Final Pension Ombudsman Determination – Mr S v RL360 (as issued on 12 July 2019)

Summary of Determination

Mr S has made a complaint against RL360 (an Isle of Man based and Financial Service Authority authorised insurance company) (**RL360)** in connection with two linked investments made under a RL360 insurance policy taken out by Bourse Pension Trustee Limited (the "**Trustee**") in its capacity as trustee of his pension scheme (the Bourse Retirement Trusts Scheme) (the **Scheme**), on Mr S's behalf, in the New Earth Recycling and Renewables collective investment fund (**NERR**). The NERR was a "high risk" collective investment fund only open to "specialist investors". The investments made in NERR under the RL360 policy on Mr S's behalf comprised a sum of £35,000 made in NERR on 2 May 2012 and a sum of £20,000 on 14 May 2012).

NERR has subsequently gone into administration and then into liquidation in or around June 2016. The investments in NERR no longer have any value and the recovery in the liquidation for creditors is minimal.

Mr S alleges that:

(a) he has sustained injustice in consequence of maladministration in connection with an action by RL360 (as a person responsible for management of the scheme); and/or

(b) RL360 is in breach of law,

by failing, as required under the Collective Investment Schemes (Specialist Fund) Regulations 2010 (the **Specialist Funds Regulations**), to provide the necessary certification (referred to in paragraph (2) of Part 2 certification of Schedule 6 to the Specialist Funds Regulations) without which the investment in NERR should not have been made by the NERR scheme administrator. In particular a failure to ensure that

(1) RL360 had procedures and controls in place to obtain the required client declarations from the Trustee; and

(2) that no investment in this type of fund is made without a client declaration being obtained from relevant policyholders; and/or

failing to obtain the client declarations from the policyholders.

It is further alleged that the failure to provide the relevant Part 2 (paragraph 2) certification and to operate appropriate procedures to obtain the relevant client declarations from the Trustee as policyholder has resulted in loss to Mr S as a member of the Scheme. In particular that if RL360 had sought the necessary client declarations the investment could not been made in NERR and Mr S would not have lost the value of the investments. If the Trustee been asked by RL360 for the relevant certification (which it is alleged it was not) it would not have been able to provide them given the size of the investment (below US 100,000 dollars) and arguably would also have needed to go back directly to Mr S to confirm that he was aware of the investment (which I understand he was not).

It has been argued by RL360 on various grounds that I do not have jurisdiction to investigate and determine the complaint including that:

(a) the complaint is out of time;

(b) the complaint relates to no breach of law by RL360 but by an alleged breach by the NERR administrator;

(c) I have no power to investigate the complaint as it relates to a pension scheme governed by Guernsey trusts; and

(d) RL360 is not a person responsible for the management of the scheme for the purposes of my jurisdiction.

It has been agreed previously by the parties that I will determine the jurisdictional issues as a preliminary issue. It has not, in fact, been possible to determine the preliminary jurisdictional issue without analysing the factual background and certain elements of the complaint in detail. Also as the complaint raises legal issues which are of general relevance to the exercise of my jurisdiction going forward I have looked at relevant statute and case law in considerable depth.

In relation to:

(1) the first issue, my view is that the complaint is not out of time for the reasons set out more fully in the determination;

(2) The second issue, it can be argued that there has been maladministration and/or an implied breach of contract by RL360 which has arguably resulted in loss to Mr S;

(3) the third issue, the fact that the trusts of the pension scheme is governed by Guernsey law and has Guernsey trusts does not preclude me from investigating the complaint given it relates to an insurer operating out of and regulated in the Isle of Man and the insurance contract is governed and should be construed in accordance with Isle of Man law and provides that the parties submit to the exclusive jurisdiction of the Isle of Man courts in relation to all disputes concerning the Policy. There is sufficient connection with the Isle of Man for the Pensions Ombudsman to have jurisdiction if RL360 can be characterised as an administrator in relation to the act complained of;

(4) the fourth issue, complaints against or disputes with insurers such as RL360 can fall within my jurisdiction (in circumstances where the Isle of Man financial services compensation scheme cannot investigate them) as long as the perform administrative functions in relation to the scheme or, following an extension to the Pension Ombudsman's jurisdiction, even an individual act of administration relating to the scheme (Section 146(4A) of the PSA 93). In this case however the act complained can be better characterised as relating to the financing of the scheme and not the administration of the scheme. If I had reached the opposite conclusion and found that the alleged failure to obtain the relevant client declarations was an act of administration the alleged failure is also not sufficiently closely connected with the Scheme for the Pensions Ombudsman to have jurisdiction. Accordingly am unable to determine the complaint on either basis.

Background to the Complaint against RL360

Mr S is a member of Scheme. The Scheme is a trust based pension scheme established in the Bailwick of Guernsey under Guernsey trusts (subject to Guernsey law) and approved by the tax authorities in Guernsey. It is open to residents and non-residents of Guernsey. At the time Mr S joined the Scheme he was, I understand, living in Cyprus but he has subsequently moved to the UK.

The Trustee is also a Guernsey based company. The Trustee has powers under the trusts of the Scheme to offer investment options on behalf of its members under the terms of the trust deed. The Trustees have invested Mr S's contributions in linked investments under an insurance policy issued by RL360.

The insurance policy with RL360 (an Isle of Man authorised insurer under the Isle of Man Insurance Act 2008 operating out of the Isle of Man) is described as a Personal Investment Management Service Policy. I have been provided with a copy of the Policy terms and the Policy Schedule. The Governing Law provisions of the Policy provide that the Policy will be governed by and construed in accordance with Isle of Man law and the Isle of Man Courts will have exclusive jurisdiction in relation to all disputes concerning the Policy.

The RL360 policy is what is described in documentation as I have seen as an "open architecture" policy. I understand this means there is scope under the policy for the policyholder to instruct RL360 to invest in a very wide range of linked investments. The accompanying Guide to Investments states that this may include investments in "experienced, professional, qualified and sophisticated investor funds". The guide goes on to say that

> "Where we make such funds available you will usually be required to complete further documentation prior to any dealing instructions being required."

On the Application Form (Section 8) signed by Mr S there is a paragraph dealing with investments in Experienced, Professional, Qualified or Sophisticated Investment funds.

> "Due to regulatory restrictions (external to RL360), because of the extremely high risk associated with them and the relative lack of regulation or supervision, certain funds are only available to "experienced", "sophisticated." or "professional" investors who are able to completely understand the implications of investing in such assets and can stand the entire loss of the investment to ensure that potential investors meet the necessary regulatory criteria and fully understand the nature and risks associated with such an investment Royal London 360 will require the Policyholder(s) to sign the funds application form making the appropriate declaration to confirm they qualify and meet the required standards for that fund. The declaration must be obtained prior to the purchase transaction being placed and Royal London 360 reserves the right entirely at its own discretion, to decline to invest in a particular fund without providing any explanation for its rationale."

The Guide to investments issued to potential investors therefore flags the fact that that additional documentation will be required when investing in sophisticated investor funds. The declaration in the Policy terms also demonstrates that RL360 was cognisant of the requirements in the Specialist Funds Regulations that it is required to sign a certification before an investment can be made in a specialist fund and that it is only able to do this if it has first obtained a declaration from the policyholder. If it can be demonstrated that RL360 failed to do either or both of these two things (as I understand has been alleged) this potentially could amount to maladministration and/or breach of an implied term of the policy to administer the Scheme in accordance with Isle of Man law. The fact that as ben argued by RL360 that the responsibility for obtaining any declaration from RL360 under the Specialist Funds Regulations is on the fund administrator does not mean that an allegation of maladministration or breach of law could not be made against RL360 if RL360 is an administrator for the purposes of my jurisdiction.

There is also an ability under the RL360 policy to appoint an investment adviser for the purposes of the policy in the Application Form. My understanding is also that a Mr O'Shea (of Alexander Beard) who was based in Cyprus was appointed as the investment adviser for the purposes of the policy. I have been provided with a copy of the signed appointment letter dated 19 February 2010 relating to Mr O'Shea signed by Mr S which states among other things:

"I/We authorise the investment adviser to give instruction to the Royal London 360 Insurance Company (the Company) on a discretionary basis on my/our behalf in relation to the investments to which my/our portfolio is to be linked. I/We have satisfied myself/ourselves that the investment adviser is authorised where relevant to provide instruction on a discretionary basis. No other parties shall be permitted to give investment instructions to the Company.

I/We understand that the Company will not be responsible for any loss or liability caused to the portfolio resulting from advice given by the investment adviser or negligence of the investment adviser or for the investment return produced within the portfolio.

I/We undertake to indemnify the Company to the extent of any loss howsoever arising suffered by the Company in respect of this appointment agreement.

I/We confirm that all communications in relation to investment instructions should be directed to the investment adviser."

In the current case the alleged loss arises not as a result of acting on instructions of the investment adviser but by the alleged failure by RL360 to provide the necessary certifications to the fund administrator to enable the investment to be made under the Specialist Funds Regulations. I would also note that given the policyholder was the Trustee it should have been the Trustee signing the investment adviser appointment and **not** Mr S personally who signed the policy (as appears to have happened in this case). It does however appear from the way the policy was set up that the Trustee was not involved in giving any direct instructions to RL360. These all came from Mr O'Shea on Mr S's behalf as appointed discretionary manager without consulting Mr S at the time they were made. Legally this does not quite work as the Trustee was the policyholder so it should have been the Trustee, not Mr S, appointing Mr O'Shea. I am not convinced however that anything turns on this defect in the policy documentation.

On the evidence I have seen that Mr O'Shea did given instructions to RL360, on Mr S's behalf (Mr S alleges this was without his knowledge) to make two investments in the NERR. There was a dealing instruction to RL360 dated 19 January 2012 which was subsequently provided to Mr S relating to the first investment of £35,000. RL360 have not provided any further documentation relating to Mr T's further investment of £20,000 on 14 May 2012 but it would appear that a second investment was made in NERR on that date following receipt of an instruction from Mr O'Shea.

I have not had sight of any other documentation relating to the two investments in NERR. I have not been provided by RL360 with any signed fund investment application form or most importantly any certifications signed by or on behalf of the Trustee or Mr S or RL360 without which the investment in the specialist fund should not have been made by the NERR administrator (if such certifications could be provided this would be a complete answer to the complaint).

The applicable statutory requirements of the Specialist Fund Regulations are set out more fully in Appendix 1 to this determination.

Where the investment is made via an insurance policy the insurer also has to provide the Part 2 (paragraph 2) Certification:

(a) We have procedures and controls in place to obtain client declarations from our policyholders which include confirmation from the policy holder to the effect that-

(i) the policyholder has the opportunity to read the offering documents for funds of this nature, where they wish to do so, and as such has information about and accepts the levels of risks associated with this type of investment; and

(ii) the policyholder , where necessary, meets the minimum criteria of a class of investor of a fund of this nature;

(b) we confirm no investment in this type of fund is made without a client declaration being obtained from relevant policyholders.

In other words RL360 should have been asked by the NERR administrator for client declaration confirming that procedures and controls are in place to obtain the applicable confirmations and has to certify that no investment in this type of fund without the client declarations being made. It is difficult to see how a declaration could have been made since the initial investment was less than US $100,000. The application form signed by Mr S does not in itself amounts to a client declaration, as recognised by RL360 in its standard PIMS terms a further signed declaration would be needed. Any failure to obtain one (if proved) would not be, as submitted by RL360, be a technical breach. The requirement is an important part of investor protection in the Isle of Man.

Mr S's advisers have confirmed on Mr S's behalf that he was not aware that a client declaration should have been obtained by RL360 before the investment was made in NERR in 2012. Mr S, I understand, only became aware that a declaration should have been signed in June 2016 after NERR entered into administration when Mr S corresponded with the Isle of Man Financial Services Authority who advised Mr S of the relevant statutory requirements who explained how they worked.

I understand that Mr S has pursued a claim against his investment adviser in relation to the investment but the recovery of damages was limited. Mr S may possibly have a legal basis for a claim which might be pursued against the administrator of NERR if it can be shown as a matter of fact that the appropriate certifications were not, as alleged, obtained by the NERR fund administrator. However, I understand that there may be practical difficulties with Mr S pursuing such a complaint given that NERR is in liquidation. I also do not in any event have jurisdiction to assist in relation to complaints against either such party or make a determination in relation to any such complaint.

Independent Dispute Resolution Procedure and Financial Services Ombudsman Scheme response

The complaint has been "round the houses" before reaching the Pensions Ombudsman.

After discovering that his investment in NERR was now worthless, Mr S made a complaint against RL360 via RL360's internal disputes procedure on 3 October 2016. Mr S received a brief response to his complaint on 27 October 2016 from RL360 which did not address the issue of whether RL360 had obtained the required certifications. The response just stated:

> "As Bourse Pension Trustees Ltd are a professional organisation there is an expectation that they would have completed the relevant forms and due diligence before placing any trades with us.
>
> Whilst we appreciate your frustrations we are unable to accept responsibility for the agreements and appointments made prior to accepting RL360 as your product provider. We understand that this was not the response you were hoping for.

> In conclusion, your complaint has not been upheld. If you believe we have not dealt fairly or correctly with your complaint you have the right to refer your complaint to the Isle of Man Financial Services Ombudsman.
>
> ……."

In other words the investment was down to the Trustee who was responsible for completing the relevant forms and due diligence before completing any trades with RL360. Mr S then instructed lawyers who explained in their letter of 16 January 2017 that the RL360 response did not address his complaint made namely the alleged failure to comply with RL360's statutory requirements in relation to the NERR as a specialist collective investment vehicle (see above for more detail of these requirements). Mr S's lawyers' alleged breach of statutory duty and maladministration on the basis that Mr S was not a specialist investor and was not aware of the risks relating to the funds.

On 7 April 2017 RL360 confirmed that their response remained as in their earlier letter. In other words they did not respond to the complaint but just maintained that the responsibility for the investment was with the Trustee as RL360 operated an execution only investment service.

Mr S then, as notified was an option by RL360, referred the matter to the Financial Services Ombudsman Scheme operated by the Isle of Man Office of Fair Trading. Broadly the Financial Services Ombudsman scheme can investigate complaints by authorised providers of financial services operating in or out of the Isle of Man. In their letter of 9th May 2017 the Office of Fair Trading noted however that the Financial Services Act 2008 only allows it to consider complaints from trustees of self-directed pension schemes in relation to events occurring on or after 1 April 2015. The OFT noted however that it may be open to Mr S to pursue the matter through the Isle of Man courts.

Mr S's lawyers then approached the Pensions Ombudsman scheme in the Isle of Man in May 2017. For various reasons the complaint has taken a while to reach the provisional determination stage. On 23 November 2018 responded to a detailed summary of the complaint set out in a letter dated 6 November 2018

> "Thank you for your letter dated 6 November 2018. It is RL360's understanding that the Isle of Man Pensions Ombudsman can only be used for complaints concerning personal or occupational pension schemes administered in the Isle of Man. Mr S is the beneficiary of a Retirement Trust Scheme established and administered by Trustees (The Bourse Trustees) under the laws and jurisdiction of the Bailiwick of Guernsey.
>
> We have investigated the complaint and find that RL360 are not at fault. [Mr S] appointed an Investment Adviser on a discretionary basis to actively manage his account through buying and selling of assets that would meet his investment objectives. The responsibility to ensure that any asset purchased meets the risk profile of the client is the responsibility of the Investment Advisor.
>
> The responsibility for obtaining the relevant certification lies with the Fund Administrator. The Fund Administrator/Manager would have needed to identify RL360 as a long term insurer. RL360 and Bourse Pension Trustees would not have been automatically deemed professional investors.
>
> RL360 is the product provider and operates only on an execution basis for our client, which on this policy is Bourse Pension Trustees. RL360 cannot be held responsible for the investment selection made and this is clearly stated in the PIMS product T&Cs and the dealing instruction form.

……"

Again the response failed to address the actual complaint made i.e. alleged failure to provide the certification required from RL360 and RL360's role in ensuring that the appropriate certification/ confirmations had been obtained from the Trustee. RL360 argues that responsibility lies with the investment adviser appointed on behalf of Mr S and also for the first time argues that the responsibility for ensuring that the required certifications were obtained rested with the NERR fund administrator. RL360 is correct that responsibility for the investment instructions in NERR does rest with the investment manager and the NERR fund administrator should not have accepted the investments without the required certifications. However, that would not absolve RL360 from its own responsibility to ensure that the necessary client declarations are obtained.

I then explained to RL360 that the Pensions Ombudsman has jurisdiction to investigate complaints against:

(1) Trustees of occupational and personal pension schemes;

(2) Persons responsible for the management of a scheme which include:

a. managers of occupational and personal pension schemes; and

b. administrators of occupational and personal pension schemes (who do not fall within the definition of manager).

I also explained that my view was that the ombudsman's jurisdiction is capable of extending to managers or administrators of a non Isle of Man pension schemes if there is a sufficient connection with the Isle of Man. I also drew RL360's attention to the various UK cases which had held that insurers could be administrators where they perform any administrative functions in relation to a pension scheme which would include individual acts of administration. There has then been further correspondence about the issue of whether I have jurisdiction which is still a disputed issue. Eventually it was agreed that the issue of jurisdiction should be determined as a preliminary issue as I am permitted to do under the relevant legislation (see regulation 6(4)(b) of the Personal and Occupational Pension Schemes (Pensions Ombudsman)(Procedure) Rule 1995 (as applied to the Isle of Man by the Pension Schemes Legislation (Application) Order 1996 (SD1 39/96)).

I then invited both parties to make representations on the issue of jurisdiction by reference to the relevant case law. Mr S considers, having regard to the relevant case law, that I do have jurisdiction to investigate the complaint on the basis that RL360 can be categorised as an administrator and notes that a person can be regarded as an administrator if they are engaged in a one off act of administration and the issue of whether a person is an administrator is a question of fact and degree (citing a UK authority – *R (on Application of the Government Actuary's Department v Pensions Ombudsman [2013] EWCA Civ 901*). Mr S has also submitted the complaint is not out of time as Mr S only became aware of the relevant certification requirements in June 2016.

RL360's position is as I understand it that:

(1) The Pensions Ombudsman has no jurisdiction to investigate and determine the complaint as it relates to a pension scheme established and approved in Guernsey; and

(2) RL360 is not in any event an "administrator" for the purposes of my jurisdiction as its only function under the policy is to make investments on the policyholder's behalf on an execution only basis;

(3) The regulatory obligation to ensure the Schedule 6 Part 2 Certification is complied with rests directly on the fund managers of NERR and not on RL360 so there is no breach of law by RL360;

(4) If it were to be found that RL360 should have submitted the Schedule 6 Part 2 Certification, this would at most be a technical omission on the part of RL360 and would not, on the balance of probabilities, have changed the investment decision, instruction or outcome in this matter.

RL360 has also argued that it cannot be a person responsible for the management of the scheme as it is not an "administrator" for the purposes of the Retirement Benefits Schemes Act 2000 as it only provides an execution only investment service and is not authorised as a manager for the purposes of the RBS 2000.

The Pensions Ombudsman's powers and jurisdiction in the Isle of Man – Governing Legislation

The Pensions Ombudsman's powers and jurisdiction are set out in the Pension Schemes Act 1993 (as applied to the Isle of Man by the Pension Schemes Act 1993 (Application) Order 1993 made on 25 October 1995)(the **1993 Act**) under powers granted to the Treasury by the Pension Schemes Act 1995. Under section 1 of the Pension Schemes Act 1995 Act the Treasury may by order apply to the Island as part of the law of the Island, subject to such exceptions, adaptions and modifications as may be specified in the order , any legislation of the United Kingdom to which section 1 applies. Section 1 applies under section 1(2) of the Pension Schemes Act 1995 to the UK 1993 Act and any statutory instrument made or having effect under the UK 1993 Act. The Treasury may also by order specify for the purposes of section 1(2) any UK Act of Parliament passed under the Act that relates to pension schemes. For this purpose the expression pension scheme means

> *",any scheme or arrangement which is comprised in one or more instruments or agreements and which has, or is capable of having, effect so as to provide benefits in the form of pensions or otherwise, payable on termination of service, or on death or retirement, to or in respect of persons engaged in any employment*."

I would note (and will return to this point later) that this is a very wide definition and is not expressly limited to pension schemes established in the Isle of Man

Any order made by the Treasury under the Pension Schemes Act 1995 does not take effect unless it is approved by Tynwald. The order was approved by Tynwald on 12 December 1995 and the order came into effect on 1 January 1996. Later orders have also applied the Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995 (SI 1995/1053) and the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (SI 1996/2475) to the Island (see The Pension Schemes Legislation (Application) Order 1996 (SD139/96) and the Pension Schemes Legislation (Application) (No 4) Order 1998 (SD341/98) respectively).

In a later order (the Pensions Act 2004 (Application) (No 3) Order 2005 (SD220/05) certain provisions of the Pensions Act 2004 were also applied to the Isle of Man including a provision extending the scope of the Isle of Man's powers to investigate complaints against administrators. This introduced a new section 146(4A) to cover individual acts of administration mirroring a change made in the UK following the Britannic decision (of which more later).

The Pension Ombudsman's jurisdiction

The Pensions Ombudsman has power, among other things, to investigate complaints or disputes

(a) made by or on behalf of a beneficiary of an occupational or personal pension scheme who, in connection with any act or omission of another person responsible for the management of the scheme [*of which more later*], alleges maladministration of the scheme (Section 146(1)(a) of the PSA 93); and

(b) any dispute of fact or law in relation to an occupational or personal pension scheme between a person responsible for the management of the scheme [*of which more later*] and an actual or potential beneficiary (section 146(1)(c) of the PSA 93 (as applied to the Isle of Man).

The "persons responsible for the management of the scheme" include the trustees and managers (section 146(3) of the PSA 93).

There is also regulation making power which enables regulations to be made so that Part X of the PSA 93 (Investigations the Pensions Ombudsman) to treat another person (who is not a trustee or manager but who is concerned with the financing or administration of, or provision of benefits under the scheme, as if for the purposes of Part X he were a person responsible for the management of the scheme.

The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 defines "administrator" at Regulation 1(2) as follows:

> "administrator" …..in relation to a personal pension scheme, means any person concerned with the administration of the scheme other than….(i) a person responsible for the management of the scheme (as defined in section 146(3) of the Act for the purposes of Part X of that Act)…."

Regulation 2 then goes onto set out the scope of the jurisdiction in relation to administrators:

"2. Jurisdiction in relation to administrators

(1) The Pensions Ombudsman may investigate and determine a complaint concerning the administration of a personal or an occupational pension scheme made by or in respect of an actual or potential beneficiary of the scheme who alleges that he has sustained injustice in consequence of maladministration in connection with an act or omission of an administrator of the scheme.

(2) Where the Pensions Ombudsman commences an investigation under paragraph (1) above, the provisions of Part X of the Pension Schemes Act 1993 (the Pensions Ombudsman) shall apply in relation to the administrator as they would apply in relation to the person responsible for the management of the scheme.

The extension of the Pensions Ombudsman's jurisdiction to cover administrators only relates to complaints from a beneficiary who alleges that he has sustained injustice in consequence of maladministration in connection with an act or omission of an administrator of the scheme under section 146(1)(a) and not under section 146(1)(c) of the PSA 93. It is, however, possible for a complaint to be correctly characterised as both a complaint of maladministration and a breach of law – there is potential overlap between my jurisdiction under section 146(1)(a) and (c). However, unlike section 146(1)(a,) a complaint under section 146(1)(c) does not require the complainant to have sustained injustice. My view this is that the alleged omission complained of can be both characterised as both as

maladministration and a breach of law. Also on the basis of the case law referred to below a complaint of maladministration can include a complaint of breach of law although I would note for completeness that it is also possible for there to be maladministration without a breach of law.

The definition of administrator was extended when a new section 146(4A) was inserted into the Isle of Man PSA 93 (mirroring the new section 146(4A) inserted into the UK PSA 93 to reverse the Britannic case – see below) so that:

"(4A) For the purposes of subsection (4) a person or body of persons is concerned with the administration of the scheme where the person or body is responsible for carrying out an act of administration concerned with the scheme."

The relevance of UK Case law as an aid to construction in relation to Isle of Man statutes

RL360 has argued that UK law does not automatically apply to the Isle of Man, although regard can be had to it in limited circumstances, particularly where Isle of Man laws, regulations or legal precedent may be silent. This is in my view this statement underplays the potential relevance of UK authorities as persuasive authority in relation to the Pensions Ombudsman's jurisdiction.

It is my understanding that it has been common in the Isle of Man in the past for Tynwald to adopt and apply UK statutes (often with minor changes to reflect any specific differences between the UK and the Isle of Man). A considerable part of Isle of Man pensions legislation is, however, the same (or very similar to the UK). In particular The Isle of Man originally adopted and applied the PSA 93 in the Isle of Man (including Part X which contains the provisions setting out the jurisdiction of the Pensions Ombudsman and has subsequently made similar amendments to the PSA 93 to those made in the UK). In recent years there has been some legislative divergence in the field of pensions. The Isle of Man has adopted some (but not all) of the provisions of the UK Pensions Act 1995 and UK Pensions Act 2004. The Isle of Man also has its own Retirement Benefit Schemes Act 2000 setting out its own regulatory regime and certain other provisions applicable to Isle of Man pension arrangements.

The approach taken generally by the Isle of Man courts when considering UK case law (other than on appeal to the Privy Council as the ultimate court of appeal from Isle of Man decisions) is, I understand , to generally treat them persuasive authority particularly those of the Court of Appeal and the House of Lords.

In Frankland v R 1978 -80 MLR 275 (SGD): Glidewell in the Isle of Man courts: it was said that

> "*The correct principle in our view is that decisions of English courts, particularly the House of Lords and the Court of Appeal are persuasive in the Manx courts, but not binding. They should, however, generally be followed unless either there is something to the contrary in a Manx statute or there is some clear decision of a Manx court to the contrary, or exceptionally, there is some local condition which would give good reason for not following the particular English decision*."

More recent Isle of Man cases have, however, questioned whether the comments of Glidewell in Frankland have the same force today in the context of a jurisdiction which is becoming increasingly independent of English statutes and procedures and is frequently choosing to be informed by or to adopt the common law and practices found in jurisdictions other than England (see for example Dominator Ltd v Gilberforce SL (judgment 1 May 2009). However, in other cases it has been noted that the correct approach seems to be to

establish the English precedent … and to follow the precedent unless there is justification to depart from it in line with Frankland v R (In the Matter of the Petition of Cussons). In the subsequent cases of Bitel v Kyrgz Mobil and most recently the important case of AB v CD 2016 it was judicially noted that Manx law has developed significantly since Lord Ackner's comments and in appropriate circumstances while the cases are of persuasive authority if there are local policy reasons for departing from UK law the Isle of Man courts will do so. I am satisfied that UK authorities are persuasive authority in a case like this (if this case were to be appealed on a point of law to the High Court in the Isle of Man) where the relevant statute to which they relate are virtually identical to the applicable UK statute.

It is clear, however from the statutory provisions I have reviewed and also extracts from Hansard relating to the proceedings of Tynwald that I have looked at that Tynwald did intend to the UK provisions relating to the Pensions Ombudsman's jurisdiction to apply to the Isle of Man with modifications where appropriate. In the Tynwald debates there is recognition that it is appropriate to adopt and adapt UK pensions legislation. The provisions relating to the Pensions Ombudsman's jurisdiction adopted in the Isle of Man are virtually identical form to those applied in the UK. In particular the jurisdiction of the Ombudsman is extended to include not just complaints against "managers" but also administrators when Regulation 2 of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996. Tynwald did not have to extend the PSA 93 in this way. Also following the Britannic decision in the United Kingdome (see below) the jurisdiction of the Ombudsman was further extended so that a person could be an administrator if they are engaged in a single act of administration. Again Tynwald did not have to extend the jurisdiction of the Ombudsman in this way if it was considered inappropriate to do so.

In construing a virtually identical statute in the Isle of Man, is likely that courts will regard any applicable UK authorities looking at jurisdictional issues as persuasive authority (to which they can have regard to but are not bound to follow) unless there is something contrary in the Manx statute, contrary Manx authority or some local reason not to follow them.

There is extensive relevant UK authority relating to the equivalent provisions in the 1993 Act relating to the UK Ombudsman's jurisdiction under the equivalent UK PSA 93. To date to my knowledge there has only been one Isle of Man decision briefly touching on the Ombudsman's jurisdiction. I would also note that until 2015 the same individual was both Pensions Ombudsman in the UK and the Isle of Man (albeit when the Isle of Man complaints were considered the Ombudsman would sit in this capacity) which indicates that the intention was to follow the same approach. I would also note that there are several hundred determinations a year by the UK Ombudsman while only a handful by the Isle of Man Pensions Ombudsman. Accordingly legal points relating to the Ombudsman's jurisdiction are more likely to come before the UK courts and the judgments are likely to be of assistance. The UK authorities are a rich source of persuasive judicial authority which the Pensions Ombudsman and Isle of Man Courts can have regard to in the absence of any specific Manx authority or any specific reason due to differences in the Isle of Man pension system why a different approach should be taken.

UK Case Law on scope of Pensions Ombudsman's jurisdiction

It has been held in a number of UK cases (which for the reasons set out above are persuasive authority in the Isle of Man) that the definition of manager and administrator is very wide and in particular an insurer can fall within the definition of manager or, if it is not a manager, can fall within the definition of administrator for the purposes of the UK Pension Ombudsman's jurisdiction where it provides a full or partial administration service to the trustees.

The issue was first considered in the Century Life Plc v The Pensions Ombudsman [1995] PLR 135 where it was found that an insurer providing investment and bundled administrative services under the terms of a policy could potentially fall within the definition of "manager" under the version of the UK PSA 93 then in force. The fact that the administrative services were provided as part of the services under the insurance policy did not preclude the insurer from being a "manager". There was also discussion of what was meant by the undefined expression "manager" and it was accepted that the "manager" was an ordinary English word and means the person running the scheme on a day-to-day basis.

There have also been a number of further UK cases since the Century Life case which have considered the question of who fell within the definition of "administrator" since Century Life. In Ewing v Arthur Cox [2000] 22 PBLR it was held in relation to the Northern Ireland version of the Pension Schemes (Northern Ireland) Act 1993 that solicitors instructed to recover a debt on behalf of trustees did not fall within the definition of administrator. In this case it was accepted that whether a solicitor is an administrator must be considered on a case by case basis by reference to the terms of his retainer it is a matter of "fact and degree" as to whether the tasks amounted to acts of administration. In this case the solicitors were acting as legal advisers and had not crossed the line to make them an administrator where they were merely instructed to seek recovery of certain sums from the respondent and their role involved only writing a letter of claim.

The issue of whether an insurer only providing a unit linked investment option could be an "administrator" for the purposes of the Ombudsman's jurisdiction (where the scheme had not exercised an option to provide wider administration services) was explored in depth by the UK Courts at first instance by the High Court (Chancery Division) in Britannic Asset Management v Pensions Ombudsman [2002] EWHC 441 (Admin). The decision was then appealed and considered by the Court of Appeal in Britannic Asset Management v Pensions Ombudsman [2002] 90 PBLR; [2002] 4 All ER. It was argued in this case that Britannic were accessories to a breach of trust by acting on investment instructions from the trustees this constituted acts of maladministration by the Claimants as administrators to the scheme causing injustice to the beneficiaries. It was noted by Mr Justice Lightman at first instance that:

> "*The Claimants' acts in complying with the Trustees' divestment instructions may indeed be characterised as "acts of administration" concerned with the scheme, the sense that the acts of processing the divestment instruction were administrative acts, and the divestment, being at the request of the Trustees obviously concerned or related to the scheme. However, that was not the relevant question [Pensions Ombudsman notes in this connection - on the definition of administrator in force at the time] which was in so acting the claimants were "concerned in the administration of the scheme".*

Mr Justice Lightman accepted that the claimants:

> "…were correct when they say administering the scheme means in (whole or part) running the Scheme e.g. inviting employees to join keeping records of members, communicating with members, calculating benefits, providing benefit statements, paying the benefits when due, keeping documentation up to date, dealing with governmental or regulatory agencies (Inland Revenue, DWP, OPRA) etc. In the case of a funded scheme, it will no doubt involve running the fund, investing and managing the Scheme's assets. The ultimate responsibility for all these acts will usually lie with the trustees but: (1) if someone else carries out the day-to-day running on their behalf that person may be a manager (2) if someone is otherwise involved with an act of administration for the trustees (whether by carrying out such

> an act or advising on it) that person may be concerned with the administration of the scheme. But the touchstone is whether he is engaged to act, or advise, in or about the trustees' affairs in running the scheme"

Mr Justice Lightman went on to say [in relation to the original definition of administrator]

> "It is of essence for a person to be or act as an administrator that he shall have assumed an administrative role… "on the trustees' side in the administration of the Scheme's affairs."

Under the old definition of administrator Mr Justice Lightman, at first instance, concluded that merely acting on trustees instructions under the terms of the policy did not amount to the assumption of an administrative role on the trustees' side.

The Court of Appeal in Britannic noted that an "administrator" [*The Pensions Ombudsman would note that this was under the definition in force at the time* is someone concerned with the administration of the scheme and that a person who is only concerned with the financing of the scheme or only with the provision of benefits under the scheme is not an "administrator" of the scheme. It was nevertheless accepted by the Court of Appeal that the notional allocation or cancellation of units

> "..are administrative in nature: which may be described as being carried out in connection with a scheme: the relevant question [Ombudsman note using the old pre 2005 definition of administrator in force at the time] is whether a person is "concerned with the administration of the scheme".

The Court of Appeal concluded however on the basis of the definition of administrator in force at the time (i.e. the pre 6 April 2005 UK definition) that an insurance company which does not more than administer its own assets and calculate from time to time, the amount which it is liable to pay under a unit linked policy is in much the same position as the trustees bankers or other depositary. It is no more concerned in the administration of the scheme than others who have contracted to make payments to the trustees or the scheme beneficiaries on request or demand. It was confirmed again, however , that if an insurance company did provide full or partial administrative services to the trustees it could fall within the definition of administrator (if it did not fall within the definition of manager as per the Century Life decision).

It is therefore clear if the same approach was taken as in Britannic that RL360 would not be an "administrator" under the original definition of "administrator" in force in the UK up to 6 April 2005 and originally also in force in the Isle of Man.

The impact of the Britannic decision in the UK was, however, relatively short-lived. With effect from 6 April 2005 in the UK a new section 146 (4A) of the UK PSA 93 was inserted which provided that "*a person or body of persons is concerned with the administration of an occupational or personal pension scheme where the person or body is responsible for carrying out an act of administration concerned with the scheme*". The relevant explanatory note explaining the change in the UK provided as follows:

> "In the case of Britannic Asset Management v the Pensions Ombudsman, the Court of Appeal drew a distinction between a person who undertakes an "act of administration concerned with the scheme" and a person "concerned with the administration of the scheme". It noted that the former fell outside the Pensions Ombudsman's jurisdiction. This section provides that the Pensions Ombudsman will be able to investigate complaints involving "on-off" acts of administration." In the UK the section was effective in relation to a complaint or a dispute in so far as it relates to a matter which arises on or after the date the section comes into force."

Following the change in the law the UK Pensions Ombudsman took this as meaning that for events occurring before 6 April 2005 the old definition of administrator should be applied and for events on or after 6 April 2005 the new definition should be applied (Pensions Ombudsman - Pearson case M00522 – 12 March 2007 and Pepper case M00309 – 25 March 2009). For post 6 April 2005 acts however the UK Pensions Ombudsman has exercised jurisdiction in relation to one off acts of administration. The UK Pensions Ombudsman has since interpreted an "act of administration" as being something "integral" to a pension scheme as opposed to an "external process" (UK Ombudsman case Pearson M00522 12 March 2007 and UK Ombudsman case Marshall 72963/1).

The UK Pensions Ombudsman has confirmed, however, that for the purposes of his jurisdiction that just because a party is an "administrator" for one purpose it does not mean that they are an administrator for other purposes. In case Hull 71888/1, the UK Pensions Ombudsman said of scheme administrators:

> "They may have been the administrator at the time the advice was given, but that does not make advising the trustees an act of administration. The fact that one activity carried out by them is within my jurisdiction does not mean that all the activities of the same corporate body are within jurisdiction."

There was also a further UK Court of Appeal decision (Government Actuary's Department v Pensions Ombudsman [2013] Civ 901) in connection with whether the Government Actuary's department could be characterised as an administrator in relation to a firefighters' scheme in relation to its role in reviewing and revising actuarial factors for benefit calculation purposes. This case however again concerns the pre 6 April 2005 position (under the old non extended definition of administrator) as it was accepted by the parties that post 5 April 2005 GAD was an administrator. It does however review the previous case law and also notes that the extension of the Pensions Ombudsman's jurisdiction to cover administrators only related to complaints of maladministration by those concerned with the administration of the scheme, but not those concerned with the financing or the provision of benefits under a scheme. It was argued that the role of the actuary in this case was concerned with the provision of benefits under the scheme and not the administration of the scheme and accordingly the Pensions Ombudsman has no jurisdiction. The Court of Appeal accepted in GAD v Ombudsman that the provision of benefits under the scheme was not intended to be conterminous with the administration of the scheme itself. It must relate to the payment out to the benefits of the benefits to which they are entitled under the scheme. The court could see no reason to give, as had been submitted, an expansive meaning to "*concerned with the provision of benefits*" and a corresponding narrow meaning to "*concerned with the administration of the scheme*". Given the central role of the Government Actuary's department in the scheme it would be surprising if the UK Parliament had intended to limit the Ombudsman's jurisdiction in this way. The fact that the gap in protection exposed in the Britannic case was made good by the introduction of section 146(4A) strongly suggested that the UK Parliament did not consider there was any policy jurisdiction for restricting the Ombudsman's jurisdiction in the way that was argued in this case.

For completeness I should perhaps also comment on what is meant by maladministration and also on the Pensions Ombudsman's powers to award compensation in relation to complaints of maladministration. The UK case of Baugniet v Capita Employee Benefits (Teachers Pensions) [2017] EWHC 501(Ch), noted that previous case law confirmed that maladministration is a broad concept which goes further than a violation of legal rights. There can be maladministration even if a person's legal rights are not infringed but there may also be other categories of matter within the Pensions Ombudsman's remit will involve allegations that legal rights have been infringed. So a determination may include a determination of breach of trust, misrepresentation, poor advice or negligence.

Is the complaint already out of time?

Generally the Pensions Ombudsman only has jurisdiction to investigate complaints or disputes if the act of omission which is the subject of the complaint or dispute occurred more than three years before the date on which the complaint or dispute was received by him in writing (regulation 5(1) of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996) as applied to the Isle of Man by the Pension Schemes Legislation (Application) (No 4) Order (SD341/98).

Where, however, at the date of its occurrence, the person by or in respect of whom the complaint is made was in the opinion of the Pensions Ombudsman unaware of the act or omission which is the subject of the complaint, the 3 year period should begin on the earliest date on which the person knew or ought reasonably to have known of its occurrence (Regulation 5(2) as above).

Where, in the opinion of the Pensions Ombudsman, it was reasonable for a complaint not to be made or a dispute not to be referred before the end of the period allowed under the above two paragraphs, the Pensions Ombudsman may investigate and determine that complaint or dispute if it is received by him in writing within such further period as he considers reasonable (Regulation 5(3) as above).

I have been advised that Mr S was not aware of the investment instruction from Mr O'Shea in 2012 to invest in NERR. In fact Mr S was not aware of the investments in NERR until NERR went into administration in June 2016. I also understand that Mr S was unaware of the requirement that RL360 should have provided a Part 2 (paragraph 2) Certification to the NERR fund administrator before the funds could be invested. Mr S only became aware of this when he corresponded with Ms Bowness of the Isle of Man Financial Regulator in 2016. The complaint was originally submitted to the Pensions Ombudsman on 12 May 2017. If Mr S had sight of RL360s standard terms and conditions (and read them) it could argued that Mr S was aware that RL360 would request a signed certification before investing in specialist funds. However, Mr S was not aware that the requirements to obtain a signed certification was not complied with until much later as he had no knowledge of the investment in NERR at the time it was made.

Accordingly I am satisfied that the complaint is not out of time as Mr S could not in my opinion have been aware of the omission which is the subject of the complaint (i.e. the alleged failure to provide the Part 2 (paragraph 2) certification by RL360 or the alleged failure to seek a client declaration) until June 2016 which is less than 3 years before the date the complaint was submitted).

Is the complaint outside the Pensions Ombudsman's jurisdiction by virtue of the fact that the Scheme is set up under Guernsey based trusts and approved by the Guernsey tax authorities?

The next question I need to consider is whether the complaint is outside the Pension Ombudsman's jurisdiction by virtue of the fact that the Scheme is established under Guernsey trusts and the trusts are expressed to be governed by Guernsey law. This is quite a difficult legal question and is of general relevance to the scope of my jurisdiction going forward.

The Pension Schemes Act 1995 gives power to the Treasury to apply the UK PSA 93 to the Island. It does not however specifically state that it can only apply the provisions of the PSA 93 to Isle of Man pension schemes. The definition of "pension schemes" referred to in section 1(5) of the Pension Schemes Act 1995 has no geographical reference in it. It would however have been possible to limit the geographical effect of the PSA 93 by making

amendments to its provisions in the relevant Order or making changes to the relevant regulations dealing with jurisdiction

There are a couple of specific provisions relating to the territorial effect of the Pension Schemes Act 1993. There is regulation making power at section 145(1A) of the PSA 1993 which provides that:

> (1A) Provisions conferring power on the Pensions Ombudsman to conduct investigations as mentioned in subsection (1) are to be read as conferring power that:
>
> (a) In the case of a prescribed description; or
>
> (b) In the case involving a scheme that is prescribed or is of a prescribed description,

may be exercised whatever the extent of any connections with places outside the Isle of Man."

This regulation making power has, to my knowledge, never been exercised. However, it is not possible to infer from this that if the scheme is not established under Isle of Man trusts that the Pensions Ombudsman has no jurisdiction to consider the complaint. This is because section 145(1C) of the PSA 93 which goes on to provide that:

> (1C) Subsection 1(A) shall not be taken to prejudice any power of the Pensions Ombudsman apart from that subsection to conduct investigations in a case having connections with places outside the Isle of Man.

This then throws up back to the wording of the remainder of the PSA 93. Is Part X of the PSA 93 capable of applying to complaints against trustees, managers and administrators of non Isle of Man pension schemes established under Isle of Man trusts? In this connection I would note that when Tynwald approved the application of the PSA 93 to the Isle of Man it did not expressly seek to limit the scope of the Act to Isle of Man established pension schemes or Isle of Man trustees or Isle of Man based managers or administrators.

The Act does would appear on its wording to be capable of applying to trustees, managers or administrators of pension schemes outside the Isle of Man. In this connection it is helpful to contrast the definitions of "occupational pension scheme" and "personal pension scheme" which have no reference to the geographical location of the scheme with the definition of "public service pension scheme" which specifically provides that the definition can only apply to an occupational pension scheme established by or under an enactment or by resolution of Tynwald. Tynwald could easily have included a similar restriction in the definition of occupational pension scheme and personal pension scheme if it wished to limit the jurisdictional scope of the PSA 93 to schemes established under Isle of Man trusts but did not do so when adopting and applying the equivalent statutory provisions to the Isle of Man.

The Isle of Man is a major jurisdiction offering pension schemes for non-residents. It is my understanding that many of these pension schemes have non-Isle of Man based trustees governed by trusts set up in other jurisdictions with Isle of Man managers and/or administrators. Many of the pension managers in the Isle of Man have offices in multiple jurisdictions. I understand that there are other schemes which have Isle of Man managers/administrators but non-Isle of Man trusts sometimes with dual authorisation where it is necessary for managers/administrators to be authorised in other jurisdictions. If it is the case that if the scheme is set up under trusts of another jurisdiction I could never investigate and determine complaints against an Isle of Man based manager or administrator of that scheme that would reduce the scope of my jurisdiction to determine complaints against Isle of Man based managers/administrators.

My understanding is that the Isle of Man approach to regulation is to seek to ensure that it has a strong regulatory and compensatory system so that outside investors have confidence in the Isle of Man financial system. If the intention of Tynwald was to limit the scope of the Pension Ombudsman's jurisdiction to exclude the Ombudsman from investigating complaints against Isle of Man managers and administrators I would have expected Tynwald to have set this out more explicitly in the relevant legislation in cases where the persons responsible for the management of the scheme are based and operate in the Isle of Man.

In cases where there are non-Isle of Man trusts and trustees and Isle of Man managers/administrators it does produce a counterintuitive result if I can consider complaints against managers/administrators but could not consider complaints against trustees. In situations, however, where the complaint just relates to the functions of trustee or managers in that capacity and does not concern both this issue does not seem to impose an intractable problem in investigating the complaint.

Having regard to all the above analysis I consider that I do not have jurisdiction to investigate a complaint against the Trustee and Managers (if it had been made) in a case such as this where the scheme is governed by Guernsey trusts and governed by Guernsey law and the Trustee/ Manager is located in Guernsey. I consider, however, that in this case:

(a) as the contract of insurance is issued by an Isle of Man Insurer operating in and out of the Isle of Man and under which the parties (including RL360) submit to the exclusive jurisdiction of the Isle of Man courts; and

(b) the alleged maladministration complained of relates to compliance with Isle of Man legislation designed to protect investors in specialist funds,

there is sufficient connection with the Isle of Man for me to have jurisdiction to investigate a complaint against an Isle of Man based insurer. This is subject of course to it being possible to characterise RL360 as an "administrator" in relation to the act complained of. I am not precluded from investigating a complaint against RL360 merely due to the fact that the pension scheme is established under Guernsey trusts and has a Guernsey based trustee and manager.

Is RL360 an administrator for the purposes of my jurisdiction?

It is finally necessary to consider the key issue of whether RL360 falls within the extended definition of administrator for the purposes of the PSA 93. This is an extremely difficult question and I recognise that, having carefully considered the persuasive UK case law, this is very much a borderline case.

The first point I would note is that generally where the OFT can investigate a complaint under the financial services compensation scheme I cannot also investigate a complaint unless it relates to the management of a personal pension scheme (regulation 4 of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996). However, as noted previously the OFT has already confirmed that it does not have jurisdiction to investigate the complaint under the financial ombudsman scheme and also the complaint does arguably relate to the management of a personal pension scheme.

RL360 has submitted that it cannot be a person responsible for the management of the scheme for the purposes of my jurisdiction as it is not an authorised administrator for the purposes of the Retirement Benefit Schemes Act 2000. RL360 has also submitted that "..*the term "administrator" as set out in Isle of Man legislation and a UK interpretation of this term merely to establish jurisdiction in this case. It would be a stretch in the application of UK law that is not justifiable in the circumstances*".

RL360s submission does not recognise the crucial fact both the RBS Act 2000 and the PSA 93 (as applied to the Isle of Man) are Isle of Man statutory provisions. RL360s submission also fails to recognise that different definitions of administrator/manager are used in the RBS Act 2000 and the PSA 93. RL360 are correct that all persons performing the functions of "administrator" for the purposes of the RBS Act 2000 in relation to Isle of Man authorised or recognised schemes need to be authorised by the FSA. The RBS Act 2000 however defines administrator "*as the person responsible for the management of the scheme*". This is a much narrower definition than the extended definition of "*persons responsible for the management of the scheme*" in the PSA 93 (as applied to the Isle of Man). The extended PSA 93 definition includes not just the manager (which is essentially co-terminous with the RBS 2000 definition of administrator) but also includes any person who concerned with the administration of the scheme (*but are not a manager*) and also, following the introduction of the new section 146(4A) of the PSA 93, covers persons responsible for a single act of administration concerning the scheme. On the basis of the relevant Isle of Man statues and the persuasive UK authorities my view is that my jurisdiction can cover insurers as long as they fall within the extended definition of administrator even if they are not specifically authorised as a manager for the purposes of the RBS Act 2000.

I do however recognise that RL360 are correct that the functions of RL360 concerning the Scheme under the policy are very limited. RL360 are not a "manager" for the purposes of section 146(3) as they do not provide a full or partial administration service in relation to the Scheme. RL360 just provides an execution only insurance wrapped investment platform under the terms of the RL360 policy offering access to a range of "linked" investments and funds offered via other providers.

Under the extended definition of "administrator, however, to be concerned in the administration of the scheme all that is now necessary is that the person or body is responsible for carrying out an act of administration concerned with the scheme (section 146(4A) PSA 93). If the act complained of can be correctly characterised as an act of administration concerned with the scheme (and not an act concerned with the benefits under or financing or the provision of the benefits under the scheme) it is potentially within my jurisdiction.

In the current case before me, it might plausibly be argued in the context of a money purchase scheme (such as this) where the pension depends on the performance of the funds invested, that the act complained of (i.e. the failure to ensure that the appropriate certifications had been completed by the Trustee and the failure to provide the certification itself which the NERR administrator should have sought from RL360 for the purposes of the Specialist Investment Regulations) is not an act concerned with the administration of the scheme but an act "*concerned with the benefits of the scheme*". In this connection however I would note that in GAD v Pensions Ombudsman the Court of Appeal took the view the expression concerned with the benefits of the should be construed narrowly as only relating to the payment out to beneficiaries of the benefits the beneficiaries were entitled to under the scheme.

It may also be argued that the investment in an insurance policy with RL360 is "*concerned with the financing of the scheme*" and not concerned with the administration of the scheme. This would be a stronger argument if the scheme had been a defined benefit instead of defined contribution. The expression the financing of a scheme applies more naturally to a defined benefit scheme where the trustees need to fund the promised benefits. I can see however that it can reasonably be argued that the expression "*financing of the scheme*" could encompass the investments of the scheme as these produce the benefits. If it is correct and as has been held in English cases, the expression "*financing of the scheme*" is

not co-terminous with the expression "*administration of the scheme*", I do not have jurisdiction.

Having reviewed the case law it is not entirely clear in my view whether the new section 146(4A) PSA 93 did achieve the effect of reversing Britannic. There is recognition in Britannic at first instance and at Court of Appeal level that investing in and managing assets under the insurance policy with Britannic Asset Management are "...*administrative activities which may be described as being carried out in connection with the scheme*" albeit that the relevant test at the time was not whether a person carries out "administrative activities in connection with the scheme" but whether the person is "*concerned with the administration of the scheme*". The intention of the introduction of section 146(4A) of the UK PSA 93 in the UK was also on the evidence I have seen to reverse the Britannic decision that single acts of administration (such as acting on a divestment instruction of the trustee under an insured policy) were not sufficient to bring a complaint within the Pensions Ombudsman's jurisdiction. Also it is reasonable in my view to infer that the intention of Tynwald by approving the same change to the Isle of Man PSA 93 was to extend the jurisdiction in the same way. This does suggest that individual investment or divestments in an insurance policy by pension scheme may in certain circumstances be administrative acts within the scope of my jurisdiction.

I consider however that the current case can be distinguished from the Britannic case. In Britannic the complaint was essentially that Britannic were party to a breach of trust by divesting the funds from the policy. In the current case the act complained of relates to a requirement that should have been complied with in relation to the investment of the scheme. This does seem to be to relate more to the financing of the scheme (i.e. the financing of the benefits provided under the scheme) rather than being an administrative act concerning the scheme. I recognise that this is very much a borderline case and the side of the line the alleged failure falls is a question of fact and degree. If I had concluded that the act complained of was an act of administration and not an act relating to the financing of the scheme and I were to adopt a similar approach to the UK Ombudsman's revised post Britannic test, in my view the alleged failure by RL360 is not in my view integral to the scheme but an external checking process. On either ground I would not have jurisdiction.

I recognise that in reaching the above conclusion I am denying Mr S the ability to pursue his complaint through an ombudsman process (without a costs risk) given the financial services ombudsman service also does not have jurisdiction. I have considerable sympathy with the complainant as it does seem on the evidence submitted seem that there has been an apparent failure in the protections built into the Specialist Funds Regulations to operate as intended. However, I only however have power to investigate and determine matters which fall within my jurisdiction so I am unable to assist and determine the complaint.

Ian Greenstreet

Pensions Ombudsman

12 July 2019

Appendix 1 – Extracts from Collective Investment Schemes (Specialist Fund) Regulations 2010 – Certification Requirements relating to investments in Specialist Funds

"3. **Interpretation**

"administrator" has the meaning given in the Act and means the person appointed in accordance with regulation 8

"specialist investor" has the meaning given in Schedule 1"

……..

"8 **The administrator**

The fund must have an administrator who-

(a) Is an authorised person; or

(b) Is licensed to act as an administrator of this type of fund in an acceptable jurisdiction."

……..

"9. **Responsibility of administrator**

(1)…….

(2) The administrator must:

(a) satisfy itself that the fund's investors have certified they are specialist investors and have made an initial investment of at least US$100,000;

(b)……..;

(3) ……."

"13 **Application Form**

(1) The fund's application form must contain the certifications set out in Schedule 6.

(2) Before being accepted as an investor each applicant must complete the Part 1 certification and, if applicable, the relevant Part 2 certification."

……

" **Schedule 1**

Meaning of specialist investor

A specialist investor is a person or body who has certified that they are sufficiently experienced to understand the risks associated with an investment in a specialist fund, who invests an initial amount of at least $100,000 and that, at the time of the initial investment in that fund falls within one of the following categories:

(a) A person or body corporate, partnership, trust or other unincorporated association whose ordinary business or professional activity includes acquiring, underwriting, managing, holding or disposing of investments, whether as principal or agent, or giving advice about investments;

(b) ……);

(c) ……..;

(d) ……..;

(e) ……..;

(f) ……..;

(g) ……..;

(h) ……..;

(i) ……..;"

…….

" **SCHEDULE 6**

Certifications to be contained in the specialist fund's application form

The Part 2 Certification (1) may be omitted where the fund expressly prohibit an investor from investing on behalf of another person.

The Part 2 Certification (2) may be omitted where the fund expressly prohibits a life assurance company from investing assets comprised within its long term business fund in circumstances where the fund has been selected by the policyholder of a particular policy as the basis for determining the benefit of that policy.

Part 1 Certification – this certification must be completed by all applicants. The investor confirmations (a) to (d) apply to all applicants. The investor confirmation applies to all applicants except those who are signing a Part 2 certification.

"I/we confirm that-

(a) I am/we are a specialist investor as defined on page [ ] of the offering document of the [name of fund] dated [ ]; and

(b) I am/we are sufficiently experienced to understand the features and risks associated with an unauthorised and unapproved fund of this type; and

(c) I/we have read and fully understood the offering document, including in particular the information on the risks associated with an unauthorised and unapproved fund of this type; and

(d) I/we confirm that, where appropriate, I/we have taken independent advice on the suitability of this investment within my/our overall investment portfolio; and

(e) I/we personally accept all the risks associated with this investment and particularly that my/our investment in the [name of fund] involves risks that could result in a loss of a significant proportion of all of the sum invested.

[Signed] [Dated]"

Part 2 Certification

(1) The following certification is to be completed by any investor who is investing on behalf of another person.

I/We confirm that I am/we are investing in the specialist fund on behalf of another person/other persons and have certifications(s) signed by such person to show that

each such person/persons is a specialist investor and understands and accepts the risks associated with this type of investment.

[Signed] [Dated]"

(2) The following certification is to be completed by an investor who is a life assurance company investing assets comprised within its long term business fund where the [XYZ fund] has been selected by the policyholder of a particular policy as the basis for determining the benefit of the policy holder to the effect that –

(a) We have procedures and controls in place to obtain client declarations from our policyholders which include confirmation from the policy holder to the effect that-

(i) the policyholder has the opportunity to read the offering documents for funds of this nature, where they wish to do so, and as such has information about and accepts the levels of risks associated with this type of investment; and

(ii) the policyholder , where necessary, meets the minimum criteria of a class of investor of a fund of this nature;

(b) we confirm no investment in this type of fund is made without a client declaration being obtained from relevant policyholders.

[Signed] [Dated]"