scheme*

administrator of the Scheme has no legal or other obligation to give you investment advice, to take investment decisions or to challenge the investment strategy of the investment adviser and you."

5.5 Mr S was not satisfied with Boal & Co's response and then made a complaint to the Pensions Ombudsman. Mr S recognises in his complaint that Boal & Co were not responsible for providing him with investment advice. Mr S has nevertheless advanced various arguments as to why Boal & Co is still responsible for the losses he has suffered. These are not all set out again here but include essentially that:

5.5.1 Boal & Co owed any duty of care to Mr S to carry out checks to confirm that Mr S's financial adviser was properly regulated at the time of his appointment ;

5.5.2 Boal & Co should have checked that Mr S was indeed a professional investor and had agreed the alleged high risk strategy at the outset and in particular the strategy of having all his money invested in the structured notes;

5.5.3 Boal & Co should have checked the Financial Adviser's track record and other client records at the time of his appointment ;

5.5.4 Boal & Co should have monitored and exercised oversight over the activities of the Financial Adviser during the period from 2013 to 2017;

5.5.5 Boal & Co should have and questioned or notified Mr S at a much earlier stage about the alleged high risk strategy being pursued on his behalf and the losses in the value of his investments. If there had been monitoring and Mr S had been notified earlier the losses suffered may have been reduced.

6. Boal & Co's further response to the Complaint

6.1 Boal & Co have responded to Mr S's complaint in a further letter with extensive supporting documents. I am not going to set out the arguments advanced in full in the determination. However, I will refer to some of the submissions below:

6.1.1 **Boal & Co's actions should not be judged with hindsight** - any opinions given by other financial advisers to Mr S should be viewed as conjecture and the actions of Boal & Co cannot be judged with hindsight. Only facts and circumstances of the relevant time of accepting Mr S as a member of the Scheme and a financial adviser making the investment directions should be considered.

6.1.2 **Limitation Arguments** – certain of the elements of the complaint were out of time as generally the ombudsman cannot investigate events more than 3 year ago unless the complainant could not reasonably have been aware of the events which were the subject of the complaint or the Pensions Ombudsman exercises his discretion to go back further.

6.1.3 **No legal or regulatory duty to investigate the scope of the appointed financial adviser's regulation or permissions** - the

Trustee had no legal or regulatory duty to investigate the scope of the appointed financial adviser's regulation or permissions and was not on notice of potential issues. In these circumstances it was reasonable for the Trustee to rely on the statements made in the contractual documents signed by Mr S and [Mr L] l as Mr S's adviser.

6.1.4 **Steps taken to verify 3VF's credentials** – Even though Boal & Co had no duty to investigate the scope of the appointed advisers regulation or permissions Boal & Co did take steps to verify the credentials of Mr [L] l and his firm [the Investment Adviser] as the appointed financial adviser and investment manager. The adviser form confirms that he was regulated by VQF in Switzerland. This would have been verified on the FINMA website at the time of Mr [L]'s appointment, as VQF is, in turn officially recognised, regulated and supervised by FINMA.

6.1.5 **Lack of sight of investment instructions** – In response to Mr S query as to why Boal & Co did not have sight of the investment instructions, Boal & Co notes that this is because Mr [L] had been given discretionary rights to manage the investment so there was no need to sign any investments;

6.1.6 **No duty to verify financial adviser's track record** – Boal & Co were under no duty to verify Mr [L]'s financial record;

6.1.7 **No duty on Boal & Co to verify advice from Mr [L]** – Boal & Co maintains there is no duty on Boal & Co to independently verify advice obtained from Mr [L] on the basis of the contractual documents signed when Mr S joined the Scheme

6.1.8 **Boal & Co's duties with regard to investments** – Boal & Co only has limited investment duties to Mr S. Boal & Co as trustee has wide power of investment under Clause 6.3 of the Trust Deed, subject only that the investments did not prejudice approval of the Scheme. Boal & Co at all times ensured that its investments did not prejudice approval of the Scheme. Boal & Co created its own investment guidelines in December 2016. Boal & Co took the decision, although they have no duty to do so, to attempt to mitigate the risk of members who may wish to embark on high risk strategies after discussing their options with members. I would note that the guidelines are described as being for adviser use and require the portfolio to be diversified and for the overall structure of the Portfolio to fit with the underlying client's agreed risk profile. The new guidelines do limit the portfolio investments in structured notes to 60%. Boal & Co note that after the investment guidelines were created and signed off by management, these parameters were used to create investment reports. The purpose of the reports was to highlight any current members who did not have investments in line with the suggested guidelines. When the first set of investment reports were created these highlighted the fact that Mr S's scheme was 100% invested in structured notes and that he had also suffered a substantial loss on his original investment.

6.1.9 **Sharing of investment statements** – Boal & Co as policyholder would have received valuations from RL360 every 6 months since

policy commencement as would the investment adviser. This was confirmed by RL360. It is not the practice of Boal & Co to share valuations received from life providers with members. This is because it is the duty of the financial adviser to discuss valuations when they have regular meetings with members and members may already have been given direct access to the online system of the life provider. Mr S had access to the system in question since May 2016 so from that date he would have been able to view details of his policy including current valuation and a full transaction history.

6.1.10 **Trustee's obligations under the Investment Power and application of statutory duty of care** – Boal & Co submit that due to the investments of the Scheme being directed by the member the Trustee do not exercise the power of investment and did not select the investments on behalf of the member, therefore any statutory duty of care in relation to an investment is not applicable. Also Boal & Co submit that as Trustee of a self invested scheme they are not obliged to consider the suitability of investments or to prepare a list of acceptable investments. The Trustee's duty with regards to investments is limited to ensuring that any investments were not excluded under the relevant tax legislation so the approval of the Scheme is not prejudiced.

6.1.11 **Indemnity Protection** – Boal & Co submit that in any event they have under the terms of the contract and the Trust Deed the benefit of the full indemnity and exoneration clause which it can rely on. The Indemnity can only be limited in circumstances where the trustee has failed to exercise due skill and diligence in the exercise of its functions. In this case, the investment function is not exercised by Boal & Co as trustee or scheme administrator. Boal & Co has exercised due care and diligence in the exercise of all applicable functions.

7. Trustee's duties in relation to the appointment of Mr [L] of the [Investment Adviser]

7.1 In relation to the alleged breach of a duty of care in relation to the appointment of Mr [L] , the evidence I have seen shows that Boal & Co were contacted by Mr [L] of the [Investment Adviser] with a request to join the Scheme after Mr [L] had been appointed by Mr S as his financial adviser. I agree with Boal & Co that it is not responsible for that original decision by Mr S to appoint Mr [L] of the [Investment Adviser] as his financial adviser. I also agree with Boal & Co that Mr S (not Boal & Co) was responsible for satisfying himself as to Mr [L]'s general competence to provide him with financial advice. I therefore do not uphold this element of the complaint.

7.2 Mr [L] of the [Investment Adviser] was, then also appointed by Boal & Co (as Trustee) as Mr S's financial adviser in accordance with the instructions of Mr S under the Application Form (see above) and also at the request and with the knowledge of Mr S by the Trustees (in its capacity as policyholder of the Policy) with delegated authority from the Trustee to give RL360 instructions under the Policy in relation to the choice of linked investments in relation to the Policy. Again Boal & Co cannot be held responsible for the appointment of Mr [L] to perform this role as they were acting on instruction of Mr S.

7.3 In relation to Boal & Co's duties (if any) to verify Mr [L] of Investment Adviser's regulatory status, my view is that Boal & Co may have assumed a limited duty to verify that the person that Mr S has instructed them to appoint as the discretionary manager for the purposes of the Policy was regulated in an appropriate jurisdiction as the application form contained a box requesting information on the regulatory status of the adviser. If they had not obtained this information there could have potentially have been a breach. Boal & Co did, however, request the relevant authority and authorisation number in Switzerland of the financial adviser in the Pensions Application which was provided. I also note that a check would have been made by Boal & Co on the VQF website of the registration number. It also does indeed appear from the VQF response that the [Investment Adviser] were regulated by VQF at the relevant time. Mr S has argued that the checks Boal & Co undertook were not sufficiently robust as they did not identify the limited nature of the regulatory functions undertaken by VQF in relation to investments. My view is that the checks built into Boal & Co's system for accepting a Pension Application were sufficient. To the extent that a duty was owed or assumed in relation to confirmation of the regulatory status of the appointed financial adviser it was discharged. It is also not in my view the responsibility of Boal & Co to advise Mr S of the regulatory regime in Switzerland and the fact that under the regulatory system operated by Switzerland at the time it was possible to be regulated by a an SRO for money laundering purposes only.

7.4 In relation to the complaint that Boal & Co should have checked that Mr S was indeed a professional investor and had agreed the alleged high risk strategy and in particular the strategy to have all his money invested in the structured notes, I agree that Boal & Co was not responsible for providing Mr S with investment advice and had no duty to independently verify or check the investment advice or his status. Boal & Co are not able to provide investment advice under their regulatory permissions. Mr S acknowledged in the Application Form that Boal & Co did not carry out investment business or provide investment advice and any investment parties to which it was a party will not involve the giving of investment advice. I therefore do not uphold this element of the complaint.

7.5 In relation to the complaint that Boal & Co should have checked the Investment Adviser's track record and other client records at the time of appointment, I agree with Boal & Co that they owed no duty to do so nor would they have the expertise to assess the Investment Advisers track record. Checking other records at the time of appointment would also have been in breach of the duty of confidentiality Boal & Co owes to other clients. A duty to notify Mr S of issues with the performance of the investment adviser would only arise if they were on specific notice of a particular issue with the adviser e.g. withdrawal of regulatory status, which I understand they were not at the time.

8. Monitoring of Performance of Investments and Notification Obligations on Boal & Co

8.1 In relation to the complaint about the alleged failure to monitor performance of the investments my view is that Boal & Co did not have a duty to do this as under the terms of the Application Form it was clear that they were not able to give investment advice. It is also reasonable for Boal & Co to assume that the Investment Adviser would share copies of the 6 monthly investment statements in the period up to when Mr S had direct online access to RL360s systems from May 2016. I understand from Mr S that this was the first time he had direct

access to the information. To the extent that Mr S was not given regular updates of the performance of the investments by his Investment Adviser I do also consider that Mr S is himself responsible to follow this up with his Investment Adviser.

8.2 I also do not accept that the fact the investments made under the Policy were of a "high risk" nature necessitates Boal & Co to bring these investments to the attention of Mr S given their limited role in relation to investments and their inability to advise on the investments. I agree with Boal & Co that it is reasonable to assume that Mr S's discretionary investment adviser will have agreed a risk profile with him in relation to investments and will have contacted him at regular intervals to ensure that he is kept up to date on the performance of his investments. Boal & Co not party to the investment advice received by Mr S and would not have had any knowledge of Mr S's attitude to risk in relation to investments and/or any knowledge of any other investments (if any) held by Mr S (outside the Scheme) to form a view on how the investments fitted into his overall investment strategy nor did they have regulatory authorisation to perform this role. Members do sometime adopt higher risk investment strategies which can result in loss as well as greater returns if the strategy is successful. The fact that the investments were in structured notes was not sufficient in itself to notify Mr S during a period when such investments were permitted under the Scheme rules.

8.3 I do not consider the fact that there were significant losses on the Policy investments in itself necessitates Boal & Co bringing this to the attention of Mr S (in the absence of other specific reasons). It is reasonable, in my view, to assume that the investment adviser (who will have received the same investment reports) would have brought this to the attention of Mr S. There is some evidence that he did indeed tell Mr S that there had been losses.

8.4 I do consider, however, that Boal & Co does owe a more limited duty to ensure that investments were made in accordance with the Trust Deed and Rules. To the extent that the Trustee have adopted a policy limiting permissible investments that can be made under Clause 6.3 they need to put systems in place to monitor compliance. In the period up to December 2016, the only restrictions on permitting investments were broadly those which would prejudice tax approval. So the duty of Boal & Co to monitor investments was in my view limited to checking that no investments were being made that could prejudice approval. In relation to the period on and after December 2016 when new more restrictive investment guidelines were adopted the duty would extend to ensuring compliance with the new guidelines. I accept that this could not have been done instantly following the adoption of the new Guidelines. Boal & Co did, however, carry out such checks and this identified the fact that the investments being made involved a very high proportion of structured notes in excess of the permitted percentage under the new Guidelines. I am therefore satisfied that Boal & Co discharged this limited monitoring duty.

8.5 I will also for completeness deal with the limitation arguments advanced by Boal & Co. If I had upheld any of the above complaints I agree that it would have been necessary to consider the appropriate limitation periods in relation to each of the complaints. I am generally only able to look at complaints in relation to acts or omissions that are the subject of the complaint occurring up to 3 years before the date the complaint was made if the complainant was unaware of the act or omission. If the complainant was unaware of the act or omission which is

the subject of the complaint then the time limit runs from the date he ought reasonably to have been aware, of the matter. My view is that it was reasonable for Boal & Co to assume that the investment reports would have been shared at least once a year by the Investment Adviser (arguably every 6 months). The maximum period I could look back in relation to complaints about the investment losses (if I had upheld them) would have been between 3 (possibly up to 4 years). From May 2016 onwards Mr S also had direct access to RL360s online systems.

8.6 I would also note that although clause 12 of the Trust Deed does contain an exclusion clause from trustee or administrator liability this does not cover any failure to exercise due care and skill in the discharge of their respective functions in respect of the Scheme. It is also not possible as a matter of law under section 20 of the Retirement Benefits Schemes Act 2000, to exclude trustees and administrators from liability for any failure to exercise due skill and care in the performance of their respective functions. So if I had found there had been a breach of duty (which I have not) the exoneration clause would have been ineffective to protect Boal & Co.

8.7 In a supplementary submission Mr S has states that had he understood Boal & Co's limited role in relation to governance of investment decisions when he completed the forms he would have been more cautious in his investment decisions. Mr S also notes that the Investment Adviser said how credible Boal & Co were and would have ensured against malpractice. Whatever Mr S may have been told about Boal & Co's governance role by the Investment Adviser, in my view the role of Boal & Co in relation to investment decisions was made sufficiently clear in the Pension Application and accompanying documentation including the Brochure.

8.8 Mr S has also questioned in his response to the provisional determination whether Boal & Co should have alerted him to the fact the Investment Adviser had invested his fund in structured notes without an adequate cash reserve. Again I consider that Boal & Co would not have had a duty to notify this. Effectively if they had they would have been straying into the role of giving financial advice which would be outside the terms of their authorisation and it was agreed they were not providing under the Application Form.

9. The Trustee's investment duties in relation to the investments as Trustee and Administrator

9.1 I finally need to consider whether Boal & Co are in breach of any general investment duties under Isle of Man law or the terms of the trust deed governing the Scheme. Boal & Co have argued in their submissions that *due to the investments of the Scheme being directed by the member the Trustee do not exercise the power of investment and did not select the investments on behalf of the member, therefore any statutory duty of care in relation to an investment is not applicable. Also Boal & Co submit that as Trustees of a self invested scheme they are not obliged to consider the suitability of investments or to prepare a list of acceptable investments. The Trustees duty with regards to investments is limited to ensuring that any investments were not excluded under the relevant tax legislation so the approval of the Scheme is not prejudiced.*

9.2 I have considered this argument carefully as this type of issue is of general relevance to my jurisdiction as there are many self-directed pension schemes in the Isle of Man. I have concluded that having regard to the term of the Scheme (see below) Boal & Co are broadly correct. However, Boal & Co do owe a limited duty to Mr S under the trust deed and trust law generally in relation to its role in determining the permissible investments under the Scheme and also monitoring compliance with its lists of permissible investments from time to time (see above). To understand why I have reached this conclusion it is necessary to analyse the investment duties which can be owed by Trustees under Isle of Man law which could potentially include duties under:

9.2.1 the Retirement Benefits Schemes Act 2000 (which is the main statute under which Isle of Man occupational pension schemes and personal pension schemes are regulated by the Financial Services Authority);

9.2.2 The Trustee Act 2001 (to the extent it has not been excluded and is not inconsistent with the terms of the Scheme); and

9.2.3 the terms of the trust and Trust law generally.

9.3 I agree with Boal & Co that the Scheme does fall within the relevant exemption for self-directed schemes. The exemption can be found at Regulation 15(1)(c) and (d) of the Retirement Benefits Schemes (Domestic Schemes) (General Administration) Regulations 2004. The requirement to prepare a statement of investment principles and have regard to suitability and diversification requirements under the Retirement Benefits Schemes Act 2000 do not apply to a self-directed scheme.

9.4 It is a more difficult legal question whether a statutory "duty of care" could potentially arise under the Trustee Act 2001 in relation to investments. This requires some detailed legal analysis.

9.5 The Trustee Act 2001 (like the Trustee Act 2000 Act in the UK on which it was modelled) was introduced primarily to solve problems faced by many private trusts and charities that had restrictive investment powers, which were no longer appropriate in a modern investment environment. Trusts in the Isle of Man now have wide investment powers by virtue of the Trustee Act 2001, in addition to any investment powers contained in the trust deed.

9.6 The Trustee Act 2001 also introduced a new statutory "duty of care" (which applies to the exercise of the investment power and other powers conferred by the Trustee Act 2001) to sit alongside common law trustee duties and responsibilities. There is a specific exemption for occupational pension schemes but not for trust based personal pension schemes like the Scheme. If the duty of care applies broadly in exercising any power of investment whether under the Trustee Act 2001 or otherwise, the Trustee must (subject to any restriction or contrary provision imposed by the trust deed) also have regard to the "standard investment criteria" (see section 4(1) and section 6(1)(b)) when exercising an investment power . The standard investment criteria in relation to a trust are:

9.6.1 The suitability to the trust of the investments of the same kind as any particular investment proposed to be made or retained and of the particular investment as an investment of that kind; and

9.6.2 The need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust.

9.7 The 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 (clause 4(2) of the Trustee Act 2001).

9.8 Before exercising a power of investment or when reviewing a power of investment or when reviewing the investments of the trust the trustee must obtain and consider proper advice unless he reasonably concludes that in all the circumstances it is unnecessary or inappropriate to do so.

9.9 The explanatory notes for the original UK version of the Trustee Act 2000 (which is to all intents and purposes identical to the Trustee Act 2001 adopted in the Isle of Man) states:

"The duty is a default provision. It may be excluded or modified by the terms of the trust. The new duty will apply to the manner of the exercise by trustees of a discretionary power. It will not apply to a decision by the trustees as to whether to exercise that discretionary power in the first place"

9.10 Any duty of care under the Trustee Act 2001 can only arise, as noted above, to the extent it relates to the exercise of any investment power by the trustee. The duty of care also *does not apply insofar 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).

9.11 It is therefore necessary to examine the provisions of the Trust Deed in detail to establish whether the Trustees are indeed exercising any investment power and, if so, whether it appears from the trust instrument that the duty is not meant to apply to determine whether it is capable of applying in relation to the Scheme. I will consider this issue further in section 10 of the determination as the analysis is quite complicated.

9.12 The final source of obligations in relation to investments can be found in trust law generally. Generally in relation to the exercise of investment powers the trustees have to exercise them in a way which is in the best interests of members which in the context of an investment power is generally regarded as the best financial interests of the member having regard to the level of risk in the context of the overall portfolio. Various trust law cases in the UK (Which would be persuasive authority in the Isle of Man) have held more recently that acting in the best interests of the members is often used in a way which is short-hand for the more general trust law principle that trustees must exercise their powers in a way which promotes the purposes of a trust. In the context of a money purchase pension scheme this would in my view be to exercise their powers with the purpose of building up a sufficient pot of money to provide pension and lump sum benefits on retirement.

10 Have the Trustees acted consistently with their investment duties under the trust deed and/or the Trustee Act 2001?

10.1 I will now consider in more detail whether Boal & Co is correct that, in their analysis of their investment duties (as set out in section 9.1 of the determination).

10.2 The first point I would note is that under Clause 3.6 of the Trust Deed (perhaps surprisingly for a self-directed scheme) it is provided that *the provisions of the Trustee Act 2001 shall apply to the trustees in so far as it applies to pension trustees*. This, however, does not take us much further as the Trustee Act 2001 only applies to some (and not all) pension trustees and the statutory "duty of care" does not apply to pension trustees where it appears from the trust deed that it is not intended to do so. It is therefore necessary to look at the investment provisions themselves at Clause 6.3 to see is the duty of care applies or has been effectively excluded.

10.3 It is common in my experience to find in self-directed investment schemes that express provisions are written into the investment power in the trust deed and rules requiring the trustees to act on the instructions of the member and/or the member's appointed investment adviser and, giving the trustees no discretion in relation to the permitted investments specified under the investment power. At first examination this is not what clause 6.3 is doing. The first paragraph of Clause 6.3 gives the Trustee a wide ranging investment power permitting them to invest in anything a beneficial owner could invest in subject to the Applicable Requirements (which include various requirements of Isle of Man law such as not to make investments that prejudice tax approval). This is a typically worded investment power you would find in many other trusts where the trustees have a general wide ranging power to decide what investments to make on behalf of the beneficiaries under the trust.

10.4 I consider, however, that the addition of the words in the second paragraph of clause 6.3:

> *"The choice of the range of investments offered to Members from the above permitted list shall be at the sole discretion of the trustees, subject to the overriding requirement that the investments shall comply with the Applicable Legislation."; and*

also the provisions contained in the Application Form requiring the Trustee to appoint the financial adviser to act on his behalf and permitting them to accept instructions in relation to investments on his behalf, achieves a similar result. These words effectively give the Trustee a wide ranging discretion to offer member's a choice from the permitted list of investments (which at its widest include all the investments permitted under the Clause 6.3 or a more restricted list) and also give the Trustees authority to act on the instructions of the member's financial adviser in relation to investment choices in respect of investments. If a member is given a choice from a range of permitted investments by implication the Trustee must act on that choice or direction in relation to the investment. There is no residual discretion once the choice of the range of investments offered to Members has been determined.

10.5 Accordingly to the extent that the Trustee is required to act on the instruction of the member or his appointed adviser (under clause 6.3 and the Application Form) a statutory duty of care does not arise under the Trustee Act 2001 (as there is no exercise of the power by the Trustee on which the statutory duty can bite) or alternatively if, as a matter of law there is still an exercise of the power of the investment, the provisions of the trust deed are not consistent with the imposition of the statutory duty of care under the Trustee Act 2001. If the Trustee has to act on instructions they cannot consider suitability or

diversification requirements in relation to the choice of the particular investment (*and accordingly are excluded under paragraph 7 of Schedule 1 to the Trustee Act 2001*). In this connection I would note that, while the decisions of the UK Pensions Ombudsman are not binding in any way on me, the above analysis is consistent with the approach taken by the UK Pensions Ombudsman where he has held in a number of complaints that a duty of care under the UK Trustee Act 2000 did not arise in the case of a self-directed scheme.[1] I therefore agree with Boal & Co that no statutory duty of care and no requirement to consider the suitability and diversification of investments arises by virtue of the Trustee Act 2001.

10.6 As discussed previously the Trustee does still in my view have a limited residual trust law duty under clause 6.3 as it has discretion to determine the permitted range of investments the member can choose from the universe of permitted investments under clause 6.3 (which is broadly every type of investment a beneficial owner can invest in other than those not permitted under the Applicable Laws). However, again I do not consider that the exercise of a discretion (or failure to exercise the discretion) amounts to an exercise of a power of investment for the purposes of the Trustee Act 2001 to which the statutory duty of care can apply. The Trustees are not exercising a power of investment when making a decision from time to time on the range of permitted investments but setting out the limits on the investment choices available to all the members of the Scheme (including Mr S) under the Scheme. They are circumscribing the scope of the choices that can be made under the investment power.

10.7 It is still necessary to consider whether the original decision to offer an "open architecture scheme" (see page 10 of the Brochure) and to permit members of the Scheme (which is a multi-member scheme) to invest in any private portfolio bonds, investment bonds and other life assurance policies and collective investment funds (see page 10 of the Brochure) is consistent with the Trustee's general fiduciary duties in relation to the Scheme. In the context of an investment power in a self-directed money purchase scheme where the member has the benefit of investment advice or appoints a financial adviser to make investment decisions for him, allowing a wide range

---

[1] See - Mr Michael Beasley P-5670 – 30 March 2015; Mr Robert Goodwin PO -7436 16 September 2015 and Mrs Y PO 8922 12 July 2016. All these cases related to investment in an unregulated palm oil scheme by a SIPP and the question of the due diligence (if any) that it was argued should have been carried out by the UK based SIPP provider in relation to unregulated investments chosen by the member. The cases are not quite on all fours with the current complaint I am considering but all of the cases concluded that a SIPP provider who was required to act on member instructions did not owe any duty of care under the UK Trustee Act 2000 (which is identical to the Trustee Act 2001 in the Isle of Man). For completeness I should mention financial services ombudsman in the UK has held that in certain circumstances a SIPP provider owes a duty under UK financial services legislation to carry out due diligence on an unregulated investment. The reasoning in these decisions were confirmed in the UK in the UK case of Berkeley Burke SIPP Administration Ltd V Financial Ombudsman Service and the ombudsman cases distinguished on the basis that the legislative framework was not the same when considering complaints to the UK financial ombudsman. The financial services legislation in the Isle of Man differs significantly from UK financial services legislation and I do not consider that the reasoning in Berkeley Burke is of any assistance in relation to the current complaint.

of investments, gives the member maximum scope for choosing investments which meets his agreed investment profile. It is very common for self-directed schemes to offer a very wide range of investment choices – many other full self-directed schemes allow investment in virtually any investment. I do not consider the original decision to allow members of a multi-member scheme (including Mr S) to invest broadly in any investments (including investments of varying degrees of risk) with no restrictions other than compliance with the Applicable Legislation is in breach of the Trustee's fiduciary duties in relation to their limited discretionary power under clause 6.3. I do consider however that that Boal & Co has a more limited duty to take steps to ensure that investments were made in accordance with the permitted investments under clause 6.3 from time to time. This is not an exercise of an investment power by Boal & Co as such but ensuring compliance with the rules of the Scheme (i.e. investments are only made in accordance with the terms of the investment power).

10.8 The later decision by Boal & Co as Trustee to introduce investment guidelines in December 2016 for appointed advisers also is in my view within the range of what reasonable trustees of a self-directed scheme could have adopted acting consistently with their fiduciary duties under trust law. Having made that decision the Trustee would then going forward in my view be under an ongoing obligation to monitor the investment choices made by member to ensure compliance with the revised Investment Guidelines by the appointed advisers and alert members/investment advisers in the case of any non-compliance. The Trustee does however appear to have then taken steps to check member portfolios against the new investment guidelines and notified Mr S of the breach of the new guidelines. The time taken to review all members' portfolios following the introduction of the new investment guidelines does not seem to be unreasonable. I do not consider the period taken to notify Mr S of the breach of the new investment guidelines is in breach of any duty to monitor compliance with the new policy (which in my view must have arisen) following the decision to adopt the policy.

10.9 My conclusion, therefore, is that Boal & Co (as trustee) was not in breach of their investment duties under the trust deed or their fiduciary duties in relation to the exercise of their discretion to determine the range of permissible investments under Clause 6.3 of the Trust Deed or checking that investments were made in accordance with the permissible range of investments.

10.10 I do have considerable sympathy for Mr S in relation to the investment losses he has suffered as a result of decisions made on his behalf by his Investment Adviser which I understand were not consistent with Mr S's attitude to risk. However, I do not consider that Boal & Co is responsible for those losses.

Ian Greenstreet

Pensions Ombudsman

31 May 2019

Appendix 1 – Extracts from the Trust Deed and Rules

3.6 The provisions of the Trustee Act 2001 shall apply to the trustees in so far as it applies to pension trustees.

……………………………………………………………..

6 **Scheme Assets and Investments**

6.1 General

The contributions paid to the trustees in accordance with or for the purposes of the Scheme and all investments for the time being representing the same and all income thereon and all moneys derived therefrom shall constitute a fund (hereinafter called "the Fund") vested in the trustees upon irrevocable trust to hold and apply and dispose of the same in accordance with the Scheme. The Members may not withdraw monies from the Fund or may not receive income from the Fund otherwise than for the proper payment of benefits under the Scheme at the time provided by the Rules.

6.2 **Appointment of Investment Manager**

The trustees shall have power to appoint and remove an investment manager (whether being a company or an individual) to the Scheme on such terms as to remuneration or otherwise as shall from time to time be agreed between the trustees and such investment manager. Notwithstanding anything to the contrary in the Trust Deed and the Rules such investment manager may have such powers and duties in relation to the investment and change of investment of the assets for the time being of the Scheme in accordance with the provisions of Clause 6 hereof as the trustees shall think fit and in particular and without prejudice to the generality of the foregoing such investment manager if it shall be a company may be empowered to hold any such investment in its own name or the name of its nominee.

6.3 **Permitted Investments**

The trustees may retain in any bank account such moneys as the trustees may consider proper and subject thereto shall have power to invest all moneys coming into the trustees' hands on account of the Scheme and to transpose and vary any such investments in any forms of investment whether or not involving liability or producing income and whether or not authorised by law for the investment of trust moneys as if the trustees were absolutely and beneficially entitled thereto. In particular and without prejudice to the generality of the foregoing the trustees may invest any part of the Fund:-

(a) In deferred or immediate annuity policies retirement or sinking fund contracts or any other assurance policies effected with any Approved Insurer as the trustees may think fit on terms that all sums payable under such contracts or policies shall when received by the trustees be held by them upon trust for the purposes of the Scheme; or

(b) By placing the same on deposit or current account with any bank or building society at such rate of interest (if any) and upon such terms as the trustees shall think fit.

The choice of the range of investments offered to Members from the above permitted list shall be at the sole discretion of the trustees, subject to the

overriding requirement that the investments shall comply with the Applicable Legislation.

6.4 Prohibited Investments

The Scheme's assets may not be used to provide loans to Members or to any person connected with a Member. No loan from any source made to an individual who is a Member of the Scheme may in any way affect the return on the investments representations the Member's interest in the Scheme.

6.5 Connected Transactions

The Scheme is prohibited from entering into any investment transaction with a Member or any person connected with a Member.

6.6 For the purpose of Clauses 6.4 and 6.5, a person is connected with a Member if that person falls within the definition of "Connected Persons" in Section 119C of the Income Tax Act 1970. The duty of ensuring that the transaction is not one with a connected person is placed on the Administrator.

6.7 Any monies payable to the trustees which cannot be passed on to the Member or other person entitled under the Rules shall be held on deposit by the trustees.

……………………………………………

12. **Exclusion of liability and indemnity**

12.1 The trustee shall not be liable for any breach of trust, whether committed or omitted by any person, except that the trustees shall be liable:

12.1.1 in respect of any breach knowingly and deliberately committed by them;

12.1.2 for any failure to exercise due care and diligence in the discharge of their respective functions in respect of the Scheme. [*Ombudsman Note it is not possible in any event for Trustees or administrator to exclude any liability for failure to exercise due care and skill in the discharge of their functions as a consequence of section 20 of the Retirement Benefit Schemes Act 2000*]

12.2 ………..;

12.3 …………;

12.4 The trustees shall not be liable for any act or omission of an intermediary.

…………………………………………………………………………………..